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## Civil Procedure

Michael J. Gallagher Honorable  
*Judge, Circuit Court of Cook County, Chicago, IL*

Mary Beth Snyder

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# Civil Procedure

*Honorable Michael J. Gallagher\**  
*and Mary Beth Snyder\*\**

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## I. INTRODUCTION

The Illinois Supreme Court decided several issues of civil procedure during the *Survey* period. The court considered questions pertaining to statutes of limitations,<sup>1</sup> jurisdiction,<sup>2</sup> standing,<sup>3</sup> forum non conveniens,<sup>4</sup> conflicts of law,<sup>5</sup> pleadings and process,<sup>6</sup> writs of mandamus,<sup>7</sup> statutory construction,<sup>8</sup> appeals,<sup>9</sup> settlements and contribution,<sup>10</sup> and amicus briefs.<sup>11</sup>

Several legislative changes were made during the *Survey* period.<sup>12</sup> The changes made affected service of process, confidentiality of medical information, and statutes of limitations. This Article is intended to review changes in civil procedure by highlighting significant cases, rules, and statutes. In addition, this Article will briefly explain the potential impact that these changes will have.

## II. STATUTES OF LIMITATION AND REPOSE

### A. Applicability

Section 13-214(a) of the Illinois Code of Civil Procedure<sup>13</sup> pro-

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1. See *infra* notes 13-62 and accompanying text.
  2. See *infra* notes 63-127 and accompanying text.
  3. See *infra* notes 128-57 and accompanying text.
  4. See *infra* notes 158-65 and accompanying text.
  5. See *infra* notes 166-75 and accompanying text.
  6. See *infra* notes 176-99 and accompanying text.
  7. See *infra* notes 200-18 and accompanying text.
  8. See *infra* notes 219-31 and accompanying text.
  9. See *infra* notes 232-77 and accompanying text.
  10. See *infra* notes 278-95 and accompanying text.
  11. See *infra* notes 296-304 and accompanying text.
  12. See *infra* notes 305-28 and accompanying text.
  13. ILL. REV. STAT. ch. 110, para. 13-214(a) (1983) (amended 1985). The amendment changed the limitation period from two to four years. ILL. REV. STAT. ch 110, para. 13-214(a) (1985).

vides a two year statute of limitations for all actions in tort or contract involving construction projects. The Illinois Supreme Court recently considered whether section 13-214(a) is applicable to an express warranty that was given prior to the statute's effective date.

In *Stelzer v. Matthews Roofing Co.*,<sup>14</sup> the Illinois Supreme Court held that retroactive application of section 13-214 would impair the plaintiffs' contractual rights.<sup>15</sup> In *Stelzer*, the defendant allegedly breached a ten-year written guarantee concerning the installation of a roof.<sup>16</sup> Pursuant to section 13-214(a), the circuit court granted the defendant's motion for summary judgment because the complaint was filed more than two years after the plaintiffs discovered the defective roof.<sup>17</sup> The appellate court found that the plaintiffs' cause of action was timely because it was brought within the time provided for in the contract and, therefore, the appellate court reversed, holding that section 13-214 did not bar the action.<sup>18</sup>

The Illinois Supreme Court held that retroactive application of section 13-214 would impair the plaintiffs' pre-existing contractual rights.<sup>19</sup> In analyzing section 13-214, the court noted that the legislature was concerned with the impairment of express warranties, promises, and guarantees.<sup>20</sup> The court determined that the language of section 13-214(d)<sup>21</sup> effectively provides that the statute of limitations and period of repose for actions on express warranties or promises is the term provided for by the warranty or promise if that term is more than twelve years.<sup>22</sup> Although the legislature did not discuss the effect of section 13-214(d) on express warranties or

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14. 117 Ill. 2d 186, 511 N.E.2d 421 (1987).

15. *Id.* at 190, 511 N.E.2d at 423.

16. *Id.* at 187, 511 N.E.2d at 421.

17. *Id.*

18. *Id.*

19. *Id.* at 190, 511 N.E.2d at 423.

20. *Id.* at 190, 511 N.E.2d at 422.

21. ILL. REV. STAT. ch. 110, para. 13-214(d) (1983). Paragraph 13-214(d) states: "Subsection (b) shall not prohibit any action against a defendant who has expressly warranted or promised the improvement to real property for a longer period from being brought within that period." *Id.* Paragraph 13-214(b) provides in part:

No action based upon tort, contract or otherwise . . . may be brought . . . for an act or omission . . . in the design, planning, supervision, observation or management of construction . . . after twelve years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to the expiration of such act or omission shall in no event have less than two years to bring an action as provided in subsection (a) of this section.

ILL. REV. STAT. ch. 110, para. 13-214(b) (1983) (amended 1985). The amendment changed the 12-year limitation to 10 years and the two-year limitation to four years. ILL. REV. STAT. ch. 110, para. 13-214(b) (1985).

22. *Stelzer*, 117 Ill. 2d at 190, 511 N.E.2d at 423.

promises less than twelve years and entered into before section 13-214 became effective, the court reasoned that section 13-214(d) must be read to allow such a cause of action to be brought within the express term of a guarantee of less than twelve years.<sup>23</sup> The court noted that any other construction of section 13-214 would require a party to bring an action within two years of discovering the defect, thereby impairing pre-existing contractual rights.<sup>24</sup> The court, therefore, concluded that the plaintiffs' action was timely under the statute because it was filed within the term of the defendant's guarantee.<sup>25</sup>

### B. Rule 103(b) and Refiling

Rule 103(b) of the Illinois Code of Civil Procedure<sup>26</sup> requires that a plaintiff exercise due diligence in effecting service of process.<sup>27</sup> Failure to diligently serve process after the expiration of the statute of limitations may result in the dismissal of the case with prejudice.<sup>28</sup> In addition, section 13-217 of the Illinois Code of Civil Procedure<sup>29</sup> provides that if an action is voluntarily dismissed by the plaintiff, then the plaintiff has one year to refile the action or the remainder of the period of limitation, whichever is greater.<sup>30</sup>

In *Muskat v. Sternberg*,<sup>31</sup> the Supreme Court of Illinois held that a plaintiff's lack of due diligence in serving process in a suit that had been dismissed for want of prosecution could be considered when the suit is refiled under section 13-217 and a motion to dismiss is denied under rule 103(b).<sup>32</sup> In *Muskat*, the plaintiff filed a complaint one day prior to the expiration of the statute of limita-

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23. *Id.*

24. *Id.*

25. *Id.* at 191, 511 N.E.2d at 423.

26. ILL. S. CT. R. 103(b), ILL. REV. STAT. ch. 110A, para. 103(b) (1987). Rule 103(b) states:

If the plaintiff fails to exercise reasonable diligence to obtain service prior to the expiration of the applicable statute of limitations, the action as a whole or as to any unserved defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice. In either case the dismissal shall be made on the application of any defendant or on the court's own motion.

*Id.*

27. *Id.*

28. *Id.*

29. ILL. REV. STAT. ch. 110, para. 13-217 (1987).

30. *Id.*

31. 122 Ill. 2d 41, 521 N.E.2d 932 (1988).

32. *Id.* at 49, 521 N.E.2d at 935.

tions.<sup>33</sup> Two years after the complaint was filed, the suit was dismissed for want of prosecution.<sup>34</sup> During the two years, the plaintiff did not attempt to serve process on any of the defendants.<sup>35</sup>

One year after the dismissal, the plaintiff refiled her complaint pursuant to section 13-217 and she served the defendant with process.<sup>36</sup> The defendants then moved to dismiss the refiled suit under rule 103(b), alleging that the plaintiff lacked due diligence in serving process.<sup>37</sup> The circuit court denied the defendants' motion, finding that the proper period for determining whether the plaintiff exercised due diligence began with the refiling of the lawsuit and that the plaintiff refiled the lawsuit in a timely manner.<sup>38</sup> The appellate court reversed and remanded for further proceedings.<sup>39</sup>

The Illinois Supreme Court held that, in ruling on a pending rule 103(b) motion when the plaintiff has refiled an action under section 13-217, a trial court may consider the plaintiff's lack of reasonable diligence in serving process in the first suit or in the refiled suit.<sup>40</sup> The supreme court also found *Catlett v. Novak*<sup>41</sup> controlling.<sup>42</sup> In applying *O'Connell* and *Catlett*, the *Muskat* court held that the trial court must apply rule 103(b) accordingly, regardless of whether the dismissal was voluntary or for want of prosecution and the plaintiff refiles under section 13-217.<sup>43</sup>

The court's rule makes evident sense; otherwise, a plaintiff would be wise to move for a nonsuit and re-file the case when he has not been diligent in effecting service. The court has taken the view that a plaintiff may not attempt to circumvent the effect of the court's rules without a price. The rule in *Muskat* punishes dilatory

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33. *Id.* at 43, 521 N.E.2d at 933.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 44, 521 N.E.2d at 933.

40. *Id.* at 45, 521 N.E.2d at 933 (citing *O'Connell v. St. Francis Hosp.*, 112 Ill. 2d 273, 492 N.E.2d 1322 (1986)). For a discussion of *O'Connell*, see Kandaras & Wozniak, *Civil Procedure*, 18 LOY. U. CHI. L.J. 317, 319-21 (1986).

41. 116 Ill. 2d 63, 506 N.E.2d 586 (1987).

42. *Muskat*, 122 Ill. 2d at 48, 521 N.E.2d at 935. In *Catlett*, the supreme court affirmed *O'Connell* even though one of the defendants in *Catlett* had not been served and did not file a motion to dismiss in the first suit. *Catlett*, 116 Ill. 2d at 65-66, 596 N.E.2d at 588. The *Catlett* court remanded the case to the circuit court for a rule 103(b) hearing and directed the court to consider the circumstances surrounding the plaintiff's service of process in the original suit and the refiled suit. *Id.* at 70-71, 586 N.E.2d at 590.

43. *Muskat*, 122 Ill. 2d at 49, 521 N.E.2d at 935.

tactics. The court's opinion, therefore, will have a salutary effect upon all litigation.

### C. *Refiling After Voluntary Dismissal*

In *Gendek v. Jehangir*,<sup>44</sup> the Illinois Supreme Court held that, pursuant to section 13-217,<sup>45</sup> a plaintiff is permitted to refile an action only once following a voluntary dismissal.<sup>46</sup> In *Gendek*, the plaintiff, in one of two consolidated matters, filed a complaint in an Indiana state court eight days before the statute of limitations expired.<sup>47</sup> Approximately two months later, the plaintiff requested and was granted a voluntary dismissal.<sup>48</sup> Shortly thereafter, the plaintiff refiled the action in a federal court.<sup>49</sup> The plaintiff later moved to dismiss the case without prejudice because there was no subject matter jurisdiction, and the court granted the motion.<sup>50</sup> Within one year of the voluntary dismissal, the plaintiff refiled the action in an Illinois state court.<sup>51</sup> The circuit court granted the defendant's motion to dismiss with prejudice.<sup>52</sup> The appellate court affirmed.<sup>53</sup>

In the second consolidated case, the plaintiff filed a complaint for damages from an accident that occurred in September 1977.<sup>54</sup> In February 1984, the plaintiff's motion for a voluntary dismissal was granted.<sup>55</sup> The plaintiff refiled the action on the same day that the voluntary dismissal was granted.<sup>56</sup> In April 1986, the plaintiff again filed a motion for voluntary dismissal which was granted.<sup>57</sup> In May 1986, the plaintiff filed a new action.<sup>58</sup> The defendant's motion to dismiss with prejudice was granted and the appellate court affirmed.<sup>59</sup>

The supreme court determined that section 13-217 does not allow more than one refile after a voluntary dismissal if the statute

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44. 119 Ill. 2d 338, 518 N.E.2d 1051 (1988).

