# THE ART OF MOTIONS: UNDERSTANDING ILLINOIS CIVIL PRETRIAL MOTIONS

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"How do I respond to a motion?" is a question you are bound to have in your first years as a practicing attorney. This Article analyzes the common civil pretrial motions in Illinois, namely section 2-615, 2-619, and 2-1005 motions. Relying primarily on recent cases, it develops the distinctions between these motions to assist the practitioner in drafting and responding to various motions. The Article discusses when evidentiary material is appropriate in support of a section 2-619 motion and when evidentiary material belies the motion is improperly directed at the complaint's factual allegations. The Article also discusses Illinois Supreme Court Rule 191 affidavits and suggests how to attack an affidavit for failing to comply with the rule.

## I. INTRODUCTION

You open your mailbox to discover a motion to dismiss from opposing counsel. You try to control your panicked breathing, as the sight of your first real-world motion is overwhelming. You think, "But wait, my complaint was perfect. I covered everything." You read the motion and panic at the thought of the judge tossing your case out of court. You think, "I'm going to lose my first case, never be able to attract clients, and never pay my student loans!" This is one of those many times during your early years—and the years that follow—as an attorney you will ask yourself, "How do I?"

This Article is intended to help you answer the question "How do I respond to a motion and write one of my own?" and act as a guide for young attorneys in understanding basic Illinois pretrial motion practice. Unfortunately, though a critical tool for young attorneys, basic motion practice is not a required course at most law schools. Moreover, most law schools only require students to take a first-year course on federal civil procedure. However, Illinois civil procedure contains several distinctions from the federal civil procedure taught to law students. For example, Illinois is a fact-pleading jurisdiction, whereas the federal rules permit notice pleading.[1] Because of Illinois' heightened pleading requirements,

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pretrial motions to dismiss are important tools in preventing insufficient claims from proceeding to discovery.[2]

This Article is not a substitute for treatises on civil practice as those recourses are invaluable to a solid understanding of the law. It is not a substitute for practice guides, which can give straightforward advice on how to draft motions and use them in practice.[3] Nor does it provide guidance on issues such as post-trial or criminal motions.[4] Rather, this Article takes a middle-of-the-road approach. It has to set aside some of the realities of practice in order to focus on the process and cannot address all the complexities of motions, the substantive law, or the particularities of your clients. It provides depth so you have more than a "smattering" of an understanding of the individual motions, highlights the critical distinctions between common motions to dismiss and motions for summary judgment, and suggests ways to draft your own motion and respond to an opponent's motion. Where possible, I use recent cases, primarily from the past ten years, to help provide you with an up-to-date understanding. I also provide examples—often from actual cases—to provide you with a practical application. It is my goal that once you read this Article you will know what a motion is, how to write one, and how to respond without wasting your client's time.

## II. MOTIONS AND PLEADINGS IN GENERAL

To start with an analogy, a pretrial motion is a net.[5] A competent attorney files a motion as an attempt to see what comes back (i.e., problems in the other side's case). A good attorney will cast the net over to drag out parts of the case. A successful practitioner—like you—uses the various pretrial motions as a series of nets to catch most, if not all, of the case before it reaches trial.

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1. Simpkins v. CSX Transp., Inc., 2012 IL 110662, ¶ 26, 965 N.E.2d 1092, 1099; FED. R. CIV. P. 8(a)(2). *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.").
2. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (noting the shift toward relying on summary judgment under notice pleading requirements).
3. Thomas Jefferson wrote to an aspiring attorney, "[A] lawyer without books would be like a workman without tools." Letter from Thomas Jefferson to Thomas Turpin (Feb. 5, 1769), *in* WRITINGS OF THOMAS JEFFERSON 740 (Merrill D. Peterson ed., 1984). In advice to another aspiring attorney, he wrote, "It is superiority of knowledge which can alone lift you above the heads of your competitors, and ensure you success." Letter from Thomas Jefferson to John Garland Jefferson (June 11, 1770), *in* WRITINGS OF THOMAS JEFFERSON 968 (Merrill D. Peterson ed., 1984).
4. For criminal motions see 725 ILL. COMP. STAT. 5/114-1 to 15 (2012).
5. Do not confuse the net analogy with thinking pretrial motions are a fishing expedition. If you are seeking to get to trial you might view a net as a series of holes tied together.

Before addressing the particular pretrial civil motions used in Illinois, one needs a basic understanding of pleadings and motions.

## A. Pleadings

A pleading is defined as "[a] formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses."[6] In Illinois, the first pleading by a plaintiff is designated a complaint.[7] The first pleading by a defendant is designated an answer.[8] The Illinois Code of Civil Procedure (Code) requires pleadings to "contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply."[9] In other words, the pleading must contain a plain statement identifying what the pleader is alleging or denying. For example, "this is a negligence action" or "defendant denies he negligently caused plaintiff injury."

Illinois is a fact-pleading jurisdiction.[10] Under this standard, the pleader is required to set forth and allege facts that support his or her cause of action, i.e., those facts necessary for recovery pursuant to a legally recognized cause of action.[11] A complaint is not required to set out the evidentiary facts tending to prove ultimate facts; however, it is required to allege the ultimate facts to be proved.[12] Factual and legal conclusions are not required and are technically improper.[13] For example, the plaintiff must plead the ultimate fact that the defendant struck her with his vehicle. She is not required to plead all the facts tending to show he struck her with his vehicle, such as the fact that the defendant has a red vehicle and red paint was transferred to her vehicle. Obviously, it is better to plead more facts than not enough.

Illinois civil procedure reflects a modern approach to pleading by avoiding elevating questions of form over questions of substance and instead resolving the litigation on the merits.[14] Section 2-603(c) of the Code states, "Pleadings shall be liberally construed with a view to doing

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6. BLACK'S LAW DICTIONARY 1270 (9th ed. 2009).
7. 735 ILL. COMP. STAT. 5/2-602 (2012).
8. *Id*.
9. 735 ILL. COMP. STAT. 5/2-603(a) (2012).
10. Marshall v. Burger King Corp., 856 N.E.2d 1048, 1053 (Ill. 2006); Simpkins v. CSX Transp., Inc., 2012 IL 110662, ¶ 26, 965 N.E.2d 1092, 1099; Johnson v. Matrix Fin. Servs. Corp., 820 N.E.2d 1094, 1105 (Ill. App. Ct. 2004). Federal courts permit notice pleading, which is a lower standard.
11. *Marshall*, 856 N.E.2d at 1053; *Johnson*, 820 N.E.2d at 1105.
12. Chandler v. Ill. Cent. R.R. Co., 798 N.E.2d 724, 733 (Ill. 2003).
13. *Id*. at 733; Adkins v. Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 744 (Ill. 1989) ("It is fundamental that facts and not conclusions are to be pleaded.").
14. Zeh v. Wheeler, 489 N.E.2d 1342, 1348 (Ill. 1986).

substantial justice between the parties."[15] We will see this liberal approach throughout our discussion. Section 2-612 of the Code specifies that a pleading is not substantively defective if it "contains such information [that] reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet."[16] In determining whether the complaint informs the opposite party of the nature of the claim, the complaint's use of legal conclusions and allegations of evidence are considered formal defects and not substantive defects.[17] In furtherance of the modern approach to pleading, Illinois courts tend to allow liberally for amended pleadings.[18] It is important to note that section 2-612(c) provides that all defects in the pleadings, either in form or in substance, that are not objected to are waived.[19] In short, you must object to the complaint's formal requirements or legal sufficiency, otherwise you forfeit that line of attack at trial or on appeal.

## B. Motions

Black's Law Dictionary defines a "motion" as "[a] written or oral application requesting a court to make a specified ruling or order."[20] In other words, a motion requests the trial court to do something.[21] A motion can request nearly anything, and the time for motions stretches from pretrial, through trial, and into post-trial motions.[22] The focus of this Article is on common civil pretrial motions.

The Code provides for several types of pretrial motions, namely motions to dismiss pursuant to section 2-615(a) of the Code, motions to dismiss pursuant to section 2-619(a) of the Code, and motions for summary judgment pursuant to section 2-1005 of the Code. A motion to dismiss pursuant to section 2-615(a) is comparable to a Rule 12(b)(6) motion under

15. 735 ILL. COMP. STAT. 5/2-603(c) (2012).
16. 735 ILL. COMP. STAT. 5/2-612(b) (2012).
17. Bond v. Dunmire, 473 N.E.2d 78, 84 (Ill. App. Ct. 1984) ("[A]llegations of legal conclusions and allegations of evidence constitute merely formal defects and not defects of substance.").
18. *See* discussion *infra* Part V.
19. STAT. 5/2-612(c).
20. BLACK'S LAW DICTIONARY 1106 (9th ed. 2009); *see also* Blazyk v. Daman Express, Inc., 940 N.E.2d 796, 799 (Ill. App. Ct. 2010) (defining motion as "'an application to the court for a ruling or an order in a pending case'" (quoting *In re* Marriage of Wolff, 822 N.E.2d 596, 601 (Ill. App. Ct. 2005))).
21. *See* Nicholas A. Caputo & Steve A. Hart, *Motions, Requests, and Notices in Preparation for Trial*, *in* CIVIL PRACTICE (ILLINOIS): PREPARING FOR TRIAL ch. 11 (2012) (discussing common pretrial motions).
22. *See* 735 ILL. COMP. STAT. 5/2-1202 (2012) (post-trial motions in jury cases); 735 ILL. COMP. STAT. 5/2-1203 (2012) (post-trial motions in non-jury cases). A motion filed within thirty days after entry of the judgment is commonly known as a motion to reconsider. A section 2-1401 petition is used to request relief from a final order or judgment more than thirty days after entry of the judgment. 735 ILL. COMP. STAT. 5/2-1401 (2012).

the Federal Rules of Civil Procedure because it asserts the failure to plead a cause of action.[23] A section 2-619 motion is a mix of other federal 12(b) motions and other specified grounds, including section 2-619(a)(9)'s unique ground of an "affirmative matter."[24] A section 2-1005 motion closely resembles a Rule 56 motion under the federal rules and looks at whether an issue of material fact exists.[25]

The Code, meticulous practice, and demanding judges require the preservation of the distinctions between these motions.[26] We will discuss these distinctions in detail, but a simple rule to remember is that a section 2-615 motion is used to test the complaint's legal sufficiency, a section 2-619 motion is used where something outside of the litigation prevents the claim, and a section 2-1005 motion is used where the facts do not support the complaint. These motions assist to define and narrow the scope of the litigation by determining if what the plaintiff seeks has a basis in law, whether there is a meritorious dispute (i.e., the claim is not barred by the statute of limitations), and whether there are any facts that would support plaintiff's recovery. They are a series of nets working together to block nonmeritorious claims. Your goal is to recognize the flaws and catch as much of the opponent's case in the net before expending the resources required for trial.

### C. Drafting the Motion

In drafting your motion, remember three rules: use proper format, write clear, and proofread. Motions, as with most court documents, will follow a simple format of letter-size paper, 12-point font, Times New Roman or another widely accepted font, and double spacing. Remember to check the local rules for further requirements (such as whether the jurisdiction uses e-filing). Style can depend on your firm and local custom. Generally, use a clear and concise style. I recommend using plain language and a simple sentence structure. This improves readability. You will lose your reader if he or she is trying to decipher an overstuffed, 100-word sentence or distracted by undefined jargon. Define technical jargon, abbreviations, and acronyms in the motion. Commonly understood acronyms such as ATM or DNA need not be defined. Proofread. Their are know substitute four reading thru you're riding too cheek for miss steaks.

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23. FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted"). *See* Fellhauer v. City of Geneva, 568 N.E.2d 870, 880 (Ill. 1991); Holloway v. Meyer, 726 N.E.2d 678, 682 (Ill. App. Ct. 2000) ("The difference, if any, between these two standards is not outcome determinative.").
24. I reference the federal rules as most law schools teach federal civil procedure as a part of the first-year curriculum.
25. 735 ILL. COMP. STAT. 5/2-1005 (2012); FED. R. CIV. P. 56.
26. Reynolds v. Jimmy John's Enters., LLC, 2013 IL App (4th) 120139, ¶ 51, 988 N.E.2d 984, 999.

Do not rely on your word processor's spell check (as the previous sentence should have pointed out). A brilliant argument is worthless when the reader cannot understand it because the writing is full of spelling, grammar, or typographical mistakes.

Accepted practice is to separate the motion from a legal memorandum containing a supporting argument. This bifurcated style supports clarity as the motion presents the basic highlights—what you want and why you want it—while the memorandum presents the argument and elaborates why the law and facts support your position. For example, a summary judgment motion would state that there is no question of material fact that the defendant owes the plaintiff a duty of care because the plaintiff cannot show the defendant owned or controlled the property on which the plaintiff was injured (i.e., the plaintiff fell in the public roadway). The legal memorandum would contain legal analysis of a landowner's duty of care, apply the law to the facts of the case, and show why the defendant demands summary judgment in his favor.

The legal memorandum should contain an organized and logical argument. The argument must contain the applicable law (with citation), an explanation of the law, the relevant or legally operative facts, an analysis of how the law applies to the facts, and the result this demands. Never assume the reader will do the analysis—as your math teacher said, show your work—or that he or she will reach the conclusion you seek. Guide the reader to your conclusion with a logically structured argument. If you need help structuring your legal argument, consider the elements of the cause of action and use those to structure your argument. Try to keep elements separate and defined to support clarity. Every argument will be unique and will need to be tailored to the facts of the particular case.

D. Professional & Ethical Considerations

Illinois Supreme Court Rule 137(a) (effective July 1, 2013) states:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.[27]

The requirements of Rule 137(a) are paramount before filing a petition or motion and you—as an attorney—must (1) make a reasonable inquiry

27. ILL. SUP. CT. R. 137(a) (effective July 1, 2013).

into (a) the facts and (b) the law and (2) consider whether the filing is meritorious and not for an improper purpose. Failure to comply with Rule 137 can lead to "appropriate sanction[s]," such as attorney fees for the other party's expense in responding to the frivolous filing.[28] An attorney must be skeptical of a potential client's version of the facts—clients can embellish the truth—and make an effort to determine if there is a factual basis for the claim. It is important to note that sanctions are not warranted merely because the ultimate facts are adverse to those in the petition.[29] Rule 137 only applies to pleadings and does not authorize sanctions for violations of court rules or ethical misconduct.[30] However, Illinois Rule of Professional Conduct 3.1 mirrors Rule 137(a) and states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law."[31] For example, in *Hess v. Loyd*, an attorney sued his former law firm and a client for unpaid legal fees.[32] The trial court found the attorney's claim frivolous because his contract clearly stated that the firm's clients were not his clients, and it imposed sanctions.[33] The appellate court upheld the sanctions and imposed additional sanctions because the plaintiff appealed despite two previous appeals on the same issue.[34] The Illinois Supreme Court suspended both the plaintiff and his attorney from the practice of law.[35] In short, making false statements of fact or bringing frivolous claims can expose you to sanctions and disciplinary action.

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28. *Id.*
29. Commonwealth Edison Co. v. Munizzo, 2013 IL App (3d) 120153, ¶ 35, 986 N.E.2d 1238, 1246.
30. Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd., 909 N.E.2d 848, 863 (Ill. App. Ct. 2009) (Rule 137 sanctions not permitted for party's failure to appear at hearing); *In re* Marriage of Petrik, 2012 IL App (2d) 110495, ¶¶ 34-35, 973 N.E.2d 474, 484 (Rule 137 sanctions not permitted for ethical violations). *See generally* Mohica v. Cvejin, 2013 IL App (1st) 111695, 990 N.E.2d 720 (appellate court reversed trial court's sanctions where attorney filed a motion to substitute an employee of the firm as personal representative of the decedent plaintiff). Regardless of the ultimate result in *Mohica*, do not substitute an employee of your law firm as a personal representative of the decedent plaintiff. I can ensure you the plaintiff's family will not be pleased. *See also* Relf v. Shatayeva, 2013 IL 114925, ¶ 54, 998 N.E.2d 18, 32 (noting "intrinsic conflict" where employee of plaintiff's attorney appointed as "special administrator" of defendant's estate).
31. ILL. R. PROF'L CONDUCT R. 3.1 (2010) (effective Jan. 1, 2010).
32. Hess v. Lloyd, 2012 IL App (5th) 090059, ¶¶ 3-8, 964 N.E.2d 699, 702-04. *See also* Whitmer v. Munson, 781 N.E.2d 618, 628-30 (Ill. App. Ct. 2002) (false statements of fact).
33. *Hess*, 2012 IL App (5th) 090059, ¶¶ 10-11, 964 N.E.2d at 704-05.
34. *Id.* ¶ 31, 964 N.E.2d at 707-08.
35. The plaintiff was suspended for six months for this conduct. *In re* Lawrence Joseph Hess, M.R. 25481 (Ill. Sept. 17, 2012) (order suspending attorney). The plaintiff's attorney was suspended for nine months for this conduct. *In re* Bruce Alan Carr, M.R. 25521 (Ill. Nov. 19, 2012) (order suspending plaintiff's attorney).

### E. Example

The following example illustrates Illinois' modern approach to pleadings. Paul files a complaint against David alleging David negligently injured him in a traffic accident. The complaint states in its entirety, "On July 15, David negligently struck me with his automobile." David has several options, namely: File an answer, an answer and a counterclaim,[36] or a motion to dismiss.[37] While Paul's conclusory allegation that David "negligently" injured him is technically improper, it is unlikely that the complaint is substantively defective for failing to inform David of what Paul seeks, i.e., to hold him liable for negligence. Rather, David should file a motion to dismiss Paul's complaint pursuant to section 2-615 of the Code for failure to state a claim because, as discussed below, it fails to allege the necessary elements for negligence. Before dismissing the complaint with prejudice, a judge would likely allow Paul the opportunity to amend the complaint, set forth the necessary elements, and provide additional factual detail.

Having provided an overview of motions and pleadings, this Article will now discuss several important procedural motions and then the three essential substantive motions used in Illinois civil practice: (1) section 2-615 motions to dismiss, (2) section 2-619 motions to dismiss, and (3) section 2-1005 motions for summary judgment.

## III. PROCEDURAL PRETRIAL MOTIONS

Procedural motions—those motions requesting the court to make a ruling based on nonsubstantive issues—can be as important as a substantive motion to the outcome of your case. Accordingly, while the focus of this Article is on substantive motions, I would be remiss if I did not briefly discuss some important procedural motions.

### A. Motion to Continue

A motion to continue may be one of the most commonly used motions in practice. Such a motion can request to reschedule a hearing or extend the time to file an answer, object to jurisdiction, or respond to a motion.[38] This

36. A counterclaim must be a part of the answer and must be designated as a counterclaim. 735 ILL. COMP. STAT. 5/2-608(b) (2012).

37. Additionally, David could do nothing and potentially suffer a default judgment. *See* 735 ILL. COMP. STAT. 5/2-1301 (2012). This is not the best choice.

38. *See* Robinson v. Johnson, 809 N.E.2d 123, 134 (Ill. App. Ct. 2004) (listing cases). One comical motion to continue was filed in Louisiana to permit the attorneys the opportunity to view a national championship game between Louisiana State University and Ohio State University. Unopposed Motion to Continue Trial Due to Conflict with the LSU Tiger's National

request for additional time to prepare or respond can be extremely valuable and critical to your success. However, it is important that this motion not be abused.

There is no absolute right to a continuance. The trial court has discretion to grant or deny a motion to continue.[39] Section 2-1007 of the Code states, "On good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment."[40] Illinois Supreme Court Rules 183 and 231 govern motions to continue during the pretrial and trial stage. Rule 183 states:

> The court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time.[41]

Thus, the Code and the Rules require "good cause shown" for the granting of a continuance and notice to opposing counsel.

Illinois courts consider whether the moving party has exercised diligence in the proceedings as the decisive factor in assessing a motion to continue.[42] Dilatory tactics, such as numerous previous continuances, are not acceptable practice and courts will see through such behavior.[43] This is notable in motions seeking additional time for the preparation of a case. The likelihood of a continuance depends on the circumstances of the case, such as the number of previous continuances, proximity of the motion to the deadline or hearing date, and nature of the request. Do not be surprised if the court denies a motion to continue on the eve of a deadline or trial.

Two ethical rules are especially important to remember when requesting a continuance. Illinois Rule of Professional Conduct 3.2 provides, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[44] This language may lead you to think, "If we delay my client will benefit. So the motion is 'with the

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Championship Game, Harrell v. Spencer, No. 35572 (La. Div. C 2007), *available at* http://www.legaljuice.com/Mot_to_Continue%20LSU.pdf.

39. *In re* Marriage of Chesrow, 627 N.E.2d 416, 420 (Ill. App. Ct. 1994); People v. Kathy K., 867 N.E.2d 81, 99 (Ill. App. Ct. 2007).
40. 735 ILL. COMP. STAT. 5/2-1007 (2012).
41. ILL. SUP. CT. R. 183 (effective Feb. 16, 2011).
42. Somers v. Quinn, 867 N.E.2d 539, 548 (Ill. App. Ct. 2007).
43. Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum, 809 N.E.2d 730, 735 (Ill. App. Ct. 2004) ("There comes a point in an aging case where trial judges are entitled to lose patience with lackadaisical parties who simply refuse to treat trial settings as the deadline for doing the things that need to be done in order to be ready for a trial."); Maywood v. Barrett, 570 N.E.2d 645, 650 (Ill. App. Ct. 1991); Mireles v. Ind. Harbor Belt R.R. Corp., 507 N.E.2d 129, 133 (Ill. App. Ct. 1987).
44. ILL. R. PROF'L CONDUCT R. 3.2 (2010) (effective Jan. 1, 2010).

interests of the client.'" However, the comment to Rule 3.2 provides, "Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."[45] Thus, you have an ethical obligation to expedite litigation even where dragging your feet financially benefits your client.

The second important rule to remember is Illinois Rule of Professional Conduct Rule 3.3(a)(1), which provides, "A lawyer shall not knowingly make a false statement of fact or law to a tribunal."[46] First, do not misrepresent to the court you have a medical emergency when that is not the case.[47] Second, do not be tempted to embellish or fabricate a more convincing reason for your motion. For example, in *Modern Mailing Systems v. McDaniels*, the attorney appeared on the date of trial and represented to the court that his clients were out of the country and unavailable.[48] In fact, the attorney had called the clients the day before and told them not to appear.[49] His deception was uncovered when the clients walked into the courtroom with new counsel.[50]

Motions to continue will likely become a good friend as you practice, but you must remember not to abuse it or lie to the court for the reason you are seeking a continuance. This will greatly diminish your creditability before the court and subject you to possible sanctions and professional discipline.[51]

B. Motion to Dismiss for Lack of Personal Jurisdiction

A motion to dismiss for lack of personal jurisdiction must be properly presented, as mistakes can inadvertently subject the client to the court's jurisdiction. Personal jurisdiction is critical. It concerns the court's power to impose personal obligations over the party, and this power continues until all issues of fact and law are determined.[52] Personal jurisdiction is a vast and complex area of law; I will only discuss the basics.

Section 2-209 of the Code, commonly referred to as the Illinois long-arm statute, governs an Illinois court's exercise of personal jurisdiction over

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45. *Id.* cmt. 1.
46. ILL. R. PROF'L CONDUCT R. 3.3(a) (2010) (effective Jan. 1, 2010).
47. *See In re* Marriage of Ward, 668 N.E.2d 149, 154-56 (Ill. App. Ct. 1996) (discussing cases where attorney sought continuance for medical reasons). In *Ward*, the attorney contacted the court the morning of a prove-up hearing and explained he had "back problems," but never contacted opposing counsel. *Id.* at 152. The court denied the motion to continue and the case proceeded to the prove-up hearing and entry of judgment. *Id.* at 155.
48. Modern Mailing Sys., Inc. v. McDaniels, 547 N.E.2d 762, 763 (Ill. App. Ct. 1989).
49. *Id.*
50. *Id*. The court entered sanctions against the attorney for his deceptive motion. *Id.*
51. *See In re* Ingersoll, 710 N.E.2d 390, 396-97 (Ill. 1999) (attorney lied about reason for motion to continue in disciplinary proceedings and was disbarred).
52. *In re* M.W., 905 N.E.2d 757, 770 (Ill. 2009).

a nonresident.[53] Under the familiar *International Shoe* test, personal jurisdiction may arise where the defendant has sufficient minimum contacts with Illinois "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[54] The minimum contacts test will depend on whether general or specific personal jurisdiction is sought.[55] General personal jurisdiction permits a cause of action against the defendant that is entirely distinct from the activity in Illinois, whereas specific personal jurisdiction only permits an action with respect to the matters relating to the acts subjecting the nonresident to jurisdiction in Illinois.[56] General personal jurisdiction "requires a showing that the nonresident defendant carried on systemic business activity in Illinois."[57] Specific personal jurisdiction requires a showing "that the defendant purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant's contacts with the forum state."[58]

Personal jurisdiction issues are not confined to complex commercial or personal injury litigation, but also frequently arise in domestic relation cases. In dissolution of marriage cases, personal jurisdiction is not required over the out-of-state spouse to dissolve the marriage, but is required for entry of an order disposing of property, awarding maintenance, and determining child custody and child support.[59] You may need to be creative when representing a client whose spouse is out of state and will not submit to personal jurisdiction in Illinois. Often the easiest way this can be accomplished is when the out-of-state spouse comes into Illinois.[60] For example, the circuit court had personal jurisdiction over the husband when he traveled to Illinois to celebrate his parent's anniversary and the wife served him.[61] Of course, staying out of Illinois is an easy way an out-of-state spouse can avoid personal jurisdiction. But how does the out-of-state party contest personal jurisdiction?

Section 2-301 of the Code permits an attorney to make a special and limited appearance to argue that the proceedings should be dismissed for

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53. 735 ILL. COMP. STAT. 5/2-209 (2012); Russell v. SNFA, 2013 IL 113909, ¶ 29, 987 N.E.2d 778, 784.
54. *Russell*, 2013 IL 113909, ¶ 34, 987 N.E.2d at 786 (quoting Wiles v. Morita Iron Works Co., 530 N.E.2d 1382, 1385 (Ill. 1988) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).
55. *Id.* ¶ 36, 987 N.E.2d at 786.
56. *Id.* ¶¶ 36, 40, 987 N.E.2d at 786-87.
57. *Id.* ¶ 36, 987 N.E.2d at 786.
58. *Id.* ¶ 40, 987 N.E.2d at 787.
59. *In re* Marriage of Hoover, 732 N.E.2d 145, 146 (Ill. App. Ct. 2000) (property); *In re* Marriage of Petersen, 2011 IL 110984, ¶ 20, 955 N.E.2d 1131, 1136 (child support). An act of sexual intercourse within Illinois is sufficient conduct to confer personal jurisdiction over the defendant under the Illinois Parentage Act of 1984. 735 ILL. COMP. STAT. 5/2-209(a)(6) (2012); People *ex rel.* Black v. Neby, 638 N.E.2d 276, 277 (Ill. App. Ct. 1994).
60. *See* STAT. 5/2-209(b)(1) (court may exercise jurisdiction over person present in Illinois when served).
61. *In re* Marriage of Pridemore, 497 N.E.2d 818, 819-20 (Ill. App. Ct. 1986).

lack of personal jurisdiction.[62] Section 2-301 expressly provides the objection must be made "[p]rior to the filing of any other pleading or motion other than a motion for an extension of time to answer."[63] A party waives "all objections" to personal jurisdiction if the party files a responsive pleading prior to objecting to personal jurisdiction.[64] A party's wavier of objections to a court's personal jurisdiction only applies prospectively and does not retroactively validate orders entered prior to the party's submission to the court's jurisdiction.[65] A special limited appearance can be waived if, in addition to objecting to jurisdiction, the party seeks a ruling on substantive matters.[66] For example, in *In re Estate of Burmeister*, an executor of a will, who was also the trustee of a testamentary trust, contended she, as trustee, and the trust were not subject to personal jurisdiction.[67] Although she was not served with process in her capacity as trustee, the executor/trustee filed a motion concerning distributions from the trust and requesting the probate court to make a ruling on the trust.[68] This action subjected the trustee and trust to personal jurisdiction of the court.[69]

If you are the defendant and personal jurisdiction is at issue, you must (1) make a special and limited appearance pursuant to section 2-301 and (2) not argue the merits of the plaintiff's complaint. Arguing issues beyond personal jurisdiction turns the appearance into a general appearance and will subject your client to personal jurisdiction (and land you in hot water with your client).

### C. Motions for Transfer of Venue and Substitution of Judge

A motion to change venue is an important procedural motion to ensure the case is being heard by the proper court and relates to the unnecessary burden of defending the lawsuit in an inconvenient forum.[70] Venue

62. 735 ILL. COMP. STAT. 5/2-301 (2012). ILL. SUP. CT. R. 201(l) (effective Jan. 1. 2013) (governs discovery pursuant to a section 2-301 motion for the purposes of determining personal jurisdiction).
63. STAT. 5/2-301(a).
64. STAT. 5/2-301(a-5).
65. BAC Home Loans Servicing, LP v. Mitchell, 2014 IL 116311, ¶ ¶ 43-44.
66. *In re* Marriage of Snider, 712 N.E.2d 947, 948 (Ill. App. Ct. 1999) ("A special appearance is waived when a party takes affirmative action dealing with substantive issues."); *see also* GMB Fin. Group, Inc. v. Marzano, 899 N.E.2d 298, 304-13 (Ill. App. Ct. 2008) (providing extensive analysis of section 2-301).
67. *In re* Estate of Burmeister, 2013 IL App (1st) 121776, ¶ 25, 991 N.E.2d 388, 393.
68. *Id.* ¶ 35, 991 N.E.2d at 394-5.
69. *Id.* ¶ 38, 991 N.E.2d at 395.
70. Winn v. Mitsubishi Motor Mfg. of Am., Inc., 721 N.E.2d 819, 825 (Ill. App. Ct. 1999). Section 2-1001.5 of the Code permits a litigant to file a petition for change of venue on the basis that the "party may not receive a fair trial in the court in which the action is pending because the inhabitants of the county are prejudiced against the party, or his or her attorney, or the adverse

concerns the particular court that may hear and resolve the case, i.e., the particular circuit court within Illinois. Venue should not be confused with personal jurisdiction, which, as discussed above, concerns the court's power over the party. Nor should it be confused with removal, which concerns a defendant's ability to remove the case to a federal district court.[71]

Section 2-101 of the Code governs venue and generally requires the action to proceed in the defendant's county of residence or the county in which the transaction occurred.[72] Section 2-104 of the Code governs procedural motions to transfer venue and applies when the case commenced in the wrong venue.[73] Generally, a defendant waives objections to venue if he or she does not object on or before the date he or she is required to appear.[74] The defendant has the burden to prove the plaintiff's venue selection was improper.[75]

For example, Plaintiff, a resident of Cook County, sues Defendant, a resident of Champaign County, in Cook County. Defendant must object to venue in Cook County before appearing or responding to the complaint. He must show why Cook County is the improper venue. He could argue that he is not a Cook County resident or the cause of action arises out of a transaction from Champaign County. However, if Defendant appears in Cook County without objecting to the improper venue, then he waives any objection to venue.

The doctrine of forum non conveniens is closely related to venue. It shares the interest in proceeding in a forum convenient to the defendant. The doctrine allows a court to decline hearing a case, even though it may have personal and subject matter jurisdiction over the case, because "it appears that another forum can better serve the convenience of the parties and the ends of justice."[76] Illinois Supreme Court Rule 187 governs motions to dismiss or transfer the action on the basis of this doctrine. Rule 187(a) requires that the motion be filed no later than ninety days after the

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party has an undue influence over the minds of the inhabitants." 735 ILL. COMP. STAT. 5/2-1001.5(a) (2012). There are few reported cases on this section, but it is clear that there must be some evidence of bias and the court cannot rely on mere speculation and conjecture to transfer the case. Morgan v. Dickstein, 686 N.E.2d 56, 58-59 (Ill. App. Ct. 1997). In *Morgan*, the court stated that voir dire of the potential jurors could be used to and "will typically be the most accurate method for determining whether prejudice has actually infected the population of the county to a degree that a fair and impartial jury cannot be found." *Id.* at 58.

71. 28 U.S.C. § 1446 (2006). *See* MB Fin., N.A. v. Stevens, 678 F.3d 497, 498 (7th Cir. 2012) (discussing, in the context of a motion for sanctions for improper removal, several of the basic requirements of removal such as the requirement that removal be sought within thirty days, only by defendants, and with the consent of all defendants).

72. 735 ILL. COMP. STAT. 5/2-101 (2012).

73. 735 ILL. COMP. STAT. 5/2-104 (2012).

74. STAT. 5/2-104(b).

75. Corral v. Mervis Indus., Inc., 839 N.E.2d 524, 531 (Ill. 2005).

76. Fennell v. Ill. Cent. R.R. Co., 2012 IL 113812, ¶ 12, 987 N.E.2d 355, 359.

last day allowed for the filing of that party's answer.[77] In considering such a motion, the court considers the public and private interest factors in whether the case should proceed in a different forum.[78] The doctrine of forum non conveniens applies on an intrastate and an interstate basis, as well as a domestic and international basis.[79] While an Illinois circuit court has power to transfer a case to another Illinois court—i.e., to the appropriate county—it does not have the power to transfer a case to another state.[80] For a case to be "transferred" to another state, the plaintiff must dismiss the case in Illinois and file in the other forum state.[81] The doctrine of forum non conveniens should be used where the selected venue is procedurally proper but is not the most appropriate forum for the case to be heard.

A motion to substitute the judge is an important tool in selecting an impartial judge. Section 2-1001 of the Code permits a party to move for substitution of a judge as a matter of right and for cause.[82] The Illinois Supreme Court has clarified that section 2-1001 contemplates the use of a "motion" when seeking substitution as a matter of right and the use of a "petition" for situations in which substitution for cause is sought.[83] Section 2-1001(a)(2) permits a litigant one automatic substitution if the request occurs before the judge has ruled on substantial issues in the case.[84] The movant must petition for substitution by cause if there has been a substantive ruling.[85] The movant has the burden of overcoming the presumption judges are impartial and must show actual prejudice.[86] Actual

77. ILL. SUP. CT. R. 187(a) (effective Jan. 4, 2013).

78. Public interest factors include: the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a community with no connection to the litigation; and the interest in having local controversies decided locally. *Fennell*, 2012 IL 113812, ¶ 16, 987 N.E.2d at 360. Private interest factors include: the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive. *Id.* ¶¶ 15-16, 987 N.E.2d at 360.

79. *In re* Marriage of Ricard & Sahut, 2012 IL App (1st) 111757, ¶¶ 39-41, 975 N.E.2d 1220, 1228-29 (note that this is a dissolution of marriage case where France was the more convenient forum).

80. ILL. SUP. CT. R. 187(c)(1) (effective Jan. 4, 2013); *Fennell*, 2012 IL 113812, ¶ 13, 987 N.E.2d at 359.

81. ILL. SUP. CT. R. 187(c)(2) (effective Jan. 4, 2013).

82. 735 ILL. COMP. STAT. 5/2-1001(a) (2012). Section 2-1001(a)(4) of the Code permits substitution in certain contempt proceedings. STAT. 5/2-1001(a)(4).