45. ILL. REV. STAT. ch. 110, para. 13-217 (1987).

46. *Gendek*, 119 Ill. 2d at 343-44, 518 N.E.2d at 1053.

47. *Id.* at 339, 518 N.E.2d at 1051.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 339-40, 518 N.E.2d at 1051.

57. *Id.* at 340, 518 N.E.2d at 1051.

58. *Id.*

59. *Id.* at 340, 518 N.E.2d at 1051-52.

of limitations has elapsed.<sup>60</sup> Therefore, plaintiffs are entitled to refile an action no more than one time after taking a voluntary dismissal.<sup>61</sup> The court decided that to allow a plaintiff to refile more than once would permit plaintiffs to repeat filings and dismissals involving identical actions in order to avoid the statute of limitations.<sup>62</sup>

The *Gendek* opinion, as with *Muskat*, represents an intelligent effort on the part of the supreme court to prevent tactical maneuvering that does nothing toward resolving litigation. While the ability to take a non-suit certainly has great utility, the practice has been abused. Some attorneys and litigants use a voluntary non-suit as a remedy when they have failed to prepare or when they refuse to accept defeat on the merits. The *Gendek* decision makes clear that the Illinois General Assembly did not intend voluntary non-suits to have such a result and that the court will not interpret section 13-217 to allow multiple refilings for such ends. Incidentally, the same result should occur if there is one non-suit and one dismissal for want of prosecution or two dismissals for want of prosecution, and re-filings take place.

## II. JURISDICTION

### A. Subject Matter Jurisdiction

Section 2-619(a)(1) of the Illinois Code of Civil Procedure<sup>63</sup> allows dismissal of a complaint for lack of subject matter jurisdiction.<sup>64</sup> Section 2-619(a)(3) of the Illinois Code of Civil Procedure<sup>65</sup> permits dismissal of a complaint if there is another action pending between the parties for the same cause.<sup>66</sup>

In *Ransom v. Marrese*,<sup>67</sup> the Illinois Supreme Court held that an Illinois circuit court had subject matter jurisdiction over a matter even though the plaintiff did not comply with Indiana statutory

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60. *Id.* at 343, 518 N.E.2d at 1053.

61. *Id.* at 343-44, 518 N.E.2d at 1053.

62. *Id.* at 343, 518 N.E.2d at 1053.

63. ILL. REV. STAT. ch. 110, para. 2-619(a)(1) (1987).

64. *Id.* Paragraph 2-619(a)(1) provides that a motion to dismiss must be supported by an affidavit "[t]hat the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction." *Id.*

65. ILL. REV. STAT. ch. 110, para. 2-619(a)(3) (1987).

66. *Id.* Section 2-619(a)(3) provides that a motion to dismiss must be supported by an affidavit "[t]hat there is another action pending between the same parties for the same cause." *Id.*

67. 122 Ill. 2d 518, 524 N.E.2d 555 (1988).



filing procedures<sup>68</sup> and there was not another action pending between the parties for the same cause.<sup>69</sup> In *Ransom*, the plaintiff received medical treatment from the defendant doctor in Indiana.<sup>70</sup> Approximately one year after her hospitalization, the plaintiff filed a proposed complaint with the Indiana Insurance Commissioner, pursuant to the Indiana Medical Malpractice Act (the "IMMA").<sup>71</sup>

After the plaintiff filed the proposed complaint, the defendant moved to Illinois and the plaintiff subsequently filed a complaint against the defendant in an Illinois circuit court, alleging negligence and misrepresentation.<sup>72</sup> The defendant moved to dismiss the Illinois complaint pursuant to sections 2-619(a)(1) and 2-619(a)(3) of the Illinois Code of Civil Procedure.<sup>73</sup> The circuit court found that because the plaintiff did not fully comply with the IMMA, the court lacked subject matter jurisdiction.<sup>74</sup> In addition, the circuit court determined that there was another pending action between the same parties in Indiana.<sup>75</sup> Accordingly, the circuit court granted the defendant's motion to dismiss.<sup>76</sup>

The appellate court reversed, finding that the section 2-619(a)(1) dismissal was improper because the Indiana medical review procedure did not apply to actions brought outside of the Indiana courts.<sup>77</sup> Additionally, the appellate court found that because the IMMA provision was procedural, rather than substantive, an Illinois court was not required to apply Indiana's procedural rules.<sup>78</sup> The appellate court also held that the filing of the proposed complaint to the review panel in Indiana did not constitute another pending "action" and, thus, dismissal was not appropriate under section 2-619(a)(3).<sup>79</sup>

The Illinois Supreme Court determined that a section 2-

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68. *Id.* at 526, 524 N.E.2d at 559.

69. *Id.* at 530, 524 N.E.2d at 560.

70. *Id.* at 519, 524 N.E.2d at 555-56.

71. *Id.* at 519, 524 N.E.2d at 556 (citing IND. CODE ANN. § 16-9.5-1 (Burns 1984)). Section 16-9.5-9-2 provides: "No action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and an opinion is rendered by the panel." IND. CODE ANN. § 16-9.5-9-2 (Burns 1984).

72. *Ransom*, 122 Ill. 2d at 520, 524 N.E.2d at 556.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 521, 524 N.E.2d at 556.

78. *Id.*

79. *Id.*

619(a)(1) dismissal was improper because the clear language of the IMMA limited the medical review panel opinion requirement to actions filed only in Indiana.<sup>80</sup> Specifically, the court reasoned that because the IMMA itself limits the panel procedure to “any court of this State,” an Illinois court would not be bound by the procedure.<sup>81</sup> In addition, the court determined that a dismissal under section 2-619(a)(3) was improper because the filing of notice to a medical review panel does not constitute a judicial proceeding.<sup>82</sup> The court reasoned that there was no judicial proceeding because members of the review panel do not conduct hearings or trials or give judgments on the merits and, therefore, panel members are not judicial officers.<sup>83</sup> In addition, the court concluded that the complaint filed in Illinois was not a duplicate of the proposed complaint.<sup>84</sup> Accordingly, the court concluded that there was not “another action” pending under 2-619(a)(3).<sup>85</sup>

The court’s opinion should not be interpreted too broadly. The court relied rather heavily upon the statutory language limiting the panel procedure to “any court of this State [Indiana].” Such a rule comports with sound statutory construction and does not signify the expansion of the court’s power to hear and decide a case.

### B. *Judicial Review and Authority*

The Illinois Supreme Court considered several cases during the *Survey* period regarding issues of judicial review. In *Board of Education v. Compton*,<sup>86</sup> the Illinois Supreme Court held that the Illinois Educational Labor Relations Act<sup>87</sup> (the “IELRA”) does not permit circuit courts to review education arbitration awards.<sup>88</sup> *Compton* involved a teacher who was terminated by the Board of Education (the “Board”) allegedly in violation of a collective bar-

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80. *Id.* at 527, 524 N.E.2d at 558-59. *See supra* note 71 for text of section 16-9.5-9-2.

81. *Id.* at 525, 524 N.E.2d at 558-59.

82. *Id.* at 529, 524 N.E.2d at 560.

83. *Id.*

84. *Id.* at 530, 524 N.E.2d at 560-61.

85. *Id.* at 529, 524 N.E.2d at 560.

86. 123 Ill. 2d 216, 526 N.E.2d 149 (1988).

87. ILL. REV. STAT. ch. 48, para. 1701 (1987). Paragraph 1701 states:

It is the public policy of this State and the purpose of this Act to promote orderly and constructive relationships between all educational employees and their employers. Unresolved disputes between the educational employees and their employers are injurious to the public, and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution.

*Id.*

88. *Compton*, 123 Ill. 2d at 221, 526 N.E.2d at 152.

gaining agreement.<sup>89</sup> The teacher subsequently filed a grievance, and the matter was submitted to an arbitrator.<sup>90</sup> The arbitrator's binding decision ordered reinstatement of the teacher and back wages and benefits.<sup>91</sup> The Board then petitioned the circuit court to have the arbitrator's decision vacated.<sup>92</sup> The circuit court granted the Board's motion for summary judgment and vacated the award.<sup>93</sup> The appellate court reversed, holding that the circuit court lacked jurisdiction to rule on an arbitration award because only the Illinois Education Labor Relations Board has jurisdiction over such matters.<sup>94</sup>

The Illinois Supreme Court found no provision in the IELRA that permits a circuit court to rule on an arbitration award.<sup>95</sup> Furthermore, the court noted that the IELRA's outline for procedures regarding labor practice provides that the decisions of the Board are subject to review only by appellate courts.<sup>96</sup> The court concluded that the legislature did not intend for the circuit courts to review these arbitration awards or disputes concerning arbitrability.<sup>97</sup> The court held that it was solely the Board's responsibility to adjudicate the merits of arbitration awards in the first instance.<sup>98</sup>

The Illinois Supreme Court also considered the issue of judicial review of medical staff membership decisions. In *Barrows v. Northwestern Memorial Hospital*,<sup>99</sup> the supreme court held that a private hospital's decision regarding the admission of a physician to its staff is not subject to judicial review.<sup>100</sup> In *Barrows*, the plaintiff

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89. *Id.* at 218, 526 N.E.2d at 150.

90. *Id.* A collective bargaining agreement required that all grievances concerning the evaluation and termination of teachers be submitted to arbitration. *Id.* at 218, 526 N.E.2d at 150.

91. *Id.* at 218-19, 526 N.E.2d at 150-51.

92. *Id.* at 219, 526 N.E.2d at 151.

93. *Id.*

94. *Id.*

95. *Id.* at 221, 526 N.E.2d at 152.

96. *Id.* (citing ILL. REV. STAT. ch. 48, para. 1716(a) (1985)). Paragraph 1716(a) provides that the decision of the Board is subject to review "to the Appellate Court of a judicial district in which the Board maintains its principal office." ILL. REV. STAT. ch. 48, para. 1716(a) (1987).

97. *Compton*, 123 Ill. 2d at 221-22, 526 N.E.2d at 152. In addition, the court noted several problems that might arise if circuit courts were to have jurisdiction over these matters. *Id.* at 222, 526 N.E.2d at 152. Specifically, the court noted that problems would arise concerning advance knowledge of where a suit should be brought, the possibility of conflicting judgments, and forum shopping. *Id.*

98. *Id.* at 226, 526 N.E.2d at 154.

99. 123 Ill. 2d 49, 525 N.E.2d 50 (1988).

100. *Id.* at 59, 525 N.E.2d at 55.

brought an action challenging a hospital's decision to deny him medical staff membership.<sup>101</sup> The plaintiff's complaint alleged that as a matter of public policy, a hospital's denial of staff membership should be reviewable.<sup>102</sup> The circuit court granted the defendant's motion to dismiss the complaint, relying on two Illinois appellate court decisions that held that staff membership decisions are not reviewable.<sup>103</sup> The appellate court reversed, holding private hospital hiring decisions may be reviewed as a matter of public policy.<sup>104</sup>

The Illinois Supreme Court noted that even though it had not yet reviewed the issue presented, the "rule of nonreview" had been applied generally by Illinois courts.<sup>105</sup> The court rejected the plaintiff's contention that the modern trend of the courts is to allow hospital staff decisions to be reviewed.<sup>106</sup> Instead, the court found that a majority of states do not permit review of these decisions.<sup>107</sup>

The court held that as a matter of public policy in Illinois, private hospitals' staff membership decisions are not subject to judicial review.<sup>108</sup> The court noted that the Illinois General Assembly, in amending the Medical Practice Act<sup>109</sup> and the Hospital Licens-

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101. *Id.* at 50, 525 N.E.2d at 51.