83. *In re* Marriage of O'Brien, 2011 IL 109039, ¶ 28, 958 N.E.2d 647, 654.

84. STAT. 5/2-1001(a)(2)(ii).

85. *O'Brien*, 2011 IL 109039, ¶ 30, 958 N.E.2d at 655. You must file a petition for substitution of judge to preserve the issue for appeal. Powell v. Dean Foods Co., 2012 IL 111714, ¶ 41, 965 N.E.2d 404, 412.

86. *O'Brien*, 2011 IL 109039, ¶¶ 30-31, 958 N.E.2d at 655.

prejudice must be prejudicial trial conduct or personal bias.[87] The fact that a judge has previously ruled against a party in a particular case does not disqualify the judge from sitting in a subsequent case involving the same party, and most bias charges stemming from conduct during trial do not support a finding of actual prejudice.[88]

D. Others

Our discussion has addressed several procedural motions used to ensure the case is proceeding before the proper court, but what about motions to terminate the case? Three procedural motions—motions to voluntarily dismiss, for default judgment, and to withdraw as counsel—concern a case's pretrial resolution, or at least your involvement as counsel.

*1. Motion for Voluntary Dismissal*

Section 2-1009 of the Code permits the plaintiff, at any time prior to trial and upon notice to the opposing party, to "dismiss his or her action or any part thereof, without prejudice."[89] The Illinois Supreme Court has described this as an "unfettered right" subject to two qualifications.[90] The first limitation on voluntary dismissal is where a previously filed motion that could result in a final disposition of the case is pending. In this circumstance, the court has discretion to hear the dispositive motion before ruling on the plaintiff's motion for voluntary dismissal.[91] The second qualification is where dismissal under section 2-1009 would directly conflict with a specific Illinois Supreme Court rule.[92] A plaintiff may seek voluntary dismissal of the case or individual counts for a multitude of reasons. One of the most favorable reasons is when the parties choose to settle. Section 13-217 of the Code acts as a savings clause to facilitate resolution of the litigation on the merits where the complaint is dismissed to allow for additional time to develop the case.[93] Section 13-217 permits the

87. *Id.* ¶ 31, 958 N.E.2d at 655.
88. *Id.*
89. 735 ILL. COMP. STAT. 5/2-1009(a) (2012). If the trial has begun, the plaintiff may only dismiss by filing a stipulation signed by the defendant or on a motion specifying the grounds for dismissal. STAT. 5/2-1009(c). *See In re* Marriage of Tiballi, 2014 IL 116319, ¶¶ 18-22 (discussing whether dismissal was a voluntary dismissal).
90. Morrison v. Wagner, 729 N.E.2d 486, 488 (Ill. 2000).
91. STAT. 5/2-1009(b). This prevents the plaintiff from avoiding dismissal on the merits by simply dismissing and then refiling later.
92. *Morrison*, 729 N.E.2d at 488.
93. Bank Financial, FSB v. Tandon, 2013 IL App (1st) 113152, ¶ 22, 989 N.E.2d 205, 210.

plaintiff to refile the action within one year or within the remainder of the statute of limitations, whichever is greater.[94]

*2. Motion for Default Judgment*

What if the defendant will not respond to the complaint? Section 2-1301 of the Code permits a plaintiff to move for default judgment where the defendant has been served with the complaint and fails to enter an appearance, file pleadings, or make any other response.[95] Illinois courts view default judgments as "a drastic measure, not to be encouraged and to be employed only as a last resort."[96] It is drastic because a judgment is entered against a party without his or her continued participation. As such, Illinois courts will deny a motion for default where it would result in a denial of substantial justice.[97] Typically, Illinois courts follow a three-step process in default proceedings. First, if the trial court grants the default motion it enters an order of default.[98] Next, section 2-1302(a) of the Code requires that the defendant be notified of the default order.[99] Third, the court enters the default judgment. Before the court enters judgment, it may require a "prove-up" hearing where the plaintiff proves the factual allegations in the complaint.[100] Because the defendant is not present at the prove-up hearing, the plaintiff can present his version of the facts without objection. A prove-up hearing is required where the defendant filed an appearance but failed to appear for trial.[101] The court cannot simply enter default judgment; rather, the plaintiff must prove the allegations of the complaint as if the defendant had been present.[102] If the plaintiff fails to meet its burden of proof at the prove-up hearing, the court may refuse to enter the default judgment.[103] A motion for default judgment is a useful

94. 735 ILL. COMP. STAT. 5/13-217 (2012).
95. 735 ILL. COMP. STAT. 5/2-1301 (2012).
96. Dupree v. Hardy, 2011 IL App (4th) 100351, ¶ 57, 960 N.E.2d 1, 11.
97. *Id.*
98. Am. Serv. Ins. Co. v. City of Chicago, 935 N.E.2d 715, 724 (Ill. App. Ct. 2010). Before entering a default order, the court makes a finding of default. This will require you to present evidence that the defendant was served, the time for an answer has passed, and the defendant has not appeared or answered. *Id.* at 716.
99. 735 ILL. COMP. STAT. 5/2-1302 (2012).
100. *Am. Serv. Ins.*, 935 N.E.2d at 724.
101. *In re* C.J., 2013 IL App (5th) 120474, ¶ 7, 985 N.E.2d 1045, 1046-47.
102. *Id.* ¶ 7, 985 N.E.2d at 1047.
103. *Am. Serv. Ins.*, 935 N.E.2d at 724. As the Illinois Appellate Court, First District, noted:

> [E]ven after the entry of a default order, a plaintiff might not be able to secure a favorable final judgment, if (1) the trial court requires proof of the factual allegations and the plaintiff fails to satisfy its burden, or (2) the trial court finds that the legal conclusions in the complaint are not valid, or (3) the trial court exercises its discretion to set aside a default order, as it may do anytime before entry of the final judgment.

*Id.* at 725.

tool for resolving the litigation where the defendant is unresponsive, but it is important to know that a default judgment has a lower threshold—within thirty days of entry—for being set aside. Section 2-1301(e) of the Code governs motions to set aside a default, which are required to be filed within thirty days after the default.[104] Illinois courts generally follow a liberal policy of vacating defaults.[105] The requesting party need not show a meritorious defense or an excuse for failing to timely assert that defense.[106] The "overriding consideration" in determining whether to set aside a default is "whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits."[107] In other words, "[T]he court balances the severity of the penalty and the attendant hardship on the plaintiff if required to proceed to a trial on the merits."[108] Despite the lower threshold for setting aside a default judgment, a motion for default judgment is an important part of a practitioner's toolbox.

*3. Motion to Withdraw*

What if your client wants you off the case or you want to terminate your representation? Clients may choose to discharge you—for whatever reason—and seek other counsel. If this happens, you need to make a timely motion to withdraw as counsel to the court. Of course, you may also seek to terminate your representation of difficult and impecunious clients.[109] Illinois Supreme Court Rule 13 requires the motion to be in writing and the withdrawing attorney to give notice to all parties of record (i.e., opposing counsel) and to the party represented if he or she does not have substitute counsel.[110] The court has discretion to deny the motion. Rule 13 expressly provides that a court may deny the motion "if the granting of it would delay the trial of the case, or would otherwise be inequitable."[111] Generally, an attorney is able to withdraw without cause. Rule 1.16(b) of the Illinois

104. 735 ILL. COMP. STAT. 5/2-1301(e) (2012).
105. *In re* Haley D., 2011 IL 110886, ¶ 69, 959 N.E.2d 1108, 1125-26; Wells Fargo Bank, N.A. v. McCluskey, 2013 IL 115469, ¶ 16, 999 N.E.2d 321, 326.
106. *McCluskey*, 2013 IL 115469, ¶ 16, 999 N.E.2d at 326.
107. *Haley D.*, 2011 IL 110886, ¶ 69, 959 N.E.2d at 1125-26.
108. *McCluskey*, 2013 IL 115469, ¶ 17, 999 N.E.2d at 326.
109. The Rules of Professional Conduct require withdraw where representation results in a violation of the law or ethical rules. ILL. R. PROF'L CONDUCT R. 1.16(a)(1) (2010) (effective Jan. 1, 2010). The comments to Rule 1.16 clarify that withdrawal is permitted where the client refuses to comply with the representation agreement, including payment of attorney fees. *Id.* cmt. 8. Representation agreements that define the scope and expectations are important for defining the terms of your attorney-client relationship at the outset.
110. ILL. SUP. CT. R. 13(c)(2)-(3) (effective July 1, 2013).
111. ILL. SUP. CT. R. 13(c)(3) (effective July 1, 2013). Illinois recently formally adopted a limited scope appearance procedure whereby an attorney may represent a client for limited matters. *See* ILL. SUP. CT. R. 13(c)(6)-(7) (effective July 1, 2013).

Rules of Professional Conduct provides that an attorney must consider whether withdrawal "can be accomplished without material adverse effect on the interests of the client."[112] The Rules of Professional Conduct do not define "material adverse effect," but the language of Rule 1.16 indicates that withdrawal can be accomplished in many circumstances. You must remember your ethical responsibilities when withdrawing, the foremost being your continuing duty to confidentiality.[113] This means you may need to conservatively draft your motion and limit information about why you are withdrawing. A simple "I have an ethical obligation to not represent this client" or "The client has not complied with the representation agreement" will suffice over "This client is a horrible person that will not pay his bill." Where the client is unable to afford representation because of his or her financial circumstances, consider taking the matter on a pro bono basis.[114]

Procedural motions are important to consider—typically as a defendant—before addressing the merits of the petition. You do not want to argue the merits of a petition without determining whether the plaintiff is in the proper court and the court has power to hear the case. Once you have made these considerations, you can proceed to the legal and factual merits of the petition knowing that the court has power over the defendant and is the best court for the action.

## IV. SECTION 2-615 MOTIONS

Section 2-615 of the Code addresses motions raising objections to the pleadings. Section 2-615 motions can be subdivided into motions addressing the form of the pleading, motions addressing the substance of the pleading, and those in between. Motions pursuant to section 2-615(a) of the Code may request relief, such as: (1) a pleading or portion thereof be stricken because substantially insufficient in law, (2) the action be dismissed, (3) a pleading be made more definite and certain in a specified particular, (4) designated immaterial matter be stricken out, (5) necessary parties be added, or (6) designated misjoined parties be dismissed.[115] Section 2-615(e) permits the movant to request judgment on the pleadings.[116] A motion to dismiss for legal insufficiency is the most important section 2-615 motion that addresses the substance of the

112. ILL. R. PROF'L CONDUCT R. 1.16(b)(1) (2010) (effective Jan. 1, 2010).

113. ILL. R. PROF'L CONDUCT R. 1.6 (2010) (effective Jan. 1, 2010) (confidentiality generally); ILL. R. PROF'L CONDUCT R 1.9 (2010) (effective Jan. 1, 2010) (duties to former clients).

114. The ethical rules are only the minimum requirements expected of attorneys. There is no prohibition against being a compassionate and considerate person. Indeed, it will build your reputation and goodwill in the community.

115. 735 ILL. COMP. STAT. 5/2-615(a) (2012).

116. STAT. 5/2-615(e).

pleadings. Motions addressing the form of the pleading or a combination of the form and substance are (1) motions for a pleading to be made more definite and certain in a specified particular and (2) motions to dismiss based on joinder.

A. Motions Addressing the Form of the Pleading

A motion that the pleading be made more definite and certain is a section 2-615 motion addressing the form of the pleading.[117] One court described this motion as being appropriate where the "party feels that the pleading does not adequately advise him of the claim against which he must defend."[118] Proper-motion practice encourages a party to make a motion for a more definite and certain pleading prior to a motion to dismiss for failing to state a cause of action, but the party is not so required.[119] The insufficiencies complained of may be cured by amending the pleading or by conducting discovery.[120] However, the motion will provide you with an opportunity to better understand the opposing party's allegations and strengthen your hand in a subsequent motion to dismiss. This motion is related to section 2-612 of the Code, which addresses insufficient pleadings, and provides authority for the court, on its own motion, to strike a complaint that is insufficient in substance and fails to apprise the parties of the issues, and order other pleadings be prepared.[121]

A motion to strike immaterial matter is directed at a formal defect in the pleading. This motion is limited, as Illinois courts will look through a verbose or repetitious complaint to determine whether the complaint states a cause of action.[122] This motion is appropriate where the allegation is irrelevant and prejudicial to the moving party.[123]

A motion to dismiss based on joinder of parties stands somewhere between attacking the form of the pleading and attacking its substance. On

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117. This motion is similar to the federal motion for a more definite statement. *See* FED. R. CIV. P. 12(e). *See* Illinois Civil Practice Forms § 33:3 for a sample motion. 1A ILL. CIV. PRAC. FORMS § 33:3. Illinois continues to allow bills of particulars as an alternative to a motion for a more definite statement. 735 ILL. COMP. STAT. 5/2-607 (2012); *see* 3 RICHARD A. MICHAEL, ILLINOIS PRACTICE SERIES § 27:6 (2d ed. 2011) (section on bills of particular).

118. Fanning v. Lemay, 222 N.E.2d 815, 818 (Ill. App. Ct. 1966), *rev'd in part*, 230 N.E.2d 182 (Ill. 1967).

119. Wuellner v. Ill. Bell Tel. Co., 60 N.E.2d 867, 869 (Ill. 1945); Deasy v. City of Chicago, 105 N.E.2d 727, 728 (Ill. 1952).

120. If the claim is fact-intensive or facts can only be obtained through discovery, then this argument will be limited in its effectiveness.

121. 735 ILL. COMP. STAT. 5/2-612(a) (2012); Mitchell v. Norman James Constr. Co., 684 N.E.2d 872, 881 (Ill. App. Ct. 1997). As discussed above, formal defects, such as legal or factual conclusions, are not substantive defects to the pleading.

122. Capitol Indem. Corp. v. Stewart Smith Intermediaries, Inc., 593 N.E.2d 872, 875 (Ill. App. Ct. 1992).

123. 3 MICHAEL, *supra* note 117, § 27:2.

the one hand, a motion to dismiss an improper party is more than a matter of form because the dismissal of the party constitutes a final adjudication as to that party.[124] On the other hand, a motion to add a necessary party or dismiss an improper party is not substantive because the remedy is to add or dismiss the party rather than a ground to dismiss the complaint.[125] Failure to join a necessary party is not jurisdictional, and the court can decide the case as to the parties before the court even if it cannot decide portions of the case pertaining to the absent party.[126]

B. Motion to Dismiss For Failure to State Cause of Action

The most important section 2-615(a) motion is a motion to dismiss for failure to state a cause of action. This motion attacks the legal sufficiency of the complaint and asks whether the allegations, "when construed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may be granted."[127] As the Illinois Supreme Court explained in *Marshall v. Burger King*, "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery."[128] Justice Robert J. Steigmann has described a section 2-615(a) motion to dismiss as a "So what" motion and explained that "the defendant in such a motion is saying, 'So what? The facts the plaintiff has pleaded do not state a cause of action against me.'" [129]

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124. *See* ILL. SUP. CT. R. 273 (effective Jan. 1, 1967); *see also* Joseph T. Ryerson & Son, Inc. v. Manulife Real Estate Co., 606 N.E.2d 463, 466 (Ill. App. Ct. 1992) ("[A]s a general rule the failure to join an indispensable party is not considered an adjudication on the merits . . . .").

125. Village of Orland Park v. First Fed. Sav. & Loan Ass'n of Chi., 481 N.E.2d 946, 951 (Ill. App. Ct. 1985); Horwath v. Parker, 390 N.E.2d 72, 77 (Ill. App. Ct. 1979). Sections 2-404 and 2-405 of the Code, respectively, govern joinder of plaintiffs and defendants. 735 ILL. COMP. STAT. 5/2-404 to 405 (2012). Joinder of plaintiffs is permissive and not mandatory. Mount Mansfield Ins. Grp. v. Am. Int'l Grp., 865 N.E.2d 524, 531 (Ill. App. Ct. 2007). A necessary party is defined as one whose presence is required in the litigation: (1) to protect an interest that the party has in the subject matter of the controversy that would be materially affected by the judgment entered in the party's absence, (2) to reach a decision that will protect the interest of those who are before the court, or (3) to enable the court to decide the controversy completely. McNeil v. Ketchens, 931 N.E.2d 224, 237 (Ill. App. Ct. 2010). Illinois courts frequently use the terms "necessary party" and "indispensible party" interchangeably. Allied Am. Ins. Co. v. Ayala, 616 N.E.2d 1349, 1355 (Ill. App. Ct. 1993).

126. *In re* Estate of Thorp, 669 N.E.2d 359, 363-64 (Ill. App. Ct. 1996); *but see* Feen v. Ray, 487 N.E.2d 619, 622 (Ill. 1985) ("When an indispensible party is absent from a case, the court should not proceed to a decision on the merits, even though no objection is made by any party litigant.").

127. Napleton v. Village of Hinsdale, 891 N.E.2d 839, 845 (Ill. 2008); Bjork v. O'Meara, 2013 IL 114044, ¶ 21, 986 N.E.2d 626, 630.

128. Marshall v. Burger King Corp., 856 N.E.2d 1048, 1053 (Ill. 2006).

129. Winters v. Wangler, 898 N.E.2d 776, 779 (Ill. App. Ct. 2008). In contrast, a section 2-619 motion is described as a "Yes, but" motion. *See infra* note 218 and accompanying text.

A section 2-615 motion to dismiss is typically filed at the outset of litigation. A defendant can challenge a complaint that fails to state a cause of action at any time, but this does not apply to where the complaint contains an incomplete or insufficient statement of a recognized cause of action.[130] The defendant waives objections to an incomplete statement of a recognized cause of action by filing an answer and responding to the allegations. A movant can request dismissal of an individual count or the entire pleading. If challenging a multiple-count complaint, the movant is required to specify which counts are insufficient.[131] As a practical matter, if the movant only challenges a part of the pleading, he should not file an answer as to those parts sought to be stricken.

The ultimate question in a section 2-615 motion to dismiss is whether the plaintiff has alleged a cause of action against the defendant. Section 2-615 motions can be broken down into two categories: the general and the particular. The general category asks whether there is, by statute or common law, an applicable cause of action in Illinois, i.e., whether Illinois accepts this cause of action and if the cause of action encompasses the complained of conduct. For example, in *Bonhomme v. St. James*, the plaintiff brought a claim for fraudulent misrepresentation against a woman who misrepresented herself on the Internet.[132] The Illinois Supreme Court found that the deceitful representations were within a "purely personal relationship," and concluded that the tort of fraudulent misrepresentation did not permit recovery for this type of relationship.[133] The specific category asks whether the plaintiff has alleged facts supporting a recognized cause of action, i.e., whether the plaintiff has adequately alleged all the elements of the cause of action. Dismissals within this category are commonly brought on the basis that the plaintiff failed to adequately allege a claim under negligence principles, namely because the defendant did not owe a duty of care.[134] For example, in *Jane Doe-3 v. McLean County Unit*

130. Adcock v. Brakegate, Ltd., 645 N.E.2d 888, 893 (Ill. 1994).

131. 735 ILL. COMP. STAT. 5/2-615(b) (2012).

132. Bonhomme v. St. James, 2012 IL 112393, ¶¶ 3-10, 970 N.E.2d 1, 2-4.

133. *Id.* ¶ 38, 970 N.E.2d at 11. Rather, the tort of fraudulent misrepresentation is "a very narrow tort that applies only to cases involving business or financial transactions between parties." *Id.* ¶ 35, 970 N.E.2d at 10. *See generally* Lawlor v. N. Am. Corp. of Ill., 2012 IL 112530, ¶ 35, 983 N.E.2d 414, 425 (recognizing tort of intrusion upon seclusion in Illinois).

134. In Illinois, "'every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act.'" Simpkins v. CSX Transp., Inc., 2012 IL 110662, ¶ 19, 965 N.E.2d 1092, 1097 (quoting Widlowski v. Durkee Foods, 562 N.E.2d 967, 968 (Ill. 1990)). In Illinois, the duty analysis is whether the plaintiff and defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct. Jane Doe-3 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs., 2012 IL 112479, ¶ 22, 973 N.E.2d 880, 888. The "relationship" is shorthand for the analysis of four factors: (1) the reasonable foreseeablity of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of

*District No. 5 Board of Directors*, the plaintiffs alleged that the defendants were liable for failing to disclose information about a teacher who subsequently transferred to the plaintiffs' school and sexually abused them.[135] The Illinois Supreme Court disagreed, concluding that the defendants did not have an affirmative duty to aid or protect the plaintiffs because no "special relationship" applied.[136] The court held that the defendants had a duty only to accurately state the teacher's employment history on forms sent to the new school district, because having undertaken the act of filling out the form, the defendant had a duty to use reasonable care in ensuring that the information was accurate.[137] Section 2-615 motions to dismiss based on the particular factual pleadings can create confusion because the motion takes into consideration the particular factual circumstances and may begin to appear as a fact-based motion.

A section 2-615 motion is not a fact-based motion; it only tests the legal sufficiency of the complaint. In ruling on a section 2-615(a) motion, the court only considers (1) facts apparent from the face of the pleadings, (2) matters subject to judicial notice,[138] and (3) judicial admissions in the record.[139] Facts outside of the pleadings are disregarded, as are conclusions of ultimate fact contained in the complaint.[140] Evidentiary materials, such

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placing the burden on the defendant. *Id*.; *see also* Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 396-99 (Ill. 1987) (discussing duty of care owed to distant persons).

135. *Jane Doe-3*, 2012 IL 112479, ¶¶ 3-8, 973 N.E.2d at 884-86.

136. *Id*. ¶¶ 24-26, 973 N.E.2d at 888-89.

137. *Id*. ¶ 35, 973 N.E.2d at 891-92.

138. Judicial notice is a process whereby the court allows facts to be admitted without formal proof because the facts are of common and general knowledge, and if not commonly known are readily verifiable from sources of indisputable accuracy. People v. Henderson, 662 N.E.2d 1287, 1293 (Ill. 1996); People v. Tassone, 241 N.E.2d 419, 422 (Ill. 1968) (courts "will take judicial notice of that which everyone knows to be true"). Categories of evidence a court may take judicial notice of include: matters of common knowledge; matters capable of verification; and legal materials. Examples of matters of common knowledge include seasons and holidays (Saarela v. Hoglund, 198 Ill. App. 485 (1916)), time it gets dark (People v. Schwabauer, 16 N.E.2d 723, 725 (Ill. 1938)), and that property has some value (*Tassone*, 241 N.E.2d at 422). Examples of matters capable of ready and authoritative verification include: days and dates (People v. Duyvejonk, 169 N.E. 737, 738 (Ill. 1929)), public records (Maldonado v. Creative Woodworking Concepts, Inc., 694 N.E.2d 1021, 1025 (Ill. App. Ct. 1998)), and mileage distances (Fennell v. Ill. Cent. R.R. Co., 2012 IL 113812, ¶ 27 n.3, 987 N.E.2d 355, 362 n.3). *See also* People v. Hill, 949 N.E.2d 1180, 1184 (Ill. App. Ct. 2011) (court could take judicial notice that county correctional center was public property). Courts must take judicial notice of municipal and county ordinances and public laws. 735 ILL. COMP. STAT. 5/8-1001 (2012).

139. Gillen v. State Farm Mut. Auto. Ins. Co., 830 N.E.2d 575, 577 (Ill. 2005). Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact that is within the party's knowledge. *In re* Estate of Rennick, 692 N.E.2d 1150, 1156 (Ill. 1998).

140. Adkins v. Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733, 744 (Ill. 1989). The court stated:

> If, without considering the conclusions that are pleaded, there are not sufficient allegations of fact to state a cause of action, a motion to dismiss will properly be granted, no matter how many conclusions may have been stated and regardless of whether they inform the defendant in a general way of the nature of claim against him.

as affidavits and depositions, are not appropriate and may indicate the movant is attacking the factual sufficiency of the complaint and that the motion is improperly designated as a section 2-615 motion.[141] As discussed below, section 2-619(a) and summary judgment motions permit introduction of facts outside the pleadings. In short, the plaintiff is not required to prove his or her case at the pleading stage.

Section 2-615(d) of the Code expressly permits the court to enter an order requiring the party to replead or amend his or her pleadings.[142] As such, the court will likely afford the party an opportunity to amend his or her complaint to bring the claim within a recognized cause of action rather than dismiss the complaint.[143] This liberal amendment policy does not lessen the plaintiff's obligation to set forth the prima facie elements for recovery.[144] In a multi-count complaint, the court can dismiss only the deficient counts rather than the entire complaint. If the court dismisses the entire complaint and does not permit amendment, the court's decision constitutes a final, appealable judgment.[145] Where the trial court does not permit amendment or refiling, the dismissal is referred to as a dismissal with prejudice.[146]

A section 2-615(a) motion to dismiss is the first net a case will have to get through. It is used to block claims where the plaintiff, no matter the ultimate facts, cannot establish a cause of action permitting recovery.

### C. Motion for Judgment on the Pleadings

Section 2-615(e) of the Code provides, "Any party may seasonably move for judgment on the pleadings."[147] A judgment on the pleadings is

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*Id*. *See* Winters v. Wangler, 898 N.E.2d 776, 782 (Ill. App. Ct. 2008) (listing eleven facts outside the pleadings that the defendant used arguing his motion to dismiss).

141. *Winters*, 898 N.E.2d at 782. Summary judgment is the appropriate motion to contest the factual sufficiency of the complaint. *See* Reynolds v. Jimmy John's Enters., LLC, 2013 IL App (4th) 120139, ¶ 53, 988 N.E.2d 984, 999-1000.

142. 735 ILL. COMP. STAT. 5/2-615(d) (2012).

143. Indeed, the Illinois Appellate Court, Second District, has stated that a trial court abuses its discretion when it dismisses the complaint with prejudice and refuses the plaintiff further opportunities to plead when a claim can be stated. Bruss v. Przybylo, 895 N.E.2d 1102, 1109 (Ill. App. Ct. 2008).

144. Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 391 (Ill. 1987).

145. Dubina v. Mesirow Realty Dev. Inc., 687 N.E.2d 871, 874 (Ill. 1997); Big Sky Excavating, Inc. v. Ill. Bell Tel. Co., 840 N.E.2d 1174, 1181-82 (Ill. 2005) ("A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit."); Leavell v. Dep't of Natural Res., 923 N.E.2d 829, 843-44 (Ill. App. Ct. 2010).

146. While a "drastic sanction," courts may also enter a dismissal with prejudice "where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority." Cronin v. Kottke Associates, LLC., 2012 IL App (1st) 111632, ¶ 45, 975 N.E.2d 680, 692 (quoting Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 291 (Ill. 1998)).

147. STAT. 5/2-615(e).

limited to the pleadings and is proper if the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[148] For purposes of the motion, the court considers all well-pleaded facts in the nonmoving party's pleadings and the fair inferences drawn therefrom as admitted.[149] A section 2-615(e) motion is not used to raise affirmative factual defenses.[150] Outside of the pleadings, the court only considers facts subject to judicial notice and judicial admission.[151] It will disregard conclusory allegations in the complaint and construe the facts strictly against the movant.[152]

Generally, a motion for judgment on the pleadings is made after the issues are settled and prior to discovery.[153] Because "any party" can motion for judgment on the pleadings, these motions can allow a plaintiff to quickly resolve the case. Where the plaintiff is the movant, the purpose of a motion for judgment on the pleadings is to test whether the defendant, by his answer, has set up a defense, including a factual dispute, which would entitle him to a hearing on the merits.[154] Contract-based claims lend themselves to resolution by a section 2-615(e) motion because they are often about interpreting a contract provision or the legally operative fact is admitted in the pleadings (i.e., breach).[155]

A motion for judgment on the pleadings is commonly referred to as being like a motion for summary judgment, but limited to the pleadings.[156] Judgment on the pleadings and summary judgment are similar because their procedural questions—whether a genuine issue of material fact exists—are identical, and judgment is improper where questions of fact exist.[157] However, the motions differ in the factual material considered in resolving this question. A motion for judgment on the pleadings permits consideration of only the pleadings—the movant concedes the truth of all well-pleaded facts. In contrast, a summary judgment motion is a fact-based

148. Pekin Ins. Co. v. Wilson, 30 N.E.2d 1011, 1016 (Ill. 2010); M.A.K. v. Rush-Presbyterian-St. Luke's Med. Ctr., 764 N.E.2d 1, 4 (Ill. 2001). *See* State Bank of Cherry v. CGB Enters., Inc., 2013 IL 113836, ¶¶ 63-68, 984 N.E.2d 449, 467-68 (resolving security interest's compliance with notice requirements as matter of law).

149. *Wilson*, 30 N.E.2d at 1016 (quoting Emp'rs Ins. of Wausau v. Ehlco Liquidating Trust, 708 N.E.2d 1122, 1129 (Ill. 1999)).

150. Nationwide Mutual Fire Ins. Co. v. T & N Master Builder & Renovators, 2011 IL App (2d) 101143, ¶ 8, 959 N.E.2d 201, 204; Murcia v. Textron, Inc., 795 N.E.2d 773, 776 (Ill. App. Ct. 2003).

151. *M.A.K.*, 764 N.E.2d at 4.

152. Parkway Bank & Trust Co. v. Meseljevic, 940 N.E.2d 215, 223 (Ill. App. Ct. 2010).

153. Andrews v. Powell, 848 N.E.2d 243, 254 (Ill. App. Ct. 2006); Krych v. Birnbaum, 384 N.E.2d 52, 54 (Ill. App. Ct. 1978); Grossman Clothing Co. v. Gordon, 443 N.E.2d 613, 614 (Ill. App. Ct. 1982).

154. Millers Mut. Ins. Ass'n of Ill. v. Graham Oil Co., 668 N.E.2d 223, 227 (Ill. App. Ct. 1996).

155. *See infra* notes 161 and 372 and accompanying text.

156. Pekin Ins. Co. v. Wilson, 930 N.E.2d 1011, 1017 (Ill. 2010).

157. *Id.* at 1021; Hahn v. County of Kane, 2012 IL App (2d) 110060, ¶ 23, 964 N.E.2d 1216, 1224.

motion that permits consideration of affidavits, deposition transcripts, and other evidentiary material to establish the absence of a factual dispute.[158]

It is important to note that a section 2-615(e) motion requests a "judgment" and not a "dismissal." A motion for judgment on the pleadings is based on admissions in the opposing party's pleadings; whereas a motion to dismiss is based on the facts, taken as true, as alleged by the pleader.[159] If dismissal for failure to state a claim is sought, then section 2-615(a) of the Code is the proper procedural section.

D. Examples

How do the section 2-615 motions detailed above operate in practice? Consider the following examples.

Example 1: Parsons files a two-count complaint against Delta, Inc. Count I alleges a Delta delivery driver negligently injured Parsons when the driver struck Parsons in a crosswalk. The count alleges the injury occurred at noon on July 1 at Pine and Market Streets. Count II alleges Delta negligently hired the delivery driver. This count states the delivery driver was hired on June 30 and includes no other facts. Delta files a motion to dismiss count I and appends a police report stating the accident occurred at Oak and Water Streets. Delta files a motion to dismiss count II, pursuant to section 2-615(a) of the Code, on the basis that Parsons failed to adequately allege a cause of action for negligent hiring. Assume Parsons was previously permitted to amend his pleadings several times. The court would likely deny Delta's motion to dismiss count I because it merely attacks the factual basis of the count. Viewing the complaint in the light most favorable to Parsons and taking the facts pleaded as true, the court must accept that the accident occurred at noon on July 1 at Pine and Market. The court would likely grant Delta's motion to dismiss count II because the complaint fails to properly allege facts necessary to assert that cause of action. Parsons has had several opportunities to amend and has not alleged Delta knew or had reason to know the delivery driver was potentially dangerous.

Example 2: Horace sues Condo Board for intentional infliction of emotional distress. Horace alleges Condo Board insisted he move out of his residence while it performed repairs to his unit. Horace alleges this was inconvenient, aggravating, and annoying. Condo Board files a motion to dismiss on the basis that Horace's allegations are insufficient to allege its conduct was extreme and outrageous. A claim for intentional infliction of emotional distress requires the plaintiff to establish that the defendant

158. *In re* Estate of Davis, 589 N.E.2d 154, 157 (Ill. App. Ct. 1992).
159. *Id.*

engaged in extreme and outrageous conduct toward the plaintiff. Because Horace merely alleged "inconvenient, aggravating, and annoying" conduct, he has failed to state a cause of action, and the court will grant Condo Board's motion to dismiss.[160]

Example 3: Pricey Credit, Inc., files a complaint asserting an unpaid debt. Debra Debtor files an answer and does not deny that she owes the unpaid debt. Because Debtor admitted the unpaid debt, judgment on the pleadings is proper.[161]

Example 4: Leasing, Co., sues Trucker, Inc., for breach of contract. The contract states Trucker would not hire Leasing's employees for one year after the agreement. During the course of the agreement, Trucker hired one of Leasing's employees. Trucker files an answer admitting all relevant facts contained in the complaint and asserted the contract was an invalid restraint on trade. Leasing files a section 2-615(e) motion for judgment on the pleadings. Because the contract is valid and Trucker admitted to all the facts, judgment on the pleadings is proper.[162]

## V. A NOTE ON AMENDED PLEADINGS

When the trial court dismisses a count and permits you to amend the pleading, are objections to the dismissal preserved? The simple answer is "No." Under the *Foxcroft* doctrine, if a plaintiff files an amended complaint, he or she waives objections to the prior complaint if the amended complaint does not expressly refer, incorporate, or adopt the prior pleading.[163] The earlier pleading is in effect abandoned and withdrawn.[164] A party's ongoing objections to a dismissal order are not sufficient to preserve the issue for appeal, even when the party raises the objections in a motion in limine, motion for a new trial, or a motion to reconsider.[165] The *Foxcroft* rule ensures that the trial judge will be aware of the points at issue between the parties based on the final-amended complaint when the action proceeds to trial.[166] The Illinois Supreme Court has further explained a rule

160. Example based on *Duffy v. Orlan Brook Condo. Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 39, 981 N.E.2d 1069, 1080.

161. Example based on *Pied Piper Yacht Charters Corp. v. Corbel*, 308 N.E.2d 35, 37-38 (Ill. App. Ct. 1974) (judgment on the pleadings was proper where allegations in answer were mere conclusions).

162. Example based on *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 805 N.E.2d 1177 (Ill. 2004).

163. Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp., 449 N.E.2d 125, 126 (Ill. 1983); Pearce v. Ill. Cent. Gulf R.R. Co., 411 N.E.2d 102, 109 (Ill. App. Ct. 1980); *see also* Kincaid v. Parks Corp., 477 N.E.2d 68 (Ill. App. Ct. 1985).

164. *Foxcroft*, 449 N.E.2d at 126.

165. Gaylor v. Campion, Curran, Rausch, Gummerson & Dunlop, P.C., 2012 IL App (2d) 110718, ¶ 37, 980 N.E.2d 215, 226.

166. *Foxcroft*, 449 N.E.2d at 127.

permitting a plaintiff to proceed to trial on different issues contained in separate complaints would disadvantage the defendant.[167] In short, the rule prevents unnecessary confusion and burden on the court and defendant.