102. *Id.* at 51, 525 N.E.2d at 51.

103. *Id.* The circuit court relied on *Jain v. Northwest Community Hospital*, 67 Ill. App. 3d 420, 385 N.E.2d 108 (1st Dist. 1978), and *Mauer v. Highland Park Hospital Foundation*, 90 Ill. App. 2d 409, 232 N.E.2d 776 (2d Dist. 1967).

104. *Barrows*, 123 Ill. 2d at 50, 525 N.E.2d at 50.

105. *Id.* The rule of "non-review" was first established in *Mauer*, 90 Ill. App. 2d at 412-13, 232 N.E.2d at 778.

106. *Barrows*, 123 Ill. 2d at 52, 525 N.E.2d at 52.

107. *Id.* at 52-53, 525 N.E.2d at 52. The court also found that the case relied on by the plaintiff, *Greisman v. Newcomb Hospital*, 40 N.J. 389, 192 A.2d 817 (1963), involved special circumstances that did not apply to the case on review. *Barrows*, 123 Ill. 2d at 53, 525 N.E.2d at 52. The court distinguished *Greisman* on several grounds. First, according to the *Barrows* court, the defendant-hospital in *Greisman* was the only hospital in the area where the plaintiff-doctor practiced and, therefore, the plaintiff's patients would be deprived of his care if he was not given staff privileges. *Id.* at 53-54, 525 N.E.2d at 53. In addition, the hospital's decision would have a negative economic impact on the plaintiff's practice because there were no other hospitals near the doctor's place of residence. *Id.*

The *Barrows* court noted that New Jersey subsequently extended *Greisman* by eliminating economic impact as a basis for judicial review of hospital staff decisions. *Id.* at 55, 525 N.E.2d at 53. Thus, New Jersey adopted a "pure" public policy position that permitted review of hospital staff decisions. *Id.* Yet, the *Barrows* court noted that the New Jersey decisions were made prior to Illinois appellate court decisions. *Id.* Furthermore, the court noted that there were a limited number of jurisdictions that followed New Jersey's position. *Id.* at 55-56, 525 N.E.2d at 53-54. The *Barrows* court stated that New Jersey's position allows for review of private hospital decision based on the hospitals' "quasi-public fiduciary status." *Id.* at 55, 525 N.E.2d at 53. See generally Note, *Michigan Court Joins Majority in Denying Judicial Review of Staffing Decisions of Private Hospitals*, 6 AM. J. TRIAL ADVOC. 339 (1982).

108. *Barrows*, 123 Ill. 2d at 59, 525 N.E.2d at 55.

109. ILL. REV. STAT. ch. 111, para. 4406 (1987).

ing Act,<sup>110</sup> included provisions that grant immunity to hospitals and their staffs from civil liability for service on peer review or credential committees.<sup>111</sup> The court found that these statutes, although not dispositive of the present issue, reveal a legislative intent to permit hospitals and medical staffs to exercise freely their discretion in selecting and retaining medical staff members.<sup>112</sup> Additionally, the court found that the Illinois Health Finance Reform Act<sup>113</sup> provides a disclaimer that clearly indicates the legislature's intent on the issue.<sup>114</sup> Accordingly, the supreme court refused to accept the appellate court's policy claim.<sup>115</sup>

The court's opinion in *Barrows* is consistent with the legislative trend to maintain, as confidential, hospital decisions made with regard to policing medical staffs. The Medical Studies Act along with the recent amendments to the Medical Practice Act and the Hospital Licensing Act shield hospitals from disclosing efforts to improve health care, whether the efforts include new procedures or revoking staff privileges. The Illinois General Assembly has expressed the view that the improvement of health care supersedes the interests of physicians on staff who believe that their privileges have been wrongfully suspended or revoked. It should be pointed out, however, that the in-house procedures at most hospitals do allow for several levels of review of decisions regarding staff privileges.

In addition to the above cases concerning the scope of judicial authority, the supreme court considered its authority over circuit court rules. In *People ex rel Brazen v. Finley*,<sup>116</sup> the Illinois Supreme Court held that a circuit court is without authority to promulgate a rule that imposes requirements that are stricter than the supreme court's rules.<sup>117</sup> In *Brazen*, the plaintiff, an attorney, sought to file a petition of dissolution of marriage for his client with the clerk of the circuit court.<sup>118</sup> Because an affidavit of com-

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110. ILL. REV. STAT. ch. 111 1/2, para. 151.2 (1987).

111. *Barrows*, 123 Ill. 2d at 57-58, 525 N.E.2d at 54-55.

112. *Id.* at 58, 525 N.E.2d at 55.

113. ILL. REV. STAT. ch. 111 1/2, para. 6501-1 (1987).

114. *Barrows*, 123 Ill. 2d at 58-59, 525 N.E.2d at 55 (citing ILL. REV. STAT. ch. 111, para 6503-4 (1987)). Paragraph 6503-4 provides in part: "It is not the intent of the General Assembly, nor shall it be the policy of the State of Illinois, to take from medical staffs and hospitals the determination as to the qualifications of practitioners for purposes of granting medical staff membership and privileges." ILL. REV. STAT. ch. 111, para 6503-4 (1987).

115. *Barrows*, 123 Ill. 2d at 59, 525 N.E.2d at 54-55.

116. 119 Ill. 2d 485, 519 N.E.2d 898 (1988).

117. *Id.* at 495, 519 N.E.2d at 903.

118. *Id.* at 488, 519 N.E.2d at 899.

pliance with ethical rules was not attached to the petition, as required by Circuit Court Rule 0.7,<sup>119</sup> the clerk refused to accept the petition.<sup>120</sup> The appellate court reversed the circuit court's dismissal of the complaint, finding that rule 0.7 violated Illinois Supreme Court Rule 21.<sup>121</sup>

The defendant contended that rule 0.7 did not conflict with any Illinois Supreme Court Rule and that the supreme court does not preempt the circuit court's authority to create rules regarding attorney conduct and discipline.<sup>122</sup> The Illinois Supreme Court determined that even though the circuit courts have some power to make rules, they do not have the power to change substantive law.<sup>123</sup> Furthermore, the court found that circuit court rules are subject to review by the supreme court and may not conflict with the supreme court's rules.<sup>124</sup> The court then cited its decision in *In re Mitan*<sup>125</sup> for the proposition that the supreme court, not the circuit court, has the authority to regulate and discipline attorney conduct.<sup>126</sup> Accordingly, the court held that rule 0.7 invaded the supreme court's exclusive regulatory and disciplinary authority

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119. COOK COUNTY CIRCUIT COURT RULE 0.7. Rule 0.7 provides in part:

- (a) The unethical solicitation of employment by or on behalf of any attorney and the payment of commissions, living expenses or other gratuities in connection with such employment is prohibited.
- (b) The Affidavit of Compliance with this rule is required in all criminal, quasi criminal, traffic, personal injury and domestic relations actions and shall be in the form furnished by the clerk of the Circuit Court of Cook County.
- (c) The affidavit shall be filed by counsel when an appearance or initial pleading is filed.
- (d) Pleadings unaccompanied by such an affidavit shall not be accepted by the clerk.

*Id.*

120. *Brazen*, 119 Ill. 2d at 488, 519 N.E.2d at 899.

121. *Id.* at 490, 519 N.E.2d at 900 (citing ILL. REV. STAT. ch. 110A, para. 21(a) (1983)). Rule 21(a) provides for the adoption of circuit court rules and statutes that are consistent with state rules and statutes, provided that they are uniform throughout the state. *Id.*

In addition, the appellate court found that Rule 0.7 conflicted with Rules 2-103 and 5-103 of the Code of Professional Responsibility. *Brazen*, 119 Ill. 2d at 409, 519 N.E.2d at 900 (citing ILL. REV. STAT. ch 110A, paras. 2-103, 5-103 (1983)). Rule 2-103 concerns an attorney's communications with prospective clients. ILL. REV. STAT. ch. 110A, para. 2-103 (1987). Rule 5-103 concerns an attorney's gaining a proprietary interest in a case that he is handling. ILL. REV. STAT. ch. 110A, para. 5-103 (1987).

122. *Brazen*, 119 Ill. 2d at 490-91, 519 N.E.2d at 900-01.

123. *Id.* at 491, 519 N.E.2d at 901 (citing *Kinsley v. Kinsley*, 388 Ill. 194, 197, 57 N.E.2d 449, 450 (1944)).

124. *Id.* (citing *People ex rel. Bernat v. Bicek*, 405 Ill. 510, 521-22, 91 N.E.2d 588, 594 (1950)).

125. 119 Ill. 2d 229, 518 N.E.2d 1000 (1987).

126. *Brazen*, 119 Ill. 2d at 492-93, 519 N.E.2d at 901-02.

and wrongly imposed additional substantive hardships on attorneys.<sup>127</sup>

#### IV. STANDING AND MOOTNESS

In *Greer v. Illinois Housing Development Authority*,<sup>128</sup> the Illinois Supreme Court held that in order to establish standing, a plaintiff must show that a legally cognizable interest has been damaged.<sup>129</sup> Accordingly, the court refused to adopt the defendant's proposed "zone of interest" test for standing when an administrative agency allegedly violates a statute.<sup>130</sup>

In *Greer*, several persons who owned property near a proposed housing project filed a claim against the Illinois Housing Development Authority (the "IHDA").<sup>131</sup> The plaintiffs alleged that the IHDA approval of assisted mortgage financing for the project violated IHDA's duty under the Illinois Housing Act (the "IHA")<sup>132</sup> to avoid "undue economic homogeneity" in its financed projects.<sup>133</sup> The IHDA asserted that to have standing, a party must demonstrate that he was injured in fact and that his interest lay within the zone of interest that the statute in question seeks to protect.<sup>134</sup> The IHDA then argued that the plaintiffs failed to meet both of the test's requirements.<sup>135</sup>

The supreme court refused to adopt the IHDA's "zone of interest" rule because it would require the court to examine the IHA's goals, purposes, and objectives and then decide whether the plaintiffs were intended to benefit from the IHA.<sup>136</sup> This analysis, the court found, would confuse the standing issue and the actual merits of the case.<sup>137</sup> The court then determined that in order to have standing, a party must demonstrate only that there was an injury

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127. *Id.* at 494, 519 N.E.2d at 902.

128. 122 Ill. 2d 462, 524 N.E.2d 561 (1988).

129. *Id.* at 492, 524 N.E.2d at 574-75 (citing *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 254, 483 N.E.2d 1263, 1268 (1985)).

130. *Id.* at 491, 524 N.E.2d at 574. The "zone of interest" test requires that the plaintiff's asserted interest be within the zone of interests that the applicable statute seeks to protect. *Id.* at 487, 524 N.E.2d at 572. For further discussion of the "zone of interest" test, see *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 155-56 (1970).

131. *Greer*, 122 Ill. 2d at 470, 524 N.E.2d at 564.

132. ILL. REV. STAT. ch. 67 1/2, para. 301 (1987).

133. *Greer*, 122 Ill. 2d at 470, 524 N.E.2d at 564.