For example, in *Bonhomme*, the trial court dismissed the plaintiff's second-amended complaint.[168] Then the plaintiff filed a single-count, third-amended complaint that did not replead or reference six counts from the prior complaint.[169] The supreme court reaffirmed the *Foxcroft* doctrine and held that the plaintiff did not preserve her objections to the dismissal of the six counts contained in the second-amended complaint when she filed the single-count, third-amended complaint.[170]

A party wishing to avoid the *Foxcroft* rule and preserve a challenge to an order dismissing fewer than all the counts in a complaint can: (1) elect to stand on the dismissed counts, take a voluntary dismissal of the remaining counts, and take an appeal;[171] (2) file an amended complaint realleging, incorporating by reference, or referring to the counts set forth in the prior complaint;[172] or (3) perfect an appeal from the order dismissing fewer than all the counts of the initial complaint prior to filing an amended pleading that does not reference the dismissed counts.[173] The important takeaway is to replead, incorporate, or reference the prior pleading if you want to continue to protest an earlier dismissal.

## VI. SUPREME COURT RULE 191 AFFIDAVITS

Before getting into section 2-619 and summary judgment motions, it is important to have an understanding of how to prepare an adequate affidavit. Illinois Supreme Court Rule 191 controls affidavits submitted in support of section 2-619 and summary judgment motions, including an expert witness's affidavit.[174] Rule 191 provides that an affidavit in support of a section 2-619 or summary judgment motion:

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167. *Id.*
168. Bonhomme v. St. James, 2012 IL 112393, ¶ 1, 970 N.E.2d 1, 2.
169. *Id*. ¶ 23, 970 N.E.2d at 7.
170. *Id.* ("[U]nless the amended pleading somehow incorporates or references the pleadings in the former complaint, 'a party who files an amended [complaint] waives any objection to the trial court's ruling on the former complaints.'" (quoting Boatman's Nat. Bank of Belleville v. Direct Lines, Inc., 656 N.E.2d 1101, 1106 (Ill. 1995))).
171. Gaylor v. Campion, Curran, Rausch, Gummerson & Dunlop, P.C., 2012 IL App (2d) 110718, ¶ 35, 980 N.E.2d 215, 226.
172. This can be done by noting in a simple paragraph or footnote that the plaintiff is preserving the dismissed portions for appellate review. Tabora v. Gottlieb Mem'l Hosp., 664 N.E.2d 267, 272 (Ill. App. Ct. 1996). *See also* ILL. SUP. CT. R. 134 (effective Jan. 1, 1967).
173. Childs v. Pinnacle Health Care, LLC, 926 N.E.2d 807, 815-16 (Ill. App. Ct. 2010).
174. ILL. SUP. CT. R. 191(a) (effective Jan. 4, 2013); Robidoux v. Oliphant, 775 N.E.2d 987, 995 (Ill. 2002); *see also* Purtill v. Hess, 489 N.E.2d 867, 872-73 (Ill. 1986) (expert witness affidavits about standard of care).

(1) shall be made on the personal knowledge of the affiants;
(2) shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based;
(3) shall have attached thereto sworn or certified copies of all documents upon which the affiant relies;
(4) shall not consist of conclusions but of facts admissible in evidence; and
(5) shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.[175]

Rule 191's requirements should not be overlooked if you are submitting an affidavit in support of your motion or defending against the motion. A knowledgeable attorney can undermine an opponent's argument by attacking the affidavit or submitting a motion to strike the affidavit.[176]

A. Technical Requirements

What are the technical requirements of an affidavit? An affidavit is a written declaration sworn to by a party before some person who has authority under the law to administer oaths.[177] It is considered as a substitute for testimony taken in open court.[178] Written statements not sworn to cannot be considered an affidavit.[179] While Rule 191(a) does not require the affidavit to be notarized, the affidavit must be signed by the affiant or the affiant's name must appear as one having taken an oath.[180]

B. Substantive Requirements

What are the substantive requirements of an affidavit? For purpose of clarity, I refer to the requirements as they appear in Rule 191 and are numbered above. Rule 191's first and last requirements are often boilerplate statements in the affidavit; however, it is important not to overlook these requirements. An affidavit cannot be speculative or based

175. ILL. SUP. CT. R. 191(a).
176. *See* Pekin Ins. Co. v. Precision Dose, Inc., 2012 IL App (2d) 110195, 968 N.E.2d 664 (discussing a successful motion to strike an affidavit in a duty to defend suit). The granting of a motion to strike a Rule 191(a) affidavit is within the trial court's discretion. Am. Serv. Ins. Co. v. China Ocean Shipping Co. (Americas) Inc., 932 N.E.2d 8, 19 (Ill. App. Ct. 2010). *See also* 735 ILL. COMP. STAT. 5/2-1005(f) (2012) (affidavits made in bad faith).
177. Harris v. Lester, 80 Ill. 307, 311 (1875); OneWest Bank, FSB v. Markowicz, 2012 IL App (1st) 111187, ¶ 45, 968 N.E.2d 726, 737. *See also* BLACK'S LAW DICTIONARY 66 (9th ed. 2009) (defining "affidavit" as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths").
178. *Robidoux*, 775 N.E.2d at 994.
179. Roth v. Ill. Farmers Ins., 782 N.E.2d 212, 214 (Ill. 2002).
180. *Robidoux*, 775 N.E.2d at 998. The traditional requirements of an affidavit requires notary and should be followed outside of the Rule 191 context. *See Roth*, 782 N.E.2d at 216.

on the affiant's information and belief.[181] It must contain pertinent information to support a foundation for the affiant's ability to testify about the factual averments if sworn as a witness.[182] A typical affidavit contains a variation of a statement that "Affiant, based on personal knowledge, and if sworn as a witness, can testify competently to the following."[183] Do not thoughtlessly accept this statement. The party's attorney often drafts the affidavit—trying to support the party's claim or defeat the opponent's claim—and the actual affiant may not have personal knowledge about a statement he makes in the affidavit. (I have seen a submitted affidavit with "Insert name here" left in. Again, proofread.) One should look at the affiant and ask, "Based on the information presented, can this person testify about what he said in the affidavit?"[184] For example, in *Murray v. Poani*, the appellate court rejected a police officer's statement the police department he worked for did not have a certain custom, policy, or practice because the affidavit did not provide a basis by which the court could conclude the officer would have personal knowledge of department-wide policies.[185] Another example is seen in *Nida v. Spurgeon*, where the appellate court questioned the affiant's ability to testify about a survey plat where there was no information she knew how to read a survey plat or had surveying experience.[186]

The requirement that the affidavit contain pertinent information to support a foundation for the affiant's ability to testify about the factual averments if sworn as a witness is relaxed where a "reasonable inference" exists that the affiant could testify to the averments.[187] For example, in *Doria v. Village of Downers Grove*, the court concluded that there was a reasonable inference the affiant could testify that the property was not intended for plaintiff's use because it was within the affiant's employment

181. Argueta v. Krivickas, 2011 IL App (1st) 102166, ¶ 8, 952 N.E.2d 1238, 1243; Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1223 (Ill. 1992).

182. *Robidoux*, 775 N.E.2d at 994; Fooden v. Bd. of Governors of State Colleges & Univs. of Ill., 272 N.E.2d 497, 501 (Ill. 1971); *see* Doria v. Village of Downers Grove, 921 N.E.2d 478, 481-82 (Ill. App. Ct. 2009) (example of where affidavit supported a "reasonable inference" the affiant could testify about averments).

183. *See generally* 2 ROBERT J. STEIGMANN, NICHOLS ILLINOIS CIVIL PRACTICE § 31:64 (2011) (sample affidavit). Rule 191 does not require the affidavit to contain this statement and is satisfied if it appears from the whole that the affiant would be competent to testify if called upon. Purtill v. Hess, 489 N.E.2d 867, 872 (Ill. 1986).

184. Questions to be asked may include: Was the affiant there? Is the affiant relying on hearsay? Are the affiant's statements within his or her scope of authority or employ?

185. Murray v. Poani, 2012 IL App (4th) 120059, ¶ 41, 980 N.E.2d 1275, 1284-85. As a practical matter, the police department should have provided an affidavit from the police chief or an individual in the police department that would know department policies.

186. Nida v. Spurgeon, 2013 IL App (4th) 130136, ¶ 36, 998 N.E.2d 938, 945.

187. Kugler v. Southmark Realty Partners III, 723 N.E.2d 710, 714 (Ill. App. Ct. 1999).

to determine the use of property, although the affidavit did not contain a statement indicating how long the affiant was in his position.[188]

Rule 191's middle three requirements provide ample grounds to attack an affidavit. The second requirement requires the affiant to "set forth with particularity the facts" upon which the claim or defense is based.[189] Rule 191(a)'s fourth requirement buttresses the second requirement by rejecting conclusions of fact.[190] It is improper for an affidavit to contain unsupported conclusions, opinions, speculation, and self-serving or conclusory statements.[191] Be observant of both conclusory statements of law and fact, which are often evident in affidavits that use "legalese" or similar language. Consider a simple example. The statement "January 1 is New Year's Day" is a fact; however, the statement "January 1 is a terrible day" is a conclusion.[192] Further, the statement "On January 1, defendant's motor vehicle struck plaintiff on the sidewalk" is a verifiable fact; however, the statement "On January 1, defendant's motor vehicle negligently struck plaintiff and proximately caused plaintiff injury" contains legal conclusions about the defendant's actions. Conclusory statements should be attacked and properly limited to what is within the personal knowledge of the affiant. For example, in *Murray*, the appellate court pointed out that because there was no basis to conclude the police officer knew about department-wide policies or practices, his statement the police department did not have an official policy, custom, or plan should be limited to his personal knowledge as a police officer.[193] In *Nida*, the affiant stated the plaintiff fell within a right-of-way because she fell between a mailbox and a utility pole.[194] The appellate court pointed out that there was no basis to support this conclusion because the affidavit did not provide facts necessary to determine the location the plaintiff fell was within the right-of-way, such as the direction of the utility pole from the roadway, the distance between the mailbox and the road, or the distance between the mailbox and the pole.[195]

Rule 191(a)'s third requirement requires an affiant to attach copies of any document on which the affiant relies to the affidavit.[196] This is not a

188. *See* Doria v. Village of Downers Grove, 921 N.E.2d 478, 481-82 (Ill. App. Ct. 2009).
189. ILL. SUP. CT. R. 191(a) (effective Jan. 4, 2013).
190. *See* Robidoux v. Oliphant, 775 N.E.2d 987, 994-96 (Ill. 2002) (Rule 191 requires expert's affidavit to comply with Rule 191's plain language).
191. Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1223 (Ill. 1992); Jones v. Dettro, 720 N.E.2d 343, 347 (Ill. App. Ct. 1999) ("Unsupported assertions, opinions, and self-serving or conclusory statements do not comply with Rule 191(a).").
192. Often a key to identifying conclusions is to look for legalese. For example, "XYZ Corp. negligently caused injury to plaintiff."
193. Murray v. Poani, 2012 IL App (4th) 120059, ¶ 41, 980 N.E.2d 1275, 1284-85.
194. Nida v. Spurgeon, 2013 IL App (4th) 130136, ¶ 16, 998 N.E.2d 938, 942.
195. *Id.* ¶ 36, 998 N.E.2d at 945.
196. ILL. SUP. CT. R. 191(a) (effective Jan. 4, 2013).

mere technical requirement but is inextricably linked to Rule 191(a)'s requirement for specific factual support.[197] This requirement permits the opposing party and the court to determine whether the document supports the affiant's statements. An expert's affidavit must comply with Rule 191(a)'s requirement that supporting documents be attached.[198]

Where the affiant incorporates the documents or statements contained therein, the affidavit should provide the necessary foundation and authentication needed to make the document admissible in court.[199] Therefore, if the affiant incorporates statements contained in the documents and uses statements for the truth of the matter asserted, the affidavit should contain sufficient information to bring the document within a hearsay exception.[200]

C. Examples

To understand how affidavits are used in practice, consider the following examples.

Example 1: Polonius files a personal injury claim against Hamlet. Hamlet files a section 2-619 motion to dismiss based on a liability release. Hamlet submits an affidavit that states, "Polonius signed a liability release that bars 'all claims' against Hamlet. This includes accidental stabbing. Polonius's action is barred by the liability release." The first sentence is a statement of fact as it states Polonius signed a liability release with Hamlet containing the language "all claims." The second and third sentences are conclusions that assume the injury at bar is included within the scope of the liability release. The liability release's validity and whether the resulting injury is within the scope of the liability release will likely be contested issues. In compliance with Rule 191(a)'s third requirement, Hamlet should attach a copy of the liability release to his affidavit. With the liability release in hand, the court would be able to determine whether the liability release actually contains the "all claims" language.[201]

Example 2: Fred files a complaint against Richard seeking unpaid rent for a commercial building for the period January 2012 to December 2012. Richard files a section 2-619(a)(6) motion asserting Fred released the unpaid rent. Richard submits an affidavit and states, "Fred agreed to waive and release all rent accrued from January 2012 to July 2012 in an e-mail

197. Robidoux v. Oliphant, 775 N.E.2d 987, 998 (Ill. 2002).
198. *Id.* at 996.
199. Piser v. State Farm Mut. Auto. Ins. Co., 938 N.E.2d 640, 649-50 (Ill. App. Ct. 2010).
200. *Id.* at 651-53.
201. Example is loosely based on *Spears v. Ass'n of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, 986 N.E.2d 216.

dated August 15, 2012."[202] Richard attaches the August 15, 2012, e-mail from Fred that states, "This e-mail is to inform you that you are late on your monthly rent of $1000. All you owe is $1000 at this time. Please submit timely payment for September 1, 2012." Richard's affidavit incorporates the e-mail and uses its statements for the truth of the matter asserted. However, Richard's affidavit does not contain information to authenticate the e-mail or bring it within a hearsay exception. Further, the affidavit's statement that Fred waived and released rent should be attacked as conclusory.[203]

## VII. SECTION 2-619 MOTIONS TO DISMISS

Section 2-619(a) of the Code provides for involuntary dismissal based on nine enumerated grounds: (1) lack of subject matter jurisdiction,[204] (2) lack of legal capacity,[205] (3) another action pending between the same parties for the same cause,[206] (4) a prior judgment,[207] (5) statute of limitations,[208] (6) the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy,[209] (7) the claim is unenforceable under the Statute of Frauds,[210] (8) the claim asserted against defendant is unenforceable because of his or her minority or other disability,[211] and (9) the claim asserted against defendant is barred by other

202. The legalese language "waive and release" should trigger an alarm.

203. Example's facts derived from *Nesbit v. Midwest Molding Solutions, Inc.*, No. 4-12-0483, 2013 IL App (4th) 120483-U (Feb. 4, 2013) (unpublished order pursuant to Illinois Supreme Court Rule 23 (effective Jan. 1, 2011)).

204. 735 ILL. COMP. STAT. 5/2-619(a)(1) (2012).

205. STAT. 5/2-619(a)(2). Section 2-619(a)(2) is aimed at defenses such as incompetency and infancy; lack of standing is not properly addressed under this provision. Patterson Heating & Air Conditioning Corp. v. Durable Constr. Co., 278 N.E.2d 410, 411 (Ill. App. Ct. 1972); Phillips Constr. Co. v. Muscarello, 355 N.E.2d 567, 569 (Ill. App. Ct. 1976). Rather, standing should be addressed under section 2-619(a)(9) as an affirmative matter. Jackson v. Randle, 2011 IL App (4th) 100790, ¶ 12, 957 N.E.2d 572, 574-75.

206. STAT. 5/2-619(a)(3); *see* Craig M. Bargher, *Understanding Section 2-619(a)(3) Motions to Dismiss or Stay*, 87 ILL. B.J. 327 (1999).

207. STAT. 5/2-619(a)(4). The essential elements of res judicata are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of the cause of action; and (3) an identity of parties or their privies. Crum & Forster Managers Corp. v. Resolution Trust Corp., 620 N.E.2d 1073, 1080 (Ill. 1993); Hudson v. City of Chicago, 889 N.E.2d 210, 213 (Ill. 2008). *See* Mashal v. City of Chicago, 2012 IL 112341, ¶¶ 19-27, 981 N.E.2d 951, 958-60 (defining final decision on the merits); Hernandez v. Pritikin, 2012 IL 113054, ¶ 41, 981 N.E.2d. 981, 991 (discussing burden of showing res judicata).

208. STAT. 5/2-619(a)(5); Hubble v. Bi-State Dev. Agency of Ill.-Mo. Metro. Dist., 938 N.E.2d 483, 488 (Ill. 2010); Caywood v. Gossett, 887 N.E.2d 686, 691-92 (Ill. App. Ct. 2008) (court should deny motion to dismiss pursuant to the discovery rule unless, as a matter of law, the plaintiff knew or should have known of injury and the wrongful causation outside the statute of limitations).