134. *Id.* at 487, 524 N.E.2d at 572. IHDA also set forth defenses of non-reviewability and failure to state a claim that its activities were arbitrary and capricious. *Id.*

135. *Id.*

136. *Id.* at 492, 524 N.E.2d at 574.

137. *Id.*

in fact to a legally cognizable interest.<sup>138</sup> In order to prove an injury in fact, the plaintiff must show that the injury was "distinct and palpable,"<sup>139</sup> "fairly traceable,"<sup>140</sup> and "substantially likely to be prevented or redressed by the grant of the requested relief."<sup>141</sup>

The court found that the decrease in the plaintiffs' property value was a legally cognizable interest.<sup>142</sup> In addition, the court noted that because the plaintiffs' homes were close to the development project, the injury was "distinct and palpable," as opposed to a being a generalized, public grievance.<sup>143</sup> In addition, the court found that a decrease in the value of the plaintiffs' homes would be "fairly traceable" to IHDA's approval of the project financing.<sup>144</sup> Accordingly, the court held that the plaintiffs had standing.<sup>145</sup>

In *People ex rel Bernardi v. City of Highland Park*,<sup>146</sup> the Illinois Supreme Court held that the plaintiffs' appeal was not moot, even though the injunctions sought were too late to have an effect.<sup>147</sup> In *Bernardi*, the Illinois Department of Labor filed a complaint to enjoin the City of Highland Park ("Highland Park") from awarding a public works contract without first complying with section 11 of the Prevailing Wage Act ("the PWA").<sup>148</sup> The circuit court dismissed the complaint, stating that Highland Park could choose not to follow the PWA because it was a home rule unit.<sup>149</sup> The appellate court affirmed.<sup>150</sup>

On appeal to the Illinois Supreme Court, Highland Park dis-

138. *Id.* at 492, 524 N.E.2d at 574-75 (citing *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 254, 483 N.E.2d 1263, 1268 (1985)).

139. *Id.* at 493, 524 N.E.2d at 575 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982)).

140. *Id.* (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977)).

141. *Id.* (quoting *INS v. Chada*, 462 U.S. 919, 936 (1983)).

142. *Id.* at 493, 524 N.E.2d at 575.

143. *Id.* at 494, 524 N.E.2d at 575.

144. *Id.*

145. *Id.* at 494-95, 524 N.E.2d at 576. The court noted that the lack of standing is an affirmative defense and that a plaintiff does not have the burden of pleading and proving standing. *Id.* at 494, 524 N.E.2d at 575 (citing *In re Custody of McCarthy*, 157 Ill. App. 3d 377, 380, 510 N.E.2d 555, 556 (2d Dist. 1987)).

146. 121 Ill. 2d 1, 520 N.E.2d 316 (1988).

147. *Id.* at 6-7, 520 N.E.2d at 318.

148. *Id.* (citing ILL. REV. STAT. ch. 48, paras. 39s-1 to 39s-12 (1987)). Section 11 provides in part: "Where objections to a determination of the prevailing rate of wages or a court action relative thereto is pending, the public body shall not continue work on the project unless sufficient funds are available to pay increased wages if such are finally determined . . ." ILL. REV. STAT. ch. 48, para. 39s-11 (1987).

149. *Bernardi*, 121 Ill. 2d at 6, 520 N.E.2d at 318.

150. *Id.*



closed that the public works project at issue had been completed.<sup>151</sup> Highland Park claimed that the injunction sought by the plaintiffs could not be enforced and, therefore, the matter was moot.<sup>152</sup> The supreme court determined that even though the injunctions would have no effect, the appeal was not moot.<sup>153</sup> The court noted that although the appeal would not affect the completed event, the court's decision could have a direct impact on the rights and duties of the parties and, therefore, the appeal would stand.<sup>154</sup> Accordingly, the court held that the plaintiff's appeal was not moot because there was still a question involving rights and interests of the parties.<sup>155</sup>

Finally, the court noted that even if the appeal were moot, review would still be appropriate because exceptions exist to the general rule that cases that are moot are unreviewable.<sup>156</sup> The court stated that if an issue is likely to be repeated, then review may be appropriate.<sup>157</sup>

In both *Greer* and *Highland Park*, the court lucidly discussed the rules governing each case. In *Greer*, rather than adopt a more amorphous test which would merely obfuscate whether standing was present, the court continued to apply the more readily recognizable test of an injury in fact. In *Highland Park*, the court refused to find mootness where a decision would assist the instant parties and future parties similarly situated.

## V. FORUM NON CONVENIENS

In *McClain v. Illinois Central Gulf Railroad Co.*,<sup>158</sup> the Illinois Supreme Court held that the circuit court erred in denying the defendant's motion to dismiss based on forum non-conveniens.<sup>159</sup> In *McClain*, the plaintiff was a Tennessee resident at the time he was

151. *Id.*

152. *Id.*

153. *Id.* at 6-7, 520 N.E.2d at 318.

154. *Id.* The court determined that the decision would have an effect on the parties because section 11 of the PWA contemplates litigation even after a project has been completed. *Id.* at 7, 520 N.E.2d at 319. Additionally, the court determined that its decision would resolve the issue of whether or not the Director of the Department of Labor must publish the names of Highland Park's contractors who did not comply with the PWA. *Id.* at 8, 520 N.E.2d at 319.

155. *Id.* at 8, 520 N.E.2d at 319.

156. *Id.*

157. *Id.* Specifically, the court believed that the issue presented in this case should be resolved for the concern of all public officials in the state who have to decide whether they must obey the PWA. *Id.*

158. 121 Ill. 2d 278, 520 N.E.2d 368 (1988).

159. *Id.* at 292, 520 N.E.2d at 374.

injured in Memphis, Tennessee.<sup>160</sup> The plaintiff subsequently filed a complaint against the defendant in the Circuit Court of Madison County, Illinois.<sup>161</sup> In response, the defendant filed a motion to dismiss based on forum non-conveniens.<sup>162</sup> The plaintiff noted that after filing the complaint, he became a resident of Madison County.<sup>163</sup>

The Illinois Supreme Court stated that a plaintiff who did not live in Illinois at the time he was injured and who later moved to Illinois does not have an expectation of protection from the State of Illinois.<sup>164</sup> Consequently, the court concluded that because the plaintiff had moved to Madison County after the injury occurred and the action was filed, any assumptions about convenience to the parties was subject to closer scrutiny.<sup>165</sup> The court's conclusion is legally sound.

## VI. CONFLICTS OF LAW

Recently, the Supreme Court of Illinois considered the application of a foreign law when one non-resident spouse sues another spouse for an injury that occurred in Illinois. In *Nelson v. Hix*,<sup>166</sup> the supreme court held that when one spouse sues the other spouse in tort, the law of the couple's domicile at the time of the tortious act applies.<sup>167</sup>

In *Nelson*, the plaintiff filed a tort complaint seeking to recover damages against her husband for injuries she sustained in an automobile accident in Illinois.<sup>168</sup> The Illinois Supreme Court held that

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160. *Id.* at 281-282, 520 N.E.2d at 369.

161. *Id.* at 282, 520 N.E.2d at 369.

162. *Id.* The defendant averred that the plaintiff was a resident of Tennessee, that all of the witnesses were from Tennessee, that the physical evidence was in Memphis, that the defendant could be served with process in Memphis, and that there were no other witnesses in Illinois. *Id.* The defendant also noted that Madison County's court docket was congested and that there would be great costs in transporting witnesses to Madison County. *Id.*

163. *Id.* at 282-83, 520 N.E.2d at 369.

164. *Id.* at 290, 520 N.E.2d at 373.

165. *Id.* The court also noted that at the time the action was filed, there were no significant ties to Madison County. *Id.* The court found that the convenience to the plaintiffs in this case was outweighed by the inconvenience to other persons involved and to the Circuit Court of Madison County. *Id.* at 291, 520 N.E.2d at 373. The court found several factors that favored Memphis as the more convenient forum. Specifically, the court determined, by considering the location of the accident, the residence of the injured party and the location of the witnesses and evidence, that Shelby County was the more convenient forum. *Id.* at 290, 520 N.E.2d at 373.

166. 122 Ill. 2d 343, 522 N.E.2d 1214 (1988).

167. *Id.* at 353, 522 N.E.2d at 1219.

168. *Id.* at 344, 522 N.E.2d at 1214-15. The plaintiff was a passenger in her hus-

the law of the couple's domicile at the time of the tort controls whether one spouse may sue the other in tort.<sup>169</sup> In addition, the court noted that Illinois has little interest in regulating the rights of foreign citizens to sue a spouse.<sup>170</sup> Furthermore, the court found that Ontario's interest in regulating the family relationships of Ontario citizens outweighed Illinois' interest in an insurance carrier's expectations.<sup>171</sup>

Contrary to the defendant's argument, the court also concluded that the doctrine of comity<sup>172</sup> does not require courts to recognize a foreign law.<sup>173</sup> Instead, the court determined that comity allows a court to decline application of a foreign law that is adverse to the "public morals, natural justice or the general interest" of the citizens of Illinois.<sup>174</sup> The court concluded that the Ontario law was not clearly contrary to the public morals, natural justice, or general interest of Illinois citizens and, therefore, refusal to follow Ontario law was not justified.<sup>175</sup>

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band's car at the time of the collision. *Id.* at 344, 522 N.E.2d at 1214. Both the plaintiff and her husband were residents and citizens of Ontario, Canada at the time of the accident. *Id.* The trial court granted the husband's motion to dismiss on the ground that the plaintiff's claim against him was barred by Illinois' interspousal immunity statute. *Id.* at 345, 522 N.E.2d at 1215 (citing ILL. REV. STAT. ch. 40, para 1001 (1983)). In so holding, the trial court found that Illinois law applied, rather than Canadian law which would have permitted the action. *Id.*

On appeal, the appellate court reversed, finding that the law of marital domicile applied and, therefore, Ontario law was binding. *Id.* Pursuant to Ontario's Family Law Reform Act, one spouse may sue another in tort. ONTARIO FAMILY LAW REFORM ACT, ONT. REV. STAT. ch. 145, § 65(3)(a) (1980).

169. *Nelson*, 122 Ill. 2d at 348, 522 N.E.2d at 1216 (citing *Wartell v. Formosa*, 34 Ill. 2d 57, 59, 213 N.E.2d 544, 546 (1966)). In *Wartell*, the court adopted section 169 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, which provides that the law of a couple's domicile will usually determine whether or not spousal immunity exists. *Wartell*, 34 Ill. 2d at 59, 213 N.E.2d at 546; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1971).

170. *Nelson*, 122 Ill. 2d at 351, 522 N.E.2d at 1218.

171. *Id.*

172. The doctrine of judicial comity is defined as a "principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

173. *Nelson*, 122 Ill. 2d at 352, 522 N.E.2d at 1218.

174. *Id.* (quoting *Wintersteen v. National Cooperage and Woodenware Co.*, 361 Ill. 95, 101, 197 N.E. 578, 582 (1935)).

175. *Id.* The court also noted that effective January 1, 1988, Illinois amended its law to permit interspousal suits in tort. *Id.* See ILL. REV. STAT. ch. 40, para. 1001 (1987).

## VII. PLEADINGS AND PROCEEDINGS

A. *Sufficiency of Complaint*

The Illinois Supreme Court decided two cases that required the determination of whether or not a complaint should be dismissed for failure to state a cause of action. In *Kirk v. Michael Reese Hospital and Medical Center*,<sup>176</sup> the Illinois Supreme Court held that a complaint may be dismissed for failure to state a cause of action when the facts pleaded indicate that the defendant could not reasonably foresee the injury.<sup>177</sup> In *Kirk*, the plaintiff filed a complaint against a hospital, two drug manufacturers, and two physicians for injuries he sustained when a recently released patient, who had taken prescription drugs in the hospital, injured the plaintiff while the plaintiff was a passenger in his car.<sup>178</sup> The defendants moved to dismiss the complaint for failure to state a cause of action.<sup>179</sup> The appellate court reversed the circuit court's dismissal against five of the defendants.<sup>180</sup>

The Illinois Supreme Court noted that pleadings must be construed liberally so as to do justice between the parties.<sup>181</sup> The court stated, however, that a plaintiff is still required to set out the necessary facts for recovery under the theory alleged.<sup>182</sup> The court found that because the drug manufacturers could not have reasonably foreseen that the physicians would have dispensed drugs without a warning and that the patient would be discharged, drink alcohol, lose control of his car, and hit a tree, the complaint failed to state a cause of action.<sup>183</sup>

It appears that the court was engaged in drawing a line as to the outer limit of liability for doctors and hospitals. Given the climate relative to increased malpractice premiums and other policy concerns, the court's line drawing cannot be viewed as arbitrary or unreasonable.

In *Estate of Johnson v. Condell Memorial Hospital*,<sup>184</sup> the Illinois Supreme Court held that a complaint that does not allege that a patient was involuntarily admitted to a hospital does not provide the necessary facts to establish that the hospital has a duty to re-

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176. 117 Ill. 2d 507, 513 N.E.2d 387 (1987).

177. *Id.* at 521, 513 N.E.2d at 394.

178. *Id.* at 513-14, 513 N.E.2d at 390.

179. *Id.*

180. *Id.* at 514, 513 N.E.2d at 390.

181. *Id.* at 516, 513 N.E.2d at 391.

182. *Id.*

183. *Id.* at 521, 513 N.E.2d at 394.

184. 119 Ill. 2d 496, 520 N.E.2d 37 (1988) [hereinafter *Johnson*].

strain a patient from leaving the hospital.<sup>185</sup> In *Johnson*, the plaintiff's administrator filed a complaint seeking damages for injuries to and for the death of Kathleen Johnson.<sup>186</sup> The complaint alleged that Janice Holt, while a patient at Condell Memorial Hospital ("Condell"), obtained a knife, threatened hospital personnel, and fled the hospital in her car.<sup>187</sup> While pursuing Holt, a police car struck Kathleen Johnson's automobile, causing her injuries and later death.<sup>188</sup>

The Illinois Supreme Court concluded that the plaintiff did not establish that Condell had a duty to control Holt.<sup>189</sup> The court noted that the plaintiff alleged that Holt was a "patient," but did not specify whether Holt's admission was voluntary or involuntary.<sup>190</sup> The court found this significant because the defendant owed no duty to a patient who was admitted voluntarily.<sup>191</sup> The court held that the plaintiff failed to set out ultimate facts supporting a cause of action and, therefore, the complaint was properly dismissed.<sup>192</sup>

As in *Kirk*, the court is restricting recovery where the court perceives that it would be unfair to impose a duty. Unless the patient was known to be dangerous or is a person who might flee a hospital, it does not seem appropriate to make the hospital the virtual guardian of the patient's behavior. Certainly, there could be circumstances where the imposition of a duty regarding a voluntarily admitted patient might present a much closer question. Careful crafting of the complaint must be performed to establish that a duty would be owed in such a situation.

### B. *Medical Malpractice — Affidavits*

Section 2-622 of the Illinois Code of Civil Procedure<sup>193</sup> requires

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185. *Id.* at 510-11, 520 N.E.2d at 43.

186. *Id.* at 499, 520 N.E.2d at 37.

187. *Id.* at 499-500, 520 N.E.2d at 37-38.

188. *Id.* at 500, 520 N.E.2d at 38.

189. *Id.* at 509, 520 N.E.2d at 42.

190. *Id.* at 507, 520 N.E.2d at 41.

191. *Id.* at 508, 520 N.E.2d at 42.

192. *Id.* at 510, 520 N.E.2d at 43.

193. ILL. REV. STAT. ch. 110, para. 2-622 (1987). Section 2-622 provides in part:

(a) In any action . . . in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney . . . shall file an affidavit . . . declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes is knowledgeable in the relevant issues involved . . . .

*Id.*

a plaintiff in a medical malpractice action to attach an affidavit from his attorney and a report from a health care professional to his complaint.<sup>194</sup> In *McCastle v. Sheinkop*,<sup>195</sup> the Illinois Supreme Court held that failure to attach such an affidavit and report would not result in dismissal with prejudice of a complaint.<sup>196</sup>

In *McCastle*, the Illinois Supreme Court determined that it was not the legislature's intent to require dismissal with prejudice under section 2-622.<sup>197</sup> The court also noted that the legislature did not intend for trial courts to have discretion to grant leave to file an amended complaint when a plaintiff seeks to amend an affidavit, but not when a plaintiff fails to file an affidavit originally.<sup>198</sup> The court concluded that even though the decision to grant leave to amend is within the discretion of the trial court, the trial court dismissed the complaint under the incorrect belief that section 2-622 requires dismissal with prejudice.<sup>199</sup>

The court based its decision on legislative history that is somewhat ambiguous as to whether discretion was vested in the court with regard to dismissal with or without prejudice. The concurrence by Justice Miller indicates that section 2-619(a) of the Code of Civil Procedure allows a court to entertain "other appropriate relief," presumably including dismissal without prejudice.

The Illinois General Assembly could have avoided the confusion and the subsequent need for judicial clarification if it had not stated

194. *Id.*

195. 121 Ill. 2d 188, 520 N.E.2d 293 (1987).

196. *Id.* at 194, 520 N.E.2d at 296. The supreme court remanded the case because the trial court did not know that it had discretion to grant leave to amend the pleadings.  
*Id.*

197. *Id.* at 192-93, 520 N.E.2d at 295-96. The following debate occurred in the Illinois House of Representatives:

Representative Preston: . . . What happens in the case after you enter into discovery, you then find out, which is frequently the situation, that at that point you want to rely on the doctrine of *res ipsa loquitur*, where you hadn't discovered that prior to the filing of the complaint?

Representative Daniels: You would amend the complaint with a new consulting physician's report.

Representative Preston: Well, but after discovery has been entered into and there's been preliminary motions, you then need leave of court, do you not, to amend the complaint? It's not of right that you can amend the complaint at that time.

Representative Daniels: You would need leave of court. You would have to show good cause to the court.

Representative Preston: And the court can deny that, I assume.

Representative Daniels: I think the judge would do the right thing."

HOUSE PROCEEDINGS, 84th Ill. Gen. Assem., May 23, 1985, at 385-86.

198. *McCastle*, 121 Ill. 2d at 193, 520 N.E.2d at 296.

199. *Id.* at 194, 520 N.E.2d at 296.

in section 2-622(g) that the failure to file the required certificates shall be grounds for dismissal under section 2-619. Whether this language was written intentionally or as a legislative compromise, it causes confusion for practitioners. Because discretion now has been judicially created, if not explicitly contained in the statute, leave is granted to file a late affidavit or report much more readily.

As a result, much of the strength of the statute, intended by its sponsors to weed out frivolous claims, has dissipated. Because substantial costs, however, are still involved in retaining a physician to prepare a report, practitioners are filing fewer small or non-meritorious medical malpractice claims. While non-meritorious claims are certainly to be discouraged, it is questionable whether it is appropriate to discourage small claims that have merit simply because it is too expensive to retain a physician. Nevertheless, with the court's opinion in *McCastle*, plaintiffs at least have additional time to decide whether a case warrants retaining a physician to prepare a report.

## VIII. WRITS OF MANDAMUS

### A. *Legal Duty*

In *League of Women Voters v. County of Peoria*,<sup>200</sup> the Illinois Supreme Court held that the complaint for writ of mandamus was properly dismissed because the plaintiffs failed to demonstrate that they had a clear legal right to the relief requested.<sup>201</sup> In *League of Women Voters*, the plaintiffs filed a complaint for a writ of mandamus compelling the defendants, Peoria County and the county clerk, to implement and enforce a referendum.<sup>202</sup> Upon the defendants' motion, the circuit court dismissed the complaint with prejudice.<sup>203</sup>

On appeal to the Illinois Supreme Court, the defendants argued that the plaintiffs' referendum was not legally enforceable.<sup>204</sup> In the alternative, the defendants argued that even if the referendum was enforceable, a writ of mandamus should not issue because

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200. 121 Ill. 2d 236, 520 N.E.2d 626 (1987).

201. *Id.* at 255, 520 N.E.2d at 635.

202. *Id.* at 239, 520 N.E.2d at 628. The referendum changed the method of electing county board members and the number of county board members. *Id.*

203. *Id.*

204. *Id.* at 242, 520 N.E.2d at 629. The defendants contended that the referendum was not enforceable because article IV, section 3(a) of the Illinois Constitution allows only a county board to determine the number of its members. *Id.* In addition, the defendants argued that reapportionment does not comport with the "one man, one vote" constitutional requirement. *Id.*

neither the county nor the county clerk had a legal duty to implement the referendum.<sup>205</sup>

The Illinois Supreme Court held that a mandamus should issue only where the respondent has a clear duty to act and comply with the writ.<sup>206</sup> Thus, the court noted that the plaintiffs were required to show that the referendum was valid and that the county and its clerk had a duty to carry out the actions requested by the plaintiffs.<sup>207</sup> The court concluded that the referendum was unenforceable and, therefore, that the plaintiffs had not established a clear right to the relief sought in the writ of mandamus.<sup>208</sup>

The decision in *League of Women Voters* indicates again how cautious the court is of using mandamus power. It is only when a party makes a clear showing of the right to the relief requested that the court will allow relief in mandamus.

### B. Appeal as a Substitute

In *People ex rel Foreman v. Nash*,<sup>209</sup> the Illinois Supreme Court refused to grant a writ of mandamus or prohibition or a supervisory order because to do so would, in effect, constitute an additional appeal to which the petitioner was not entitled.<sup>210</sup> In *Nash*, the defendant had been found guilty but mentally ill on charges of murder and armed violence.<sup>211</sup> The appellate court reversed and remanded, directing the entry of judgment of not guilty by reason of insanity.<sup>212</sup> The State then moved to reinstate the original sentence or, in the alternative, to grant a retrial on the ground that the appellate court did not have authority to issue its order.<sup>213</sup> The State's motion was denied.<sup>214</sup> The State then applied for a writ of mandamus directing the appellate court to vacate its judgment and a writ of mandamus directing the circuit court to reinstate the defendant's conviction or, alternatively, for a new trial and a writ of prohibition preventing the circuit court from entering a judgment of not guilty by reason of insanity.<sup>215</sup>

The Illinois Supreme Court noted that the State's petition for

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205. *Id.*

206. *Id.* at 243, 520 N.E.2d at 629.

207. *Id.*

208. *Id.* at 254-55, 520 N.E.2d at 635.

209. 118 Ill. 2d 90, 514 N.E.2d 180 (1987).

210. *Id.* at 98-99, 514 N.E.2d at 184.