209. STAT. 5/2-619(a)(6).

210. STAT. 5/2-619(a)(7).

211. STAT. 5/2-619(a)(8).

affirmative matter avoiding the legal effect of or defeating the claim.[212] The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact at the outset of litigation.[213] As discussed further below, the "easily proved issues of fact" relate to factual questions surrounding affirmative defenses or affirmative matter, not questions relating to the plaintiff's factual allegations.[214] When ruling on a section 2-619 motion to dismiss, the trial court must interpret all pleadings, exhibits, and supporting documents in the light most favorable to the nonmovant.[215] The court should only grant the motion if the plaintiff can prove no set of facts that would support a cause of action.[216]

When making a section 2-619 motion to dismiss, a defendant—for purposes of the motion—admits the legal sufficiency of the complaint, admits all well-pleaded facts and reasonable inferences therefrom, and asserts the existence of a defect or defense that defeats the complaint.[217] Justice Steigmann refers to a section 2-619 motion as a "Yes, but" motion because "[e]ssentially, the defendant is saying in such a motion, 'Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim.'"[218]

## A. Timing of the Motion

A section 2-619 motion should be filed before the filing of an answer.[219] The filing of a section 2-619 motion after an answer is technically improper and the movant should request leave to withdraw the answer.[220] There are two rationales for this: First, the section 2-619 motion admits, for purposes of the motion, all well-pleaded facts which can conflict with facts contained in the answer. However, an answer does not preclude a section 2-619 motion, and the trial court has discretion to consider the motion.[221] Second, a section 2-619 motion is intended to be heard and decided before the expense and burden of conducting discovery.[222] Recall

212. STAT. 5/2-619(a)(9).
213. Van Meter v. Darien Park Dist., 799 N.E.2d 273, 278 (Ill. 2003); Musicus v. First Equity Grp., LLC, 2012 IL App (3d) 120068, ¶ 9, 980 N.E.2d 1233, 1235-36.
214. *See infra* note 243 and accompanying text.
215. Snyder v. Heidelberger, 2011 IL 111052, ¶ 8, 953 N.E.2d 415, 418.
216. *In re* Estate of Boyar, 2013 IL 113655, ¶ 27, 986 N.E.2d 1170, 1178.
217. *Snyder*, 2011 IL 111052, ¶ 8, 953 N.E.2d at 418; *Van Meter*, 799 N.E.2d at 278. For a sample motion to dismiss, see 2 STEIGMANN, *supra* note 183, § 31:62.
218. Winters v. Wangler, 898 N.E.2d 776, 779 (Ill. App. Ct. 2008). In contrast, a section 2-615 motion is described as a "So what" motion. *See supra* Part VI.
219. Gulley v. Noy, 737 N.E.2d 1115, 1119 (Ill. App. Ct. 2000); Clemons v. Nissan N. Am., Inc., 2013 IL App (4th) 120943, ¶ 33, 997 N.E.2d 307, 313-14.
220. *Gulley*, 737 N.E.2d at 1119.
221. *Id*.; Thompson v. Heydemann, 596 N.E.2d 664, 667 (Ill. App. Ct. 1992).
222. *Gulley*, 737 N.E.2d at 1119; *Clemons*, 2013 IL App (4th) 120943, ¶ 33, 997 N.E.2d at 313-14.

that the grounds for a section 2-619 motion are matters outside of the complaint. Thus, extensive discovery should not be required to discover the basis for the motion. Limited discovery may be required for determining the necessary facts supporting the affirmative matter, such as whether the plaintiff discovered the action within the statute of limitations or whether the defendant has sufficient minimum contacts for personal jurisdiction. A summary judgment motion is more appropriate if discovery has commenced. For example, in *Clemons v. Nissan North America*, the appellate court pointed out that the defendant's motion was untimely and procedurally improper because it was filed approximately a year and a half after the defendant filed its answer and had engaged in discovery.[223] The defendant filed the motion twenty days before trial.[224] The appellate court noted that the trial court did not consider whether the defendant's motion conflicted with its previous admissions and answer.[225] *Clemons* is an example of a clear abuse of a section 2-619 motion because the defendant filed a procedurally deficient motion—it also lacked an affidavit in support—on the eve of trial. Although the defendant won in the trial court, the appellate court took the time to express its displeasure with the sloppy motion practice and noted that this motion could have been treated as a summary judgment motion.[226]

B. Burden on the Motion

The movant carries the burden of proof and the concomitant burden of going forward on a motion to dismiss pursuant to section 2-619(a).[227] Where the motion is based on facts not apparent from the face of the complaint, the movant must support the asserted affirmative defense with affidavits or other evidence.[228] The movant must present an adequate affidavit—one that complies with Rule 191—supporting the affirmative defense to satisfy the initial burden of going forward.[229] If the movant satisfies this initial burden, then the burden shifts to the nonmovant to establish that the defense is unfounded or requires resolution of an essential element of material fact.[230] The plaintiff may establish this by submitting

223. *Clemons*, 2013 IL App (4th) 120943, ¶¶ 33-34, 997 N.E.2d at 313-14.
224. *Id.* ¶ 34, 997 N.E.2d at 314.
225. *Id.* ¶ 34, 997 N.E.2d at 313-14.
226. *Id.* ¶ 34, 997 N.E.2d at 314.
227. 4 RICHARD A. MICHAEL, ILLINOIS PRACTICE SERIES § 41:8, at 481 (2d ed. 2011).
228. City of Springfield v. West Koke Mill Dev. Corp., 728 N.E.2d 781, 787 (Ill. App. Ct. 2000).
229. Kedzie & 103rd Currency Exch., Inc. v. Hodge, 619 N.E.2d 732, 735 (Ill. 1993); Hollingshead v. A.G. Edwards & Sons, Inc., 920 N.E.2d 1254, 1260 (Ill. App. Ct. 2009) ("By presenting an affidavit supporting the basis of the motion, the defendant satisfies the initial burden of going forward . . . .").
230. Van Meter v. Darien Park Dist., 799 N.E.2d 273, 284 (Ill. 2003) (quoting Epstein v. Chi. Bd. of Educ., 687 N.E.2d 1042, 1049 (Ill. 1997)).

counteraffidavits or "other proof."[231] Failure to file counteraffidavits will render as admitted facts contained in the movant's affidavit.[232]

In other words, to carry the initial burden of proof, the movant must prove an affirmative matter that completely negates the plaintiff's cause of action. This cannot be done perfunctorily and can be a high burden. Regardless, the nonmovant must proactively respond. If applicable, the nonmovant should argue that the movant's affirmative matter does not completely negate the cause of action—perhaps it only negates parts thereof or merely attacks plaintiff's factual allegations. The nonmovant should submit a counteraffidavit to contest the movant's affidavit and show that the movant's affirmative defense requires resolution of material facts.[233]

Example: Claudio files a personal injury claim against Angelo. Angelo submits a section 2-619(a)(9) motion asserting immunity. Angelo attaches an affidavit stating he was acting within his official capacity when he broke Claudio's arm. Claudio files a counteraffidavit asserting Angelo is not a sworn police officer, but a vigilante. This would likely create an issue of fact—whether Angelo is entitled to immunity—about the affirmative matter.

### C. Evidence in Support of Section 2-619 Motions

Section 2-619(a) of the Code requires the motion to be supported by an affidavit if the grounds for the motion do not appear on the face of the pleading.[234] Whether evidentiary material is required will depend on the grounds for the motion to dismiss. If the grounds are apparent on the face of the pleadings, then no affidavit is required.[235] If the grounds are not apparent, then an affidavit is required. As discussed above, Illinois Supreme Court Rule 191 governs the form, content, and procedure relating to affidavits.[236] An affidavit must set forth with "particularity" the facts and "sworn or certified copies" of documents relied on must be attached.[237] The affidavit must include an evidentiary foundation to support these documents. For example, in *Clemons*, the appellate court explained that the defendant failed to attach an affidavit or include any foundational support

231. 735 ILL. COMP. STAT. 5/2-619(c) (2012).

232. Safeco Ins. Co. v. Jelen, 886 N.E.2d 555, 561 (Ill. App. Ct. 2008). *See* Pruitt v. Pruitt, 2013 IL App (1st) 130032, ¶¶ 14-17, 995 N.E.2d 313, 317-18 (discussing burden shifting on a section 2-619 motion).

233. If the affirmative defense itself only requires resolution of material facts, then the court may be able to resolve those facts and then rule on the motion to dismiss.

234. STAT. 5/2-619(a).

235. Asset Acceptance, LLC, v. Tyler, 2012 IL App (1st) 093559, ¶ 24, 966 N.E.2d 1039, 1045.

236. *See* discussion *supra* Part VI. ILL. SUP. CT. R. 191 (effective Jan. 4, 2013); STAT. 5/2-619(f). *See* Barber-Colman Co. v. A & K Midwest Insulation Co., 603 N.E.2d 1215, 1225 (Ill. App. Ct. 1992) (discussing affidavits submitted in support of section 2-619 motions).

237. ILL. SUP. CT. R. 191; Robidoux v. Oliphant, 775 N.E.2d 987, 996 (Ill. 2002).

for the document it alleged barred the plaintiff's recovery.[238] It added that the defendant "relied on its bare representations the document was what [the defendant] purported it to be."[239] This is not something you want a court to write about your motion.

Section 2-619(c) authorizes the nonmovant to submit counteraffidavits or other proof contesting the facts alleged by the movant or establishing facts obviating the grounds for defect.[240] It is necessary for the nonmovant to submit a counteraffidavit to refute evidentiary facts in the movant's affidavit, and failure to file a counteraffidavit admits facts within the movant's affidavit.[241] Where the nonmovant believes additional discovery is required in order to respond to the motion, Rule 191(b) permits the party to file an affidavit requesting additional discovery.[242]

The evidentiary material must be used to support the affirmative defense or matter.[243] For example, in *Caywood v. Gossett*, the plaintiff's deposition testimony revealed she knew about her injuries months prior to the applicable statute of limitations period.[244] This testimony showed her complaint was untimely filed and dismissal was proper pursuant to section 2-619(a)(5).[245] As discussed below, section 2-619 does not authorize evidentiary material that merely attempts to negate the essential allegations of the plaintiff's complaint or contest the factual allegations.[246] Where the defendant is using the affidavit or deposition testimony to present his version of the facts, this is not an "affirmative matter" under section 2-619(a)(9) and is not a proper section 2-619(a) motion.[247]

To understand evidence in support of a section 2-619 motion, consider the following examples.

Example 1: Peter sues Doris on contract. Doris files a motion pursuant to section 2-619(a)(2) asserting Peter is a minor and attaches an affidavit asserting he is sixteen years old. Peter files a counteraffidavit asserting he is not a minor and attaches a certified birth certificate, showing his date of birth, as an exhibit. The court may decide if Peter is a minor based on the affidavits and evidence offered. Here, the court would likely

238. Clemons v. Nissan N. Am., Inc., 2013 IL App (4th) 120943, ¶ 37, 997 N.E.2d 307, 312.
239. *Id.*
240. 735 ILL. COMP. STAT. 5/2-619(c) (2012).
241. Kedzie & 103rd Currency Exch., Inc. v. Hodge, 619 N.E.2d 732, 735 (Ill. 1993).
242. Dep't of Fin. & Prof'l Regulation v. Walgreen Co., 2012 IL App (2d) 110452, ¶ 21, 970 N.E.2d 552, 558; Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Inc., 909 N.E.2d 848, 859 (Ill. App. Ct. 2009).
243. Reynolds v. Jimmy John's Enters., LLC, 2013 IL App (4th) 120139, ¶ 30, 988 N.E.2d 984, 993.
244. Caywood v. Gossett, 887 N.E.2d 686, 691 (Ill App. Ct. 2008).
245. *Id.* at 693-94; *see also* Hollingshead v. A.G. Edwards & Sons, Inc., 920 N.E.2d 1254, 1260 (Ill. App. Ct. 2009).
246. *See supra* Part VII-E.
247. Smith v. Waukegan Park Dist., 896 N.E.2d 232, 238-39 (Ill. 2008).

deny Doris's motion because Peter filed a counteraffidavit and attached supporting documentation with his birth date.

Example 2: Smith sues Town for retaliatory discharge and alleges that he was discharged for exercising his workers' compensation rights. Town files a motion to dismiss pursuant to section 2-619(a)(9) and includes an affidavit that states Smith was discharged pursuant to a drug policy. Town's affidavit attempts to negate the essential allegations of Smith's complaint by disputing the basis for the discharge and is not an "affirmative matter."[248]

D. Section 2-619(a)(6): Releases, Satisfaction, and Discharge

Section 2-619(a)(6) of the Code provides for involuntary dismissal where the claim has been released, satisfied, or discharged in bankruptcy.[249] Generally, these grounds will not appear on the face of the complaint and will need a supporting affidavit. Releases warranting dismissal include agreements not to sue, such as exculpatory releases for personal injury. The movant—typically the defendant—should attach a copy of the release and a foundational affidavit. A court will deny the motion to dismiss where there is a material question of fact regarding whether the release is valid[250] or the injury sustained is within the scope of the release.[251]

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248. This example is based on *Smith*, 896 N.E.2d at 238-39.

249. 735 ILL. COMP. STAT. 5/2-619(a)(6) (2012).

250. "No form of words, no matter how all encompassing, will foreclose scrutiny of a release or prevent a reviewing court from inquiring into surrounding circumstances to ascertain whether it was fairly made and accurately reflected the intention of the parties." Goodman v. Hanson, 945 N.E.2d 1255, 1263 (Ill. App. Ct. 2011) (quoting Carlile v. Snap-On Tools, 648 N.E.2d 317, 321 (Ill. App. Ct. 1995)). Illinois courts generally enforce exculpatory clauses unless it would be against public policy or there "is something in the social relationship of the parties militating against upholding the agreement." Jackson v. First Nat'l Bank of Lake Forest, 114 N.E.2d 721, 725 (Ill. 1953). Such "social relationships" include (1) employer and employee; (2) the public and those charged with a duty of public service; and (3) where there is a disparity of bargaining power that the agreement does not represent a free choice on the part of the plaintiff. Hamer v. City Segway Tours of Chi., LLC, 930 N.E.2d 578, 581-82 (Ill. App. Ct. 2010); *see also* Spears v. Ass'n of Ill. Elec. Coop., 2013 IL App (4th) 120289, 986 N.E.2d 216.

251. Illinois courts strictly construe exculpatory clauses against the party they benefit. Scott & Fetzer Co. v. Montgomery Ward & Co., 493 N.E.2d 1022, 1029 (Ill. 1986). The clause must "spell out the intention of the parties with great particularity and will not be construed to defeat a claim which is not explicitly covered by their terms." *Id.* *See also* Schlessman v. Henson, 413 N.E.2d 1252, 1254 (Ill. 1980); Johnson v. Salvation Army, 2011 IL App (1st) 103323, ¶ 36, 957 N.E.2d 485, 495 ("'An exculpatory agreement must contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care.'" (quoting Evans v. Lima Lima Flight Team, Inc., 869 N.E.2d 195, 203 (Ill. App. Ct. 2007))); Farmers Auto. Ins. Ass'n v. Kraemer, 857 N.E.2d 691, 694 (Ill. App. Ct. 2006) ("The scope and effect of a release are controlled by the intention of the parties."); Lulay v. Parvin, 834 N.E.2d 989, 992-93 (Ill. App. Ct. 2005); Ericksen v. Rush Presbyterian St. Luke's Med. Ctr., 682 N.E.2d 79, 87 (Ill. App. Ct. 1997); *see Goodman*, 945 N.E.2d at 1263 (describing the difference between a general release and a specific release).

To understand section 2-619(a)(6) motions, consider the following example. Paula sues Dave's Skydiving Adventures for injuries sustained during a skydiving accident. Dave's files a section 2-619(a)(6) motion to dismiss asserting Paula released all liability in an exculpatory release. To avoid dismissal, Paula must show that the injury is outside the scope of the release or the release is invalid.[252]

E. Section 2-619(a)(9): What is an Affirmative Matter?

Section 2-619(a)(9) of the Code provides for a motion on the grounds "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim."[253] An "affirmative matter" is a defined term that includes matters broader than the eight previously specified affirmative defenses.[254] The standard articulation of an affirmative matter is:

> [a] type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion[s] of material fact unsupported by allegations of specific fact contained or inferred from the complaint . . . [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint.[255]

The Illinois Supreme Court has described an affirmative matter as "some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action'"[256] and "'something in the nature of a defense which negates the cause of action completely.'"[257] The definitions of "affirmative matter" require a careful unpacking in order to understand what an affirmative matter is and how to effectively use section 2-619(a)(9).

An affirmative matter must (1) completely negate the plaintiff's cause of action and (2) not merely negate the essential allegations of the plaintiff's cause of action, i.e., not merely contest the plaintiff's factual

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252. This example is based on *Falkner v. Hinckley Parachute Center, Inc.*, 533 N.E.2d 941 (Ill. App. Ct. 1989). In *Falkner*, the court held that the risk of unsafe equipment, negligent instruction, and death could be contemplated by a skydiving participant and the exculpatory clause, which stated it released "any and all claims, demands or actions or causes of action whatsoever," was broad enough to cover these situations. *Id.* at 945.

253. STAT. 5/2-619(a)(9).

254. *In re* Marriage of Musa, 430 N.E.2d 727, 729 (Ill. App. Ct. 1982).

255. Smith v. Waukegan Park Dist., 896 N.E.2d 232, 238 (Ill. 2008) (quoting 4 RICHARD A. MICHAEL, ILLINOIS PRACTICE SERIES § 41.7, at 332 (1989)).

256. *Id.* at 238 (quoting Kedzie & 103rd Currency Exch., Inc. v. Hodge, 619 N.E.2d 732, 735 (Ill. 1993)).

257. Van Meter v. Darien Park Dist., 799 N.E.2d 273, 278 (Ill. 2003) (quoting *Hodge*, 619 N.E.2d at 735).

allegations or refute legal liability.[258] Examples of affirmative matters include the plaintiff's lack of standing,[259] local government immunity,[260] qualified privilege to a defamatory statement,[261] proper notice pursuant to the Illinois Municipal Code,[262] agreement to arbitrate,[263] forum selection clause,[264] federal preemption of the area,[265] consent,[266] and restrictive covenants not to compete.[267] These matters, as in Justice Steigmann's words, assert, "Plaintiff has a claim, but I have something that completely defeats the plaintiff's claim."[268] A claim that merely *reduces* plaintiff's cause of action or recovery is not an affirmative matter.