211. *Id.* at 92, 514 N.E.2d at 181.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*



rehearing in the appellate court was denied and its petition for leave to appeal to the supreme court was also denied.<sup>216</sup> Thus, the court found that permitting the State's writ would, in effect, be permitting another appeal.<sup>217</sup> Therefore, the court denied issuance of the writs and the supervisory order because they constituted an improper additional appeal.<sup>218</sup>

As with *League of Women Voters*, the Illinois Supreme Court will not allow mandamus to be issued in a manner in which it was not intended. Practitioners should be aware of this caution on the part of the court and act accordingly. Only where the right to relief is clear will the mandamus be entertained.

### IX. STATUTORY CONSTRUCTION AND APPLICATION

In *Rivard v. Chicago Fire Fighters Union Local No. 2*,<sup>219</sup> the Illinois Supreme Court held that section 2-209.1 of the Illinois Code of Civil Procedure<sup>220</sup> should be applied prospectively.<sup>221</sup> In *Rivard*, the plaintiffs sought damages from a fire fighters union and an association of fire fighters for deaths and injuries sustained in fires that occurred when the union was on strike in 1980.<sup>222</sup> The defendants moved to dismiss the complaint on the grounds that common law did not permit a voluntary, unincorporated association to be sued in its own name.<sup>223</sup> The circuit court granted the defendant's motion and dismissed the case.<sup>224</sup>

While on appeal, the legislature amended the Illinois Code of

216. *Id.*

217. *Id.*

218. *Id.* at 98-99, 514 N.E.2d at 184. The Illinois Supreme Court considered its decision in *Moore v. Strayhorn*, 114 Ill. 2d 538, 502 N.E.2d 727 (1986), as controlling. *Nash*, 118 Ill. 2d at 98, 514 N.E.2d at 184. In *Moore*, the defendant applied to the Illinois Supreme Court for a writ of mandamus directing the circuit court to credit his sentence with the time served prior to his appeal. *Moore*, 114 Ill. 2d at 540, 402 N.E.2d at 728. The *Moore* court held that the defendant should have appealed to the appellate court before filing his petition and the failure to do so constituted an attempt to circumvent the appellate process. *Id.* Accordingly, the court denied the writ of mandamus. *Id.*

The *Nash* court distinguished *Moore* by noting that, unlike the defendant in *Moore*, the State in this case had already appealed directly to the appellate court. *Nash*, 118 Ill. 2d at 98, 514 N.E.2d at 184.

219. 122 Ill. 2d 303, 522 N.E.2d 1195 (1988).

220. ILL. REV. STAT. ch. 110, para. 2-209.1 (1987). Section 2-209.1 provides in part: "A voluntary unincorporated association may sue and be sued in its own name, and may complain and defend in all actions." *Id.*

221. *Rivard*, 122 Ill. 2d at 312, 522 N.E.2d at 1200.

222. *Id.* at 305, 522 N.E.2d at 1196.

223. *Id.* at 305, 522 N.E.2d at 1197 (citing *American Fed'n of Technical Eng'rs, Local 144 v. La Jeunesse*, 63 Ill. 2d 263, 347 N.E.2d 712 (1976)).

224. *Id.*

Civil Procedure to permit voluntary, unincorporated associations to file suit or to be named as defendants.<sup>225</sup> Subsequently, the appellate court applied the new provision retroactively and reversed the circuit court.<sup>226</sup>

The Illinois Supreme Court noted that, generally, prospective application of statutes is preferred to retroactive application.<sup>227</sup> The court found that the presumption of prospectivity may be rebutted only by express language to the contrary in the statute itself.<sup>228</sup> Although the court acknowledged that legislative changes in procedure or remedies will generally be applied retroactively,<sup>229</sup> it also determined that section 2-209.1 represents a substantive, not procedural, statute because it makes certain entities parties to suits.<sup>230</sup> Accordingly, the court held that because the statute was substantive and the statute itself did not rebut the presumption of prospectivity, the statute must be applied prospectively.<sup>231</sup>

Such a rule is consistent with the well-recognized principle that substantive changes in statutes will not be applied retroactively. There cannot be serious disagreement with the rule or the court's application of it in this instance.

## X. APPEALS

### A. Rules 304(a) and 303

Illinois Supreme Court Rule 304(a)<sup>232</sup> provides that if not all claims are resolved or not all parties in an action obtain a final judgment, then a party must file a timely notice of appeal from the time the entry is made.<sup>233</sup> Illinois Supreme Court Rule 303(a)(1)<sup>234</sup>

225. *Id.* at 306, N.E.2d at 1197; P.A. 83-901, 1983 Ill. Laws 5383.

226. *Rivard*, 122 Ill. 2d at 306, 522 N.E.2d at 1197.

227. *Id.* at 308-09, 522 N.E.2d at 1198 (citing *Orlicki v. McCarthy*, 4 Ill. 2d 342, 122 N.E.2d 513 (1954)).

228. *Id.* at 309, 522 N.E.2d at 1198 (citing *People v. Kellick*, 102 Ill. 2d 162, 180, 464 N.E.2d 1037, 1045 (1984); *United States Steel Credit Union v. Knight*, 32 Ill. 2d 138, 142, 204 N.E.2d 4, 6 (1965)).

229. *Id.* at 310, 522 N.E.2d at 1198 (citing *Maiter v. Chicago Bd. of Educ.*, 82 Ill. 2d 373, 390, 415 N.E.2d 1034, 1042 (1980)).

230. *Id.* at 311, 522 N.E.2d at 1199.

231. *Id.* at 312, 522 N.E.2d at 1200.

232. ILL. S. CT. R. 304(a), ILL. REV. STAT. ch. 110A, para. 304(a) (1987).

233. *Id.* Rule 304(a) states in pertinent part:

If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal . . . . The time for filing the notice of appeal shall run from the entry of the required finding . . . .

provides for a notice of appeal to be filed within thirty days after final judgment has been entered or within thirty days after a post-trial motion has been denied.<sup>235</sup> In *Elg v. Whittington*,<sup>236</sup> the Illinois Supreme Court held that the filing of a post-trial motion to reconsider a piecemeal judgment would not toll the thirty-day period for filing a timely appeal under rule 304(a).<sup>237</sup> In *Elg*, the appellants filed a third-party complaint against the appellees.<sup>238</sup> The circuit court entered an order granting the third-party defendants' motion for summary judgment.<sup>239</sup> In addition, the court entered a finding pursuant to rule 304(a) on its own motion.<sup>240</sup>

The appellants subsequently filed a motion to vacate the summary judgment.<sup>241</sup> The circuit court denied the appellants' motion.<sup>242</sup> More than two months after the court entered an order for summary judgment, but only twenty-six days after the appellants moved to vacate the judgment, the appellants filed a notice of appeal from the order granting summary judgment.<sup>243</sup>

The appellate court noted that the appellant's motion to reconsider did not toll the time to file their notice of appeal.<sup>244</sup> Accordingly, the appellate court held that because the notice of appeal was not filed within thirty days of the summary judgment order, the appeal would be dismissed under rule 303(a)(1).<sup>245</sup>

The Illinois Supreme Court distinguished piecemeal appeals under rule 304 from a standard appeal under rule 303 and determined that the merits of a piecemeal appeal should be decided as soon as possible so that a resolution of all parties' claims can be achieved.<sup>246</sup> In addition, the court recognized that the purpose of

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*Id.*

234. ILL. S. CT. R. 303(a)(1), ILL. REV. STAT. ch. 110A, para. 303(a)(1) (1987). Section 303(a)(1) provides in pertinent part:

[T]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely post-trial motion directed against the judgment is filed . . . within 30 days after the entry of the order disposing of the last pending post-trial motion.

*Id.*

235. *Id.*

236. 119 Ill. 2d 344, 518 N.E.2d 1232 (1987).

237. *Id.* at 351, 518 N.E.2d at 1235.

238. *Id.* at 346, 518 N.E.2d at 1233.

239. *Id.* at 348-49, 518 N.E.2d at 1234.

240. *Id.* at 349, 518 N.E.2d at 1234.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 350, 518 N.E.2d at 1234.

245. *Id.*

246. *Id.* at 354, 518 N.E.2d at 1236.

rule 304(a) is to avoid unnecessary appeals, yet permit appeals in which immediate appeal is appropriate.<sup>247</sup> Thus, the court concluded that rule 304(a) should enable litigants to determine, with certainty, when a judgment of fewer than all claims is appealable.<sup>248</sup> The court also noted that rule 304(a), unlike rule 303, does not include a provision that the time for filing a notice of appeal may run from the date of an order denying a post-trial motion.<sup>249</sup> The court, therefore, held that a motion to reconsider an order dismissing fewer than all claims or affecting fewer than all parties will not toll the time period for filing an appeal.<sup>250</sup>

*Elg* is one of the most significant cases decided during the *Survey* period. For many practitioners, it changes the rules as to when to file a notice of appeal and it emphasizes, once again, how important it is for all practitioners in Illinois to know and understand the Supreme Court Rules.

The court in *Elg* referred to two tracks of litigation that proceed when an interlocutory appeal occurs. The supreme court emphasized that it is in the interest of the court and the parties to have the two tracks merge into one again as quickly as possible. As a result, there is no tolling period provided for in rule 304(a). A party must either file a notice of appeal within thirty days or lose the opportunity to do so. Second, if a party were to file a motion while jurisdiction still rested with the circuit court, then the motion must be heard within that thirty-day period or the circuit court would lose jurisdiction to hear and decide the motion.

Section 2-621 of the Illinois Code of Civil Procedure<sup>251</sup> permits a non-manufacturer-defendant to be dismissed from a case once the product manufacturer has been identified and sued.<sup>252</sup> In *Keller-*

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247. *Id.* at 353, 518 N.E.2d at 1236.

248. *Id.*

249. *Id.* at 351, 518 N.E.2d at 1235.

250. *Id.* In addition, the court found that its decision resolved an issue of first impression and held that its decision will apply prospectively to all cases in which a notice of appeal was filed on or after November 16, 1987. *Id.* at 358-59, 518 N.E.2d at 1238-39.

Subsequently, the supreme court amended rule 304(a), effective January 1, 1989. The time for filing a notice of appeal under rule 304(a) is now the same as under rule 303. Once the express finding is made by the court, the time for filing the notice of appeal begins to elapse. The filing of a post-judgment motion will toll the time to file a notice of appeal. When the post-judgment motion is decided, a party shall have 30 days to file a notice of appeal.

251. ILL. REV. STAT. ch. 110, para. 2-621 (1987).

252. ILL. REV. STAT. ch. 110, para. 2-621(b) (1987). Section 2-621(b) provides in pertinent part:

Once the plaintiff has filed a complaint against the manufacturer or manufacturer . . . the court shall order the dismissal of a strict liability in tort claim

*man v. Crowe*,<sup>253</sup> the Illinois Supreme Court held that an order granting dismissal under section 2-621 was not final and, therefore, a finding under rule 304(a) would be inappropriate.<sup>254</sup> In *Kellerman*, the plaintiffs filed complaints for mandamus seeking damages for certain deaths resulting from the ingestion of cyanide-laced aspirin capsules.<sup>255</sup> The complaints named the product manufacturer and certain retail stores as defendants.<sup>256</sup> The trial judge granted the retailers' motion to dismiss under section 2-621 and issued an order under rule 304(a).<sup>257</sup> The plaintiffs subsequently alleged that the trial judge was without authority to make the orders appealable under rule 304(a).<sup>258</sup>

The Illinois Supreme Court noted that in order for a judgment to be final and appealable, it must terminate all litigation between the parties on the merits and eliminate the rights of a party.<sup>259</sup> The court, however, concluded that a dismissal under section 2-621 does not dispose of a party's rights because it contemplates further litigation.<sup>260</sup> The court stated that section 2-621(b) contemplates further litigation because a plaintiff may move to have a dismissal order vacated against the manufacturer if the statute of limitations has run, the incorrect manufacturer was certified by the defendant, the manufacturer could not be served, or the manufacturer would not be able to satisfy a judgment.<sup>261</sup> The court held that because a dismissal under 2-621 does not dispose of the party's rights, an order granting a motion for dismissal under 2-621 should not be final.<sup>262</sup>

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against the certifying defendant or defendants . . . . The plaintiff may at any time subsequent to the dismissal move to vacate the order of dismissal and reinstate the certifying defendant or defendants, provided plaintiff can show one or more of the following:

- (1) That the applicable period of statute of limitation or repose bars the assertion of strict liability in tort cause of action . . . .
- (2) That the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts of this State, or despite due diligence, the manufacturer is not amenable to service of process; or
- (3) That the manufacturer is unable to satisfy any judgment . . . .

*Id.*

253. 119 Ill. 2d 111, 518 N.E.2d 116 (1987).

254. *Id.* at 115, 518 N.E.2d at 118.

255. *Id.* at 113, 518 N.E.2d at 117.

256. *Id.*

257. *Id.*

258. *Id.* at 114, 518 N.E.2d at 118. The plaintiffs contended that the findings were unnecessary and encouraged piecemeal appeals. *Id.*

259. *Id.* at 115, 518 N.E.2d at 118.

260. *Id.* at 116, 518 N.E.2d at 118.

261. *Id.*

262. *Id.* at 115, 518 N.E.2d at 118. In addition, with regard to filing a petition for

This ruling comports with reality. Because a defendant can be brought back into the action at a later time, the dismissal actually is not a final order. The drawback, however, is that it renders this very practical statute less practical if a defendant is unable to be dismissed finally and permanently. The only suggestion to be made, which does not appear to be authorized or prohibited by the court's opinion, is for a defendant to wait until the correct manufacturer has been brought into the case, thereby resolving any concerns that a defendant will be brought back into the action. At that point, a motion could be made requesting the court to make a rule 304(a) finding so that a defendant finally may be eliminated from the case.

In *Carter v. Chicago & Illinois Midland Railway Co.*,<sup>263</sup> the Illinois Supreme Court held that a finding under rule 304(a) was necessary to appeal a judgment as to a severed issue, unless the trial court states in its severance orders that the claim, counterclaim, or party has been severed and will proceed separately.<sup>264</sup> In *Carter*, the plaintiff's appeals were consolidated and later severed by the appellate court while awaiting for the supreme court to decide

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writ of mandamus, the court found that a mandamus should not be substituted for appeal and that the plaintiffs' appropriate remedy would be an appeal to the appellate court. *Id.* at 118, 518 N.E.2d at 120.

263. 119 Ill. 2d 296, 518 N.E.2d 1031 (1988).

264. *Id.* at 307-08, 518 N.E.2d at 1037. In *Carter*, the plaintiff sought damages for the wrongful death of his wife and daughter who were killed in an automobile accident by the defendant's train. *Id.* at 297, 518 N.E.2d at 1032. After the jury awarded damages for the death of the wife and daughter, the trial court found that the amount of damages for the daughter's death was inadequate. *Id.* A new trial was set to determine the damages for the daughter's death. *Id.* Upon securing a special finding by the trial court under rule 304(a), the plaintiff appealed from a reduced judgment on the verdict as to his wife's wrongful death. *Id.* at 298, 518 N.E.2d at 1032. The appellate court affirmed the trial court's decision. *Id.*

The defendant filed a counterclaim against the wife's estate for damages pending in the action concerning the claim for the daughter's wrongful death. *Id.* at 298, 518 N.E.2d at 1033. The plaintiff's subsequent motion to sever the counterclaim was granted. *Id.*

Following a verdict for the daughter's estate, the defendant's post-trial motion was denied and the defendant requested, and was granted, a special finding of appealability under rule 304(a). *Id.* Subsequently, the plaintiff's motion to dismiss the counterclaim was granted. *Id.* at 299, 518 N.E.2d at 1033. The defendant's appeal from the judgment for the daughter's estate was based on rule 304(a) because, at the time, the defendant's counterclaim was still pending. *Id.* The defendants also appealed from the dismissal of the counterclaim based on rule 303 because dismissal of the counterclaim had terminated the litigation. *Id.*

The appellate court found the sequencing of events relevant. *Id.* The defendant's motion as to the judgment in favor of the daughter's estate was denied on February 14, 1985. *Id.* The special finding as to that claim was entered on March 28, 1985. *Id.* The appeal was taken pursuant to the rule 304(a) finding, but more than 30 days after denial of the defendant's post-trial motion. *Id.*

*Northtown Warehouse & Transportation Co. v. Transamerica Insurance Co.*<sup>265</sup> Following the supreme court's decision, the appellate court then found *Northtown* controlling and concluded that it had no jurisdiction over the *Carter* case because the defendant did not appeal within thirty days of the denial of a post trial motion under rule 303.<sup>266</sup>

The Illinois Supreme Court considered whether the appellate court correctly applied *Northtown*. In *Northtown*, the Supreme Court of Illinois held that a trial court's severance of a counterclaim created a separate and distinct claim from the plaintiff's.<sup>267</sup> Thus, an appeal from a final judgment in a severed action should be allowed without a finding under rule 304(a).<sup>268</sup> The *Carter* court found that in *Carter*, unlike in *Northtown*, there was a rule 304(a) finding, but the appeal was dismissed because the notice of appeal was not filed within thirty days.<sup>269</sup> The *Carter* court noted that *Northtown* did not specifically hold that an appeal must be taken only within the time required in rule 303(a).<sup>270</sup> The court reasoned that the holding in *Northtown* would require every losing party in a claim tried separately to file an appeal under rule 303 to protect against the possibility of a determination that the severance order may have created a separate action where judgment is appealable without a rule 304(a) finding.<sup>271</sup>

Additionally, the court found that a finding under rule 304(a) is necessary in order to appeal a judgment as to a severed issue, unless the trial court, in its severance order, states that the claim, counterclaim, or party has been severed and will proceed separately from other claims, counterclaims, or parties.<sup>272</sup>

### B. Waiver — Opportunity To Litigate

#### In *Spinelli v. Immanuel Lutheran Evangelical Congregation*,

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265. *Id.* at 299, 518 N.E.2d at 1033 (citing *Northtown Warehouse & Transp. Co. v. Transamerica Ins. Co.*, 111 Ill. 2d 532, 490 N.E.2d 1268 (1986) [hereinafter *Northtown*]). In *Northtown*, the court held that a counterclaim for indemnity severed in the trial court created a separate and distinct claim from that of the plaintiff. *Northtown*, 111 Ill. 2d at 537-38, 490 N.E.2d at 1271. Accordingly, the court determined that a defendant's claim, when severed, is treated as a separate action. *Id.*

266. *Carter*, 119 Ill. 2d at 300, 518 N.E.2d at 1033-34.

267. *Northtown*, 111 Ill. 2d at 537, 490 N.E.2d at 1270.

268. *Id.*

269. *Carter*, 119 Ill. 2d at 301, 518 N.E.2d at 1034.

270. *Id.*

271. *Id.* at 304, 518 N.E.2d at 1035.

272. *Id.* at 307-08, 518 N.E.2d at 1037.

*Inc.*,<sup>273</sup> the Illinois Supreme Court held that the State does not waive its right to appeal when the Attorney General is not a party to a trial court proceeding and is denied leave to intervene in the appellate court.<sup>274</sup> In *Spinelli*, the Illinois Supreme Court consolidated appeals in three actions involving the constitutionality of an act that permits employees to review personnel records (the "Act").<sup>275</sup> The Attorney General contended that he was not aware of the pendency of the action in the circuit court and, therefore, the State should not be denied its right to appeal because he had no opportunity to litigate.<sup>276</sup> The Illinois Supreme Court found that because the Attorney General was not aware of the pending action in the circuit court and was denied leave to intervene in the appellate court, the State could not have waived the issue because the Attorney General had not had an opportunity to raise an issue.<sup>277</sup>

## XI. SETTLEMENT AND CONTRIBUTION

In *Hall v. Archer-Daniels-Midland Co.*,<sup>278</sup> the Illinois Supreme Court held that a settling tortfeasor need not extinguish an injured's workers' compensation lien before filing a contribution action against the injured's employer.<sup>279</sup> In *Hall*, the plaintiff, the wife of an injured construction worker, sought damages under the Structural Work Act<sup>280</sup> for injuries sustained to the worker.<sup>281</sup> In her complaint, the plaintiff sought recovery against Archer-Daniels-Midland ("ADM") and Midstates.<sup>282</sup> ADM then filed a third-party complaint for contribution against the injured's employer,

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273. 118 Ill. 2d 389, 515 N.E.2d 1222 (1987).

274. *Id.* at 400, 515 N.E.2d at 1227.

275. *Id.* at 395, 515 N.E.2d at 1225 (citing ILL. REV. STAT. ch. 48, paras. 2001-2012 (1987)).

276. *Id.* at 400, 515 N.E.2d at 1227.

277. *Id.* The court also noted that since the action was filed, the supreme court adopted rule 19, which requires litigants to serve the Attorney General with notice that he or she intends to challenge the constitutionality of a statute. *Id.* (citing ILL. REV. STAT. ch. 110A, para. 19 (1987)).

Additionally, the court found that the defendant's waiver of the issue did not preclude the State from raising the issue in the supreme court. *Id.* at 400-01, 515 N.E.2d at 1227. Yet, the court found that because the State failed to adequately brief or argue the issue in the supreme court, the issue had been waived. *Id.* at 401, 515 N.E.2d at 1227.

278. 122 Ill. 2d 448, 524 N.E.2d 586 (1988).

279. *Id.* at 454, 524 N.E.2d at 589.

280. ILL. REV. STAT. ch. 48, paras. 60-69 (1987).

281. *Hall*, 122 Ill. 2d at 450, 524 N.E.2d at 587.

282. *Id.* ADM was the company in charge of the construction project where her husband was injured and Midstates was the company that erected an allegedly defective catwalk. *Id.*



Corrigan Co., under the Contribution Act.<sup>283</sup>

Eventually, the plaintiff and ADM entered into a settlement agreement whereby the plaintiff released all parties in exchange for a payment and indemnification by ADM for a workers' compensation lien claim by the employer.<sup>284</sup> The settlement was approved by the trial judge, and the plaintiff's complaint was dismissed with prejudice.<sup>285</sup>

In a separate proceeding, ADM pursued its contribution action against Midstates and Corrigan.<sup>286</sup> A jury found in favor of ADM against both defendants.<sup>287</sup> The jury then apportioned the parties' respective shares of contribution, and the amount of the workers' compensation award was added to the settlement amount.<sup>288</sup> A judgment in a proportionate amount was entered against the parties.<sup>289</sup>

The appellate court reversed, finding that ADM failed to satisfy section 302(e) of the Contribution Act.<sup>290</sup> Section 302(e) provides that a tortfeasor who settles with a claimant is not entitled to recover from another tortfeasor who has not extinguished liability by the settlement.<sup>291</sup> The appellate court reasoned that under section 302(e), ADM would have to extinguish all of Corrigan's liability, including the workers' compensation lien, before bringing a contribution claim against Corrigan.<sup>292</sup>

The Illinois Supreme Court determined that under the Contribution Act, a settling party is not required to eliminate every obligation, including workers' compensation benefits, that the contribution defendant owes to the injured plaintiff.<sup>293</sup> The court noted that the Contribution Act's consistent use of the terms "liability" and "culpability" indicates that the legislature wanted to include only liability obtained from negligent or culpable con-

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283. *Id.* at 450, 524 N.E.2d at 587 (citing ILL. REV. STAT. ch. 70, paras. 301-305 (1987)).