The critical limitation on an affirmative matter is that it cannot merely be a contradiction of the plaintiff's allegations. An affirmative matter, while broad, does not include factual disputes that tend to negate the complaint's factual allegations.[269] In *Howle v. Aqua Illinois*, the appellate court characterized a section 2-619 motion contesting the plaintiff's factual allegations as essentially an answer denying the allegations set forth in the complaint as "Not true."[270] The appellate court clarified that such a response concerning the negation of a plaintiff's cause of action as "Not

258. Cioni v. Gearhart, 559 N.E.2d 494, 496-97 (Ill. App. Ct. 1990). In other words, it cannot merely refute the plaintiff's prima facie cause of action.

259. Int'l Union of Operating Eng'rs, Local 148 v. Ill. Dep't of Emp't Sec., 828 N.E.2d 1104, 1110 (Ill. 2005); Jackson v. Randle, 2011 IL App (4th) 100790, ¶ 12, 957 N.E.2d 572, 574-75.

260. Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15, 763 N.E.2d 756, 759 (Ill. 2002); Schlicher v. Bd. of Fire & Police Comm'rs, 845 N.E.2d 55 (Ill. App. Ct. 2006); Prough v. Madison County, 2013 IL App (5th) 110146, 984 N.E.2d 1177; Pleasant Hill Cemetery Ass'n v. Morefield, 2013 IL App (4th) 120645, 986 N.E.2d 791; *see* Wilson v. City of Decatur, 906 N.E.2d 795, 799-800 (Ill. App. Ct. 2009) (Tort Immunity Act did not apply to protect city from immunity).

261. Genelco, Inc. v. Bowers, 536 N.E.2d 783, 786 (Ill. App. Ct. 1989).

262. Musicus v. First Equity Grp., LLC, 2012 IL App (3d) 120068, ¶ 10, 980 N.E.2d 1233, 1236; *see also* Speedy Gonzalez Landscaping, Inc. v. O.C.A. Constr., Inc., 896 N.E.2d 494 (Ill. App. Ct. 2008) (plaintiff failure to comply with Mechanics Lien Act terminated lien and barred cause of action).

263. Hollingshead v. A.G. Edwards & Sons, Inc., 920 N.E.2d 1254, 1260 (Ill. App. Ct. 2009); Borowiec v. Gateway 2000, Inc., 808 N.E.2d 957, 971 (Ill. 2004); Griffith v. Wilmette Harbor Ass'n, Inc., 881 N.E.2d 512, 519 (Ill. App. Ct. 2007); Khan v. BDO Seidman, LLP, 935 N.E.2d 1174, 1189 (Ill. App. Ct. 2010). A motion to compel arbitration and dismiss the lawsuit would be the proper motions to bring. *See* Melena v. Anheuser-Busch, Inc., 847 N.E.2d 99 (Ill. 2006) (discussing motion to compel arbitration in employment context); Graham v. Hyundai Motor Am., 855 N.E.2d 562 (Ill. App. Ct. 2006) (discussing motion to compel arbitration in defective automobile suit).

264. Brandt v. MillerCoors, LLC, 2013 IL App (1st) 120431, 993 N.E.2d 116.

265. Cohen v. McDonald's Corp., 808 N.E.2d 1, 9 (Ill. App. Ct. 2004).

266. Koester v. Weber, Cohn & Riley, Inc., 550 N.E.2d 1004, 1006 (Ill. App. Ct. 1989); *see In re* Estate of Gallaher, 890 N.E.2d 1249 (Ill. App. Ct. 2008) (addressing whether settlement agreement discharged individual from liability).

267. Glass Specialty Co. v. Litwiller, 498 N.E.2d 876, 878 (Ill. App. Ct. 1986) (disputed fact regarding whether restrictive covenant was reasonable precluded motion to dismiss).

268. *See* Winters v. Wangler, 898 N.E.2d 776, 779 (Ill. App. Ct. 2008).

269. Higgins v. Kleronomos, 459 N.E.2d 1048, 1051 (Ill. App. Ct. 1984); Reynolds v. Jimmy John's Enters., LLC, 2013 IL App (4th) 120139, ¶ 30, 988 N.E.2d 984, 993.

270. Howle v. Aqua Ill., Inc., 2012 IL App (4th) 120207, ¶ 36, 978 N.E.2d 1132, 1140.

true" is appropriately resolved under a fact-based motion (i.e., a summary judgment motion pursuant to section 2-1005 of the Code).[271] To permit section 2-619(a)(9) to act as a vehicle to determine factual allegations raised in the complaint would effectively render summary judgment motions superfluous; force the plaintiff to prove his or her case early in the litigation; and, where a jury demand has been made, require the judge, rather than a jury, to resolve material issues of fact concerning the plaintiff's cause of action.

"But wait," you might say, "isn't the purpose of a section 2-619(a) motion to dispose of easily proven issues of fact, and doesn't an affirmative matter include something that completely refutes conclusions of material fact supported by allegations of specific fact contained or inferred from the complaint?" This statement misunderstands two things: (1) the easily proved issues of fact go to the existence of the affirmative matter and are not *the* affirmative matter,[272] and (2) for purposes of the motion, a section 2-619(a)(9) motion admits the well-pleaded facts contained in the complaint. Outside evidentiary material, such as affidavits and depositions, can be used to prove the existence or application of the affirmative matter, but the outside evidentiary material cannot be used to negate the factual allegations because an affirmative matter is not merely a negation of the plaintiff's allegations.[273] For example, in *Hollingshead v. A.G. Edwards & Sons*, the defendant filed a motion to dismiss and compel arbitration supported by the arbitration contract and an affidavit establishing the contract's foundation.[274] The plaintiff's claim was defeated by an affirmative matter—the arbitration agreement—as indicated by outside evidentiary material.[275]

You might also ask, "But wait, I have an affidavit or deposition that proves my version of the facts and that affirmatively bars plaintiff's cause of action." Two misconceptions are apparent in this statement: (1) you are contesting the factual allegations contained in the complaint, and (2) fact-based contests are properly addressed in a summary judgment motion.[276]

An example of a successful section 2-619(a)(9) motion is seen in *Rogalla v. Christie Clinic*.[277] There, the plaintiff asserted that PersonalCare, a health maintenance organization, wrongfully secured a lien against her personal-injury settlement because it breached its contract with a medical services provider and fraudulently failed to disclose terms of an

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271. *Id.* ¶ 37, 978 N.E.2d at 1140.

272. If this point had been unclear previously, the Illinois Appellate Court, Fourth District, made this explicitly clear in *Reynolds*. *Reynolds*, 2013 IL App (4th) 120139, ¶ 30, 988 N.E.2d at 993.

273. *Id.* ¶ 53, 988 N.E.2d at 1000.

274. Hollingshead v. A.G. Edwards & Sons, Inc., 920 N.E.2d 1254, 1260 (Ill. App. Ct. 2009).

275. *Id.*

276. *Reynolds*, 2013 IL App (4th) 120139, ¶ 53, 988 N.E.2d at 1000.

277. Rogalle v. Christie Clinic, P.C., 794 N.E.2d 384 (Ill. App. Ct. 2003).

agreement with the provider governing payments to the provider.[278] The defendant asserted an affirmative matter—its contractual relationship with the plaintiff permitted it to collect the reasonable value of medical treatment services—defeated the plaintiff's claim.[279] The appellate court reviewed the contract and determined the definition of "payments" to mean the total capitation payment allocated to the plaintiff's treatment and thus it could not be breach of contract or fraud for the defendant to accept funds greater than the amount actually paid for the plaintiff's share of the capitation payment.[280] *Rogalla* provides an example of an affirmative matter that was an easily proved question of fact—definition of "payments"—and the appellate court resolved the affirmative matter as an issue of law—applying the definition of "payments" to the contract.

Professor Richard Michael has pointed out that the standard articulation of an affirmative matter can create confusion and has permitted a successful section 2-619(a)(9) motion to depend on the way the complaint or motion was drafted. [281] This is noticeable where the movant asserts the plaintiff does not have a cause of action, which is typically framed as an assertion that the defendant does not owe the plaintiff a duty of care. Where the motion is drafted as a matter of law, courts often address the motion. If the motion is drafted as attacking the factual allegations, courts will deny the motion. For example, in *Ford v. Round Barn True Value*, the plaintiff filed a complaint against a hardware store and a gym for injuries sustained in a parking lot.[282] The gym filed a section 2-619(a)(9) motion asserting it did not own, maintain, or control the parking lot in which the plaintiff was injured.[283] The gym filed an affidavit stating it had no ownership interest in the lot and had never performed maintenance on the lot.[284] The appellate court concluded, as a matter of law, that the gym, as an adjacent property owner, did not owe the plaintiff a duty of care.[285] In contrast, in *Reynolds v. Jimmy John's Enterprises*, the defendants filed a section 2-619(a)(9) motion, (1) asserting they did not owe the plaintiff a duty of care because the plaintiff failed to allege "true facts to establish a duty" and (2) offering their own version of the factual allegations.[286] The appellate court rejected the defendants' claims because the defendants

278. *Id*. at 394.
279. *Id*. at 395.
280. *Id*. at 396. The court used the definition of "payments" as decided in a previous case, First Midwest Trust Co. v. Rogers, 701 N.E.2d 1107, 1119 (Ill. App. Ct. 1998), between an insured and PersonalCare.
281. 4 MICHAEL, *supra* note 227, § 41:7, at 479.
282. Ford v. Round Barn True Value, Inc., 883 N.E.2d 20, 23 (Ill. App. Ct. 2007).
283. *Id.*
284. *Id*. The plaintiff did not file a counteraffidavit, so these facts were admitted.
285. *Id.*
286. Reynolds v. Jimmy John's Enters., LLC, 2013 IL App (4th) 120139, ¶ 39, 988 N.E.2d 984, 996.

sought merely to contest the plaintiff's essential allegations, i.e., the plaintiff's allegations were false.[287] In *Ford*, the gym's motion could not have been a section 2-615 motion, although it asserted it did not owe a duty of care, because it used facts outside of the complaint to show the gym did not have control of the parking lot. The motions in both *Ford* and *Reynolds* should have been summary judgment motions. The gym's motion in *Ford* should have been a summary judgment motion because it asserted, based on facts outside the pleadings, that the plaintiff could not prove it owed him a duty of care; not that an affirmative matter barred the claim.[288]

Another example is *Eckburg v. Presbytery of Blackhawk*, where the defendant's motion asserted it could not be liable under the plaintiff's theory it had a duty to inspect and maintain trees upon its property adjoining a public road because the land was not in an urban area.[289] The appellate court rejected the defendant's "simplistic 'urban/rural' distinction" and concluded the defendant's duty needed to be determined under a traditional negligence analysis, which required resolution of facts that could not be decided upon a section 2-619(a) motion to dismiss.[290]

The problem identified by Professor Michael can be eliminated by retaining the distinctions between the section 2-615, section 2-619, and section 2-1005 motions.[291] Therefore, where the complaint, on its face, does not allege a duty of care, the motion should be treated as a section 2-615 motion.[292] By contrast, where the complaint, on its face, alleges a duty of care, but the facts fail to support a duty of care, then the motion should be drafted as a section 2-1005 motion. Where an outside matter, such as the defendant's immunity, bars the claim, then the motion should be drafted as a section 2-619 motion. In practice, the success of a section 2-619(a)(9) motion may hinge on the wording of the complaint and motion, but one should use the correct motion rather than attempt to obfuscate the matter.

In defending against a section 2-619(a)(9) motion, one must be proactive and file a motion in opposition pointing out that the movant's motion is merely attacking the factual basis of the complaint rather than asserting an affirmative matter, and therefore the movant has failed to carry his burden on the motion. Where the motion asserts a proper affirmative matter, the plaintiff needs to file a counteraffidavit contesting the

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287. *Id.* ¶ 42, 988 N.E.2d at 997.

288. It is likely the appellate court did not make this distinction because of the way the defendants phrased their motions. Also, the *Ford* plaintiff failed to provide citations for his appellate argument and forfeited some of his arguments. *Ford*, 883 N.E.2d at 25.

289. Eckburg v. Presbytery of Blackhawk of the Presbyterian Church (USA), 918 N.E.2d 1184, 1187 (Ill. App. Ct. 2009).

290. *Id.* at 1193-94.

291. *See Reynolds*, 2013 IL App (4th) 120139, ¶¶ 51-53, 988 N.E.2d at 999-1000 (discussing distinctions between section 2-619(a)(9) motions and other pretrial motions).

292. *See also* Winters v. Wangler, 898 N.E.2d 776, 779 (Ill. App. Ct. 2008).

defendant's factual assertions about the affirmative matter, or file an affidavit stating that the plaintiff cannot respond to the motion and more time is needed to conduct discovery.

F. Distinction With Other Motions

How can you, as a practitioner, determine whether a section 2-619 motion is proper? First, you must be keenly aware of what the movant is really arguing. If the defendant's motion is asserting, "Plaintiff has a claim, but something defeats it," then section 2-619 is proper. However, if the defendant's motion asserts, "Plaintiff has a claim, but it's not true," then section 2-619 is not proper, and a fact-based motion should be used.[293] Where the defendant files an improper section 2-619 motion and asserts the plaintiff failed to allege sufficient facts for a cause of action, the court may treat the motion as a section 2-615 motion if resolution as such would not prejudice the plaintiff.[294] Likewise, where the motion asserts that the record shows no genuine issue of material fact regarding liability and resolution would not prejudice the plaintiff, then the court may treat the motion as a summary judgment motion.[295]

A difficult question is what type of response is proper where the defendant contends no duty of care is owed to the plaintiff. A section 2-615 motion is restricted to the four corners of the complaint, while a section 2-619 motion can raise something outside of the complaint.[296] Section 2-615 properly addresses the situation where the defendant asserts the plaintiff failed to allege a duty of care.[297] The factual inquiry regarding whether a duty is pleaded is confined to the facts contained in the complaint.[298] In contrast, where the plaintiff properly alleged a cause of action but the defendant asserts the existence of an affirmative matter outside of the complaint that bars the plaintiff's cause of action, such as immunity, a section 2-619(a) motion is the proper procedural device. Section 2-619 of the Code only permits a factual inquiry into the affirmative matter and does not permit fact-based arguments going to the veracity of the plaintiff's allegations.[299] As discussed in more detail below, a central confusion exists between a section 2-619 motion and a summary judgment motion in which

293. *Reynolds*, 2013 IL App (4th) 120139, ¶ 53, 988 N.E.2d at 1000.
294. *Winters*, 898 N.E.2d at 780 (section 2-615).
295. Howle v. Aqua Ill., Inc., 2012 IL App (4th) 120207, ¶ 39, 978 N.E.2d 1132, 1140; *see also* Turner v. 1212 S. Mich. Partnership, 823 N.E.2d 1062, 1070-71 (Ill. App. Ct. 2005).
296. Hamilton v. Conley, 827 N.E.2d 949, 954 (Ill. App. Ct. 2005).
297. *See* Nelson v. Crystal Lake Park Dist., 796 N.E.2d 646 (Ill. App. Ct. 2003) (defendant filed a section 2-619 motion contending that the plaintiff failed to state a valid claim and the court treated it as a section 2-615 motion).
298. Tedrick v. Cmty. Res. Center, Inc., 920 N.E.2d 220, 222 (Ill. 2009).
299. Reynolds v. Jimmy John's Enters., LLC, 2013 IL App (4th) 120139, ¶ 30, 988 N.E.2d 984, 993.

the defendant asserts the plaintiff cannot prove the existence of the duty of care. In both motions, the plaintiff must present some factual basis that would entitle him or her to judgment.[300] The defendant is asserting that the plaintiff's cause of action is barred because he or she cannot prove it. This is not a proper section 2-619(a)(9) motion because it is a fact-based motion. A summary judgment motion is the proper procedural device where the factual record shows no duty of care exists between the parties.[301]

Whether a statute bars the plaintiff's cause of action is another area that can be difficult to distinguish a section 2-619(a)(9) motion from a summary judgment motion. Statutory issues can overlap with these two motions because a statute can be an affirmative matter defeating the plaintiff's claim, and statutory interpretation is an appropriate question for summary judgment.[302] Which is the proper motion when application of the statute (which bars the claim) depends on a factual question? Because summary judgment is a fact-based motion, it should be used. This avoids the unnecessary confusion created by using facts to support the statute's application and alerts the parties and the court that resolution of the motion really depends on a factual issue. However, a section 2-619(a)(9) motion can also be proper. For example, in *Pruitt v. Pruitt*, the parents filed a section 2-619(a)(9) motion asserting that the grandfather could not show he was entitled to visitation under the grandparent visitation statute.[303] The parents argued that the grandfather could not be successful under the statute because they, although unmarried, lived together.[304] The parents provided an affidavit in support to this effect. The appellate court concluded that the parents met their burden of going forward on the section 2-619 motion and the grandfather could not show otherwise.[305] Thus, the statute prevented the grandfather from obtaining the relief he sought. The parent's motion properly fits within the section 2-619 framework because they asserted that the statute barred the grandparent's claim and were not asserting that their version of the facts barred the claim. However, because the parents used a fact to show the statute bars the claim, there is no real reason why the same argument could not have been brought in a summary judgment motion.