284. *Id.* at 450-51, 524 N.E.2d at 587.

285. *Id.* at 451, 524 N.E.2d at 587.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 451, 524 N.E.2d at 587-88.

290. *Id.*; ILL. REV. STAT. ch. 70, para. 302(e) (1987). Section 302(e) states: "[a] tortfeasor who settles with a claimant pursuant to para. (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement." *Id.*

291. ILL. REV. STAT. ch. 70, para. 302(e) (1987).

292. *Hall*, 122 Ill. 2d at 453, 524 N.E.2d at 589.

293. *Id.* at 454, 524 N.E.2d at 589.

duct.<sup>294</sup> The court reasoned that because the obligation of an employer under the Workers' Compensation Act is based on status alone and not on the culpability of the employer, the workers' compensation benefits were not intended to fall within the meaning of the Contribution Act.<sup>295</sup>

The status of an employer, whether under the Workers' Compensation Act or in a contribution action, always presents a problem for the court. The court's opinion in *Hall* is based, at least in part, on the reluctance of the court to interfere with a settlement reached at arms' length by the parties. Because an employer is a joint tortfeasor who can be sued for contribution based upon culpable conduct, there does seem to be a problem with the court's conclusion that section 302(e) does not apply. This is true because the workers' compensation lien is used to reduce the judgment against the employer. The strong public policy in favor of settlements would seem to outweigh any such concern, however.

## XII. AMICUS BRIEFS

In *Zurich Insurance v. Raymark Industries*,<sup>296</sup> the Illinois Supreme Court denied a motion by an amicus curiae to strike other amicus briefs.<sup>297</sup> In *Zurich*, Zurich Insurance Company ("Zurich"), Federal Insurance Company ("Federal"), and Commercial Union Insurance ("Commercial") sought a declaratory judgment concerning their obligations to indemnify Raymark against thousands of personal injury and wrongful death claims brought against Raymark.<sup>298</sup> Several amicus briefs were filed, including those of the U.S. Gypsum Company ("Gypsum"), Armstrong World Industries, Inc. ("Armstrong"), and Liberty Mutual Insurance Company ("Liberty").<sup>299</sup> Zurich, Federal, and Commercial

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294. *Id.* at 454-55, 524 N.E.2d at 589.

295. *Id.* at 455, 524 N.E.2d at 589. The court also found that, contrary to the contention of Corrigan and Midstates, ADM should not be precluded from bringing a contribution action, even though the release did not specify certain separate amounts for the settlement of the two claims against ADM. *Id.* at 459, 524 N.E.2d at 591-92. The court noted that allocation of settlement proceeds between different theories of recovery is not expressly required by the Contribution Act. *Id.* at 459, 524 N.E.2d at 592. The court found that, in any event, Corrigan and Midstates failed to challenge the good faith settlement at the trial court and therefore, waived their argument. *Id.* at 460, 524 N.E.2d at 592. In addition, the court found that ADM presented a prima facie case for contribution because the settlement was reached in good faith and ADM paid more than its share of liability, as determined by the jury. *Id.* at 461, 524 N.E.2d at 592.

296. 118 Ill. 2d 23, 514 N.E.2d 150 (1987) [hereinafter *Zurich*].

297. *Id.* at 60, 514 N.E.2d at 167.

298. *Id.* at 58, 514 N.E.2d at 152.

299. *Id.* at 58-59, 514 N.E.2d at 166.

moved to strike Gypsum and Armstrong's amicus briefs, alleging that Gypsum and Armstrong's briefs improperly attempted to supplement the record.<sup>300</sup> Subsequently, Liberty also moved to strike Gypsum and Armstrong's briefs.<sup>301</sup>

The Illinois Supreme Court concluded that because Liberty was not a party to the court action, it was only permitted to advise or make suggestions to the court.<sup>302</sup> The court, therefore, found that Liberty, as an amicus, was not permitted to engage in motion practice.<sup>303</sup> Accordingly, the court held that the motion to strike was inappropriate.<sup>304</sup>

This ruling is consistent with the limited purpose of amicus curiae. Practitioners should be careful not to abuse the privilege of advising the court by seeking to become an active litigant.

### XIII. LEGISLATION

#### A. *New or Modified Supreme Court Rules*

Effective November 25, 1987, Illinois Supreme Court Rule 63<sup>305</sup> was amended by the addition of subsection (B)(5). Amended rule 63(B)(5) provides that a judge must refrain from voting to appoint or reappoint a spouse or close relative to the office of associate judge.<sup>306</sup> In addition, subparagraph (C)(1)(c) was amended, effective August 1, 1987. Amended rule 63(C)(1)(c) provides that a judge should disqualify himself or herself when the judge was, within the past three years, associated with the attorney or law firm involved in a matter presently before the judge.<sup>307</sup> In addition, a judge may not rule on a matter if, within the past seven years, he or she represented one of the present parties while engaged in private practice.<sup>308</sup>

#### B. *New or Modified Illinois Code of Civil Procedure Sections*

##### 1. Section 2-103: Where Public Corporations May Be Sued

In an effort to expand the number of counties in which an action may be brought against a public corporation, section 2-103 of the

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300. *Id.* at 59, 514 N.E.2d at 166.

301. *Id.*

302. *Id.* at 59-60, 514 N.E.2d at 166-67.

303. *Id.* at 60, 514 N.E.2d at 167.

304. *Id.* at 59-60, 514 N.E.2d at 167.

305. ILL. S. CT. R. 63, ILL. REV. STAT. ch. 110A, para. 63 (1987).

306. ILL. S. CT. R. 63(B)(5), ILL. REV. STAT. ch. 110A, para. 63(B)(5) (1987).

307. ILL. S. CT. R. 63(C)(1)(c), ILL. REV. STAT. ch. 110A, para. 63(C)(1)(c) (1987).

308. *Id.*

Illinois Code of Civil Procedure<sup>309</sup> was amended to permit public corporations to be sued in the county where the transaction or part of the transaction occurred.<sup>310</sup> Effective November 6, 1987, the amended section treats public corporations like other defendants under section 2-101 of the Illinois Code of Civil Procedure.<sup>311</sup>

## 2. Section 2-202: Service of Process

Effective November 23, 1987, Public Act 85-907 amended section 2-202 of the Illinois Code of Civil Procedure<sup>312</sup> to expand the class of persons permitted to serve process.<sup>313</sup> Subsection (a) provides that registered employees of a certified private agency may serve process without special appointment in counties with a population of less than one million.<sup>314</sup>

## 3. Section 2-401: Designation of Parties

Section 2-401 of the Illinois Code of Civil Procedure<sup>315</sup> was amended by Public Act 85-990 to permit a party, upon application and for good cause, to appear under a fictitious name.<sup>316</sup>

## 4. Section 8-802: Physician Disclosure

Section 8-802 of the Illinois Code of Civil Procedure,<sup>317</sup> as amended by Public Act 85-992, prohibits a physician or surgeon from disclosing information acquired in attending a patient professionally.<sup>318</sup> In addition, several exceptions are provided. Effective January 5, 1988, a physician is permitted to disclose such information in prosecutions in which written blood alcohol test results are admissible under section 11-501.4 of the Illinois Vehicle Code.<sup>319</sup>

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309. ILL. REV. STAT. ch. 110, para. 2-103 (1987).

310. P.A. 85-887, 1987 Ill. Legis. Serv. 85-887 (West).

311. ILL. REV. STAT. ch. 110, para. 2-103(a) (1987).

312. ILL. REV. STAT. ch. 110, para. 2-202 (1987).

313. 1987 Ill. Legis. Serv. 85-907 (West) (amending ILL. REV. STAT. ch. 110, para. 2-202(a) (1987)).

314. *Id.*

315. ILL. REV. STAT. ch. 110, para. 2-401 (1987).

316. 1987 Ill. Legis. Serv. 85-907 (West) (amending ILL. REV. STAT. ch. 110, para. 2-401(e) (1987) (effective November 23, 1987)).

317. ILL. REV. STAT. ch. 110, para. 8-802 (1987).

318. 1987 Ill. Legis. Serv. 85-992 (West) (amending ILL. REV. STAT. ch. 110, para. 8-802 (1987)).

319. ILL. REV. STAT. ch. 110, para. 8-802(a) (1987); ILL. REV. STAT. ch. 95 1/2, para. 11-501.4 (1987).

### 5. Section 8-2101: Municipal Health Information Privilege

Effective January 1, 1988, section 8-2101 of the Illinois Code of Civil Procedure includes municipal health department information in information that is privileged and confidential.<sup>320</sup>

### 6. Section 8-2102: Admissibility of Section 8-2101 Evidence

Section 8-2102 of the Illinois Code of Civil Procedure<sup>321</sup> provides that the information in section 8-2101 shall not be admissible as evidence or discoverable.<sup>322</sup> The amended section provides that the disclosure of such information will not waive its confidentiality, non-discoverability, or non-admissibility.<sup>323</sup>

### 7. Section 13-214.2: Accounting Malpractice

New Section 13-214.2 of the Illinois Code of Civil Procedure<sup>324</sup> became effective on September 20, 1987.<sup>325</sup> The section provides that actions against any person or entity under the Illinois Public Accounting Act<sup>326</sup> or any of its employees, partners, members, officers, or shareholders, for an action in professional malpractice, must be brought within two years from the time the petitioner knew or should have known of the act or omission.<sup>327</sup> In addition, the action may not be brought more than five years after the date on which the act or omission occurred.<sup>328</sup>

## XIV. CONCLUSION

During the *Survey* period, the Illinois Supreme Court assessed the application of statutes of limitations and analyzed various dismissals under Supreme Court Rule 103(b). In addition, the court decided cases concerning jurisdictional questions and, specifically, those cases concerning the propriety of judicial review and authority. The court also discussed standards for standing and mootness. In addition, the supreme court considered various cases concerning

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320. 1987 Ill. Legis. Serv. 85-655 (West) (amending ILL. REV. STAT. ch. 110, para. 8-2101 (1987)).

321. ILL. REV. STAT. ch. 110, para. 8-2102 (1987).

322. *Id.*

323. 1987 Ill. Legis. Serv. 85-655 (West) (amending ILL. REV. STAT. ch. 110, para. 8-2102 (1987)).

324. ILL. REV. STAT. ch. 110, para. 13-214.2 (1987).

325. 1987 Ill. Legis. Serv. 85-655 (West) (amending ILL. REV. STAT. ch. 110, para. 13-214.2 (1987)).

326. ILL. REV. STAT. ch. 111, para. 5500.01 (1987).

327. ILL. REV. STAT. ch. 110, para. 13-214.2(a) (1987).

328. ILL. REV. STAT. ch. 110, para. 13-214.2(b) (1987).

rule 303 and rule 304(a) appeals. Also during the *Survey* period, the Illinois Supreme Court amended certain Supreme Court Rules affecting judges' responsibilities.

In addition, The Illinois General Assembly effected various changes in statutory law. These changes affected service of process, confidentiality of medical information, and statutes of limitations.