In sum, where the substance of the defendant's motion asserts the plaintiff has not alleged a cause of action, then section 2-615 is used; where the defendant asserts the plaintiff's cause of action is barred by an outside affirmative defense or matter, then section 2-619 is used; where the

300. Hutchcraft v. Indep. Mech. Industries, Inc., 726 N.E.2d 1171, 1175 (Ill. App. Ct. 2000) (summary judgment).
301. *Id.* at 1177.
302. Performance Mktg. Ass'n v. Hamer, 2013 IL 114496, ¶ 12, 998 N.E.2d 54, 57.
303. Pruitt v. Pruitt, 2013 IL App (1st) 130032, ¶ 1, 995 N.E.2d 313, 315.
304. *Id.* ¶ 12, 995 N.E.2d at 317.
305. *Id.* ¶¶ 17-22, 995 N.E.2d at 318-19.

defendant asserts the plaintiff cannot prove the cause of action, then section 2-1005 is used.

G. Checklist

Consider these questions when responding to a section 2-619 motion: (1) What is the substance of motion? Is it *really* a section 2-619(a) motion? (2) What is the asserted affirmative defense or matter? (3) Is this a real affirmative defense or matter or merely a different version of the factual allegations? (4) Is there an affidavit or other evidentiary material filed in support of the affirmative defense or matter? (5) Is the affidavit sufficient? Is it based on the affiant's personal knowledge and does it contain particularized facts? By asking these simple questions you should be able to identify problems in the motion and organize your thoughts before drafting a response. Before you respond, make sure you have a counteraffidavit or some type of factual evidence to support your position. Inform the court if you cannot respond without more discovery. Ask the same questions of your motion before filing it with the court. It is better for you to identify and address problems in your motion before your opponent or the court does; they are not as forgiving.

H. Examples

How do section 2-619 motions operate in practice? Consider the following examples.

Example 1: Pat files suit against Water City alleging that the city negligently caused flooding to her home when the property next to hers was landscaped. Water City files a section 2-619(a)(9) motion to dismiss on the grounds that Pat's claims were barred by governmental immunity. Water City submits an affidavit stating that it did not develop, plan, or supervise the construction of the landscape. Governmental immunity requires a showing that the actions and omissions were discretionary and the result of a policy decision. Because Water City's affidavit fails to establish this requirement, it has failed to meet its burden in presenting an affirmative matter.[306]

Example 2: Lisa sues Bernie for injuries caused by a dog bite. Lisa alleges Bernie's employee, who lives on Bernie's property, owned the dog and Bernie controlled the dog. Bernie files a section 2-619(a)(9) motion alleging, in substance, that he did not control the dogs. Because Bernie's motion attacks Lisa's factual allegations—asserts he is not liable because he

306. Example based on *Van Meter v. Darien Park District*, 799 N.E.2d 273 (Ill. 2003).

did not control the dog—this is not a proper affirmative matter and not a proper section 2-619(a)(9) motion.[307]

Example 3: Kenneth files suit against Roger for injuries sustained from a motor vehicle accident. Kenneth alleges Roger failed to properly escort a tractor. Roger files a motion asserting that the Illinois Vehicle Code did not apply to the tractor. Because Roger's motion is essentially asserting that Kenneth failed to properly allege facts showing he owed Kenneth a duty, the motion is improperly labeled as a section 2-619(a) motion and is in substance a section 2-615 motion.[308]

## IX. SECTION 2-1005 SUMMARY JUDGMENT MOTIONS

Section 2-1005 of the Code provides that summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[309] The purpose of summary judgment is to determine if a question of fact exists, not to resolve such questions.[310] The summary judgment standard is "a formidable one," under which summary judgment should only be granted where the movant's right to judgment is clear and free from doubt.[311] Summary judgment is not appropriate if: (1) the parties dispute a material fact, (2) reasonable persons could draw divergent inferences from the undisputed material facts, or (3) reasonable persons could differ on the weight to be given the relevant factors of a legal standard.[312]

### A. Timing of Motion

A defendant may move for summary judgment at any time.[313] The plaintiff may move for summary judgment at any time after the defendant has appeared or after the time within which he or she is required to appear has expired.[314] The moving party may move for summary judgment as to

307. Example based on *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, 978 N.E.2d 1132.
308. Example based on *Winters v. Wangler*, 898 N.E.2d 776 (Ill. App. Ct. 2008).
309. 735 ILL. COMP. STAT. 5/2-1005(c) (2012).
310. Forsythe v. Clark USA, Inc., 864 N.E.2d 227, 232 (Ill. 2007); Maxit, Inc. v. Van Cleve, 897 N.E.2d 745, 749 (Ill. 2008).
311. Pielet v. Pielet, 2012 IL 112064, ¶ 54, 978 N.E.2d 1000, 1015; Adams v. N. Ill. Gas Co., 809 N.E.2d 1248, 1256 (Ill. 2004); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1223 (Ill. 1992).
312. *Forsythe*, 864 N.E.2d at 232; *Pielet*, 2012 IL 112064, ¶ 53, 978 N.E.2d at 1015; Duffy v. Togher, 887 N.E.2d 535, 541 (Ill. App. Ct. 2008).
313. STAT. 5/2-1005(b). For a helpful article on drafting a summary judgment motion, see Barbara A. McDonald, *The Top 10 Ways to Avoid Losing A Motion for Summary Judgment*, 92 ILL. B.J. 128 (2004).
314. STAT. 5/2-1005(a).

one or more of the issues.[315] As a practical matter, summary judgment may be appropriate on some issues but not others and partial summary judgment may be granted.[316]

B. Common Types of Summary Judgment Motions

The two common types of summary judgment motions are (1) a motion affirmatively showing that some element of the case must be resolved in the defendant's favor[317] and (2) a motion of the kind recognized by the U.S. Supreme Court in *Celotex Corp. v. Catrett*, in which the defendant points out the absence of evidence supporting the plaintiff's position.[318] Traditional and *Celotex*-type summary judgment motions have differing burden-shifting schemes. In both motion types, the movant carries the initial burden of production and, if the movant satisfies this initial burden, the burden shifts to the nonmovant to present some factual basis that would entitle him or her to a favorable judgment. The plaintiff is not required to prove his or her case at the summary judgment stage.[319]

*1. Traditional Motions*

In a traditional summary judgment motion, the moving party has the initial burden of production to introduce competent evidence that entitles him or her to judgment as a matter of law.[320] In other words, the defendant, as the movant, is required to prove something he or she would not be required to prove at trial, because at trial the burden would be on the plaintiff to prove the element, not on the defendant to disprove it.[321] If the

315. STAT. 5/2-1005(a)-(b). Section 2-1005(d) provides:

> If the court determines that there is no genuine issue of material fact as to one or more of the major issues in the case, but that substantial controversy exists with respect to other major issues, or if a party moves for a summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue or those issues, the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just. Upon the trial of the case, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STAT. 5/2-1005(d).

316. *See* ILL. SUP. CT. R. 192 (effective Jan. 1, 1967).

317. Hutchcraft v. Indep. Mech. Indus., Inc., 726 N.E.2d 1171, 1174 (Ill. App. Ct. 2000). An example of where the plaintiff cannot establish a prerequisite of a wrongful-death claim is in *Williams v. Manchester*, 888 N.E.2d 1 (Ill. 2008) (plaintiff could not establish that fetus had a present injury such that it could have maintained a cause of action).

318. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

319. Thompson v. Gordon, 948 N.E.2d 39, 45 (Ill. 2011).

320. Mashal v. City of Chicago, 2012 IL 112341, ¶ 49, 981 N.E.2d 951, 967; Willett v. Cessna Aircraft Co., 851 N.E.2d 626, 634 (Ill. App. Ct. 2006).

321. *Hutchcraft*, 726 N.E.2d at 1174.

moving party satisfies this initial burden of production, then the burden shifts to the plaintiff to present some factual basis that would arguably entitle him or her to a judgment.[322] The nonmovant may do this by introducing evidentiary material, such as an affidavit or deposition testimony.[323] If the movant supplies facts that, if not contradicted, would warrant judgment in his or her favor, the nonmovant cannot rely on the pleadings to create a genuine issue of material fact.[324]

Similar to a traditional motion, summary judgment is permitted where (1) what is contained in the pleadings and affidavits constitutes all of the possible evidence, (2) upon such evidence nothing would be left to go to a jury, and (3) the court would be required to grant a directed verdict.[325] This is commonly referred to as a *Fooden*-type motion in Illinois.[326]

Consider two examples of traditional summary judgment motions.

Example 1: Defendant files a summary judgment motion asserting that it does not owe a duty of care to Plaintiff because it leased the property Plaintiff was injured on to a third party. Defendant attaches an affidavit setting out the relevant facts, including the lease term. Plaintiff responds with an affidavit stating that Defendant continued to provide maintenance to the area where she was injured. Summary judgment should be denied because a factual issue exists regarding whether Defendant controlled the area where Plaintiff was injured. Note that summary judgment should be granted if Plaintiff fails to supply a sufficient counteraffidavit.

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322. Fabiano v. City of Palos Hills, 784 N.E.2d 258, 265 (Ill. App. Ct. 2002) (quoting Pecora v. County of Cook, 752 N.E.2d 532, 545 (Ill. App. Ct. 2001)). In defending against the motion, the plaintiff is not required to show he is entitled to summary judgment. Rather, the plaintiff must show that there is an issue of fact that, if resolved in his favor, would entitle him to judgment at trial.

323. *Mashal*, 2012 IL 112341, ¶ 49, 981 N.E.2d at 967; Farmers Auto. Ins. Ass'n v. Burton, 2012 IL App (4th) 110289, ¶ 15, 967 N.E.2d 329, 603; *Willett*, 851 N.E.2d at 634 (quoting Soderlund Bros., Inc. v. Carrier Corp., 663 N.E.2d 1, 7 (Ill. App. Ct. 1995)).

324. Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1, 758 N.E.2d 848, 851 (Ill. 2001); Fooden v. Bd. of Governors of State Colleges & Univs. of Ill., 272 N.E.2d 497, 501 (Ill. 1971). The *Fooden* court stated:

> [A]s against positive, detailed averments of fact in an affidavit, allegations made on information and belief by an adverse party are insufficient, for they are not equivalent to averments of relevant facts but rather put in issue only the pleader's information and belief and not the truth or falsity of the "facts" referred to.

*Id.* Triple R Dev., LLC v. Golfview Apartments I, L.P., 2012 IL App (4th) 100956, ¶ 16, 965 N.E.2d 452, 387; Forsberg v. Edward Hosp. & Health Servs., 906 N.E.2d 729, 736 (Ill. App. Ct. 2009); Mitchell v. Special Educ. Joint Agreement Sch. Dist. No. 208, 897 N.E.2d 352, 356 (Ill. App. Ct. 2008); Abrams v. City of Chicago, 811 N.E.2d 670, 674 (Ill. 2004). If the movant fails to support his or her motion with evidentiary facts, the nonmovant may rely on the pleadings. Argueta v. Krivickas, 2011 IL App (1st) 102166, ¶ 6, 952 N.E.2d 1238, 1241-42 (quoting Williams v. Covenant Med. Ctr., 737 N.E.2d 662, 669 (Ill. App. Ct. 2000)).

325. Koziol v. Hayden, 723 N.E.2d 321, 324 (Ill. App. Ct. 1999).

326. *See Fooden*, 272 N.E.2d 497; *Koziol*, 723 N.E.2d at 325.

Example 2: Plaintiff files a summary judgment motion contending it is undisputed that Defendant breached a contract and failed to pay for services according to contractual terms. Plaintiff attaches an affidavit setting forth the relevant facts and attaches the contract. Defendant responds that its answer asserted it was not obligated to pay Plaintiff. Summary judgment is proper because Defendant relied on the pleadings and failed to properly contest Plaintiff's summary judgment motion.

*2.* Celotex*-Type Motions*

In *Celotex*-type motions, the movant, to meet the burden of production, must show that the nonmovant cannot acquire sufficient evidence to make the nonmovant's case. In other words, the movant, to support his or her summary judgment motion, relies on the absence of proof supporting the plaintiff's claim.[327] The movant cannot meet this burden merely by asserting that the nonmovant lacks evidence and is required to do more than "point out" the absence of evidence.[328] For example, in *Celotex*, the defendant moved for summary judgment on the basis that the plaintiff failed to identify any witnesses who could testify about the decedent's exposure to the defendant's asbestos products.[329]

If the movant meets this initial burden of production, the burden then shifts to the nonmovant to present some factual basis that would arguably entitle him or her to a favorable judgment.[330] A *Celotex*-type summary judgment motion has been described as "the rare situation when the burden of proof is essentially on the nonmovant."[331] Because of this burden-shifting structure, a trial court must only grant a *Celotex*-type motion where the nonmovant had an adequate opportunity to conduct discovery.[332]

*Hutchcraft v. Independent Mechanical Industries* presents a case study for *Celotex*-type motions.[333] There, the plaintiff worked for a general contractor that was repairing an industrial plant.[334] The general contractor hired a concrete subcontractor and a mechanical subcontractor.[335] Construction required use of welding units placed in various facility locations with connecting power cords running from the unit to the location where a weld could be performed.[336] The plaintiff was working in the

327. Hutchcraft v. Indep. Mech. Indus., Inc., 726 N.E.2d 1171, 1176 (Ill. App. Ct. 2000).
328. *Id.* at 1175; Kleiss v. Bozdech, 811 N.E.2d 330, 340 (Ill. App. Ct. 2004).
329. Celotex Corp. v. Catrett, 477 U.S. 317, 320 (1986).
330. *Hutchcraft*, 726 N.E.2d at 1175.
331. *Koziol*, 723 N.E.2d at 324.
332. Willett v. Cessna Aircraft Co., 851 N.E.2d 626, 632 (Ill. App. Ct. 2006); Williams v. Covenant Med. Ctr., 737 N.E.2d 662 (Ill. App. Ct. 2000); *Koziol*, 723 N.E.2d at 325.
333. *Hutchcraft*, 726 N.E.2d 1171.
334. *Id.* at 1173.
335. *Id.*
336. *Id.*

facility's basement and standing in water when an improperly insulated welding cord caused an electric shock.[337] The concrete and mechanical subcontractors moved for summary judgment on the basis that the plaintiff could not determine ownership of the welding unit or cord or who was using the welding unit at the time of the accident.[338] The plant owner moved for summary judgment on the basis that the plaintiff could not establish facts that it controlled the project and therefore owed a duty of care to the plaintiff.[339] The trial court granted summary judgment in favor of the three defendants.[340] The appellate court reversed the grant of summary judgment in favor of the subcontractors because the plaintiff was able to produce "limited" evidence regarding ownership of the unit that was "not conclusively contradicted by anything else in the record."[341] At the same time, the appellate court upheld summary judgment in favor of the plant owner because the evidence did not indicate that the plant owner retained control of the work or safety issues related to the construction project.[342]

Another example of a successful *Celotex*-type motion is seen in *Rogers v. Matanda, Inc.*[343] There, the plaintiff, who was celebrating his twenty-first birthday, became intoxicated at a local bar and his friends escorted him outside of the building. As he walked alone around the building, he fell off of a retaining wall located on the defendant's property.[344] The plaintiff could not recall the reason why he fell, nor could he present any evidence that a dangerous condition on the defendant's property proximately caused his injuries.[345] Because there was insufficient evidence regarding the cause of the plaintiff's fall, summary judgment was proper.[346]

### C. Issues of Material Fact

Genuine issues of material fact precluding summary judgment exist where the material facts are (1) disputed or (2) undisputed but reasonable persons might draw different inferences from the undisputed facts.[347] In determining whether a genuine issue of material fact exists, the court

337. *Id.* at 1173-74.
338. *Id.* at 1174.
339. *Id.* at 1177.
340. *Id.* at 1173.
341. *Id.* at 1176.
342. *Id.* at 1178.
343. Rogers v. Matanda, Inc., 913 N.E.2d 15 (Ill. App. Ct. 2009).
344. *Id.* at 16-17.
345. *Id.* at 20.
346. *Id.* at 21.
347. Mashal v. City of Chicago, 2012 IL 112341, ¶ 49, 981 N.E.2d 951, 967; Williams v. Manchester, 888 N.E.2d 1, 9 (Ill. 2008).

construes the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent.[348] It does not make credibility determinations or weigh evidence.[349]

A judicial admission may not be contradicted in a motion for summary judgment.[350] Judicial admissions are deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.[351] A party is not bound by admissions regarding conclusions of law because courts—not the parties—determine the legal effect of the facts adduced.[352] Judicial admissions commonly arise from (1) any admission not the product of mistake or inadvertence in a verified pleading,[353] (2) pretrial answers to interrogatories,[354] and (3) testimony at a discovery deposition.[355] One must be vigilant in determining whether the record contains a judicial admission and refrain from carelessly conceding damaging facts or admitting to the absence of evidence.

In addition to judicial admissions, a party can concede facts in a number of other ways. Remember: (1) parties filing cross motions for summary judgment concede the absence of factual issues and invite the court to decide the question as a matter of law; [356] (2) facts contained in an affidavit in support of a summary judgment motion that are not contradicted by a counteraffidavit are admitted; (3) a movant cannot rest on his or her pleadings to create a genuine issue of material fact; and (4) the mere allegation that a material factual dispute exists does not create a triable issue of fact.[357] Note that the mere filing of cross motions does not establish that there is no issue of material fact, nor does it obligate the court

348. Adams v. N. Ill. Gas Co., 809 N.E.2d 1248, 1256 (Ill. 2004).

349. Coole v. Cent. Area Recycling, 893 N.E.2d 303, 309 (Ill. App. Ct. 2008); Perbix v. Verizon N., Inc., 919 N.E.2d 1096, 1100 (Ill. App. Ct. 2009).

350. *In re* Estate of Rennick, 692 N.E.2d 1150, 1156 (Ill. 1998). The purpose of the doctrine of judicial admissions is to remove the temptation to commit perjury. Herman v. Power Maint. & Constructors, LLC, 903 N.E.2d 852, 860 (Ill. App. Ct. 2009).

351. *Rennick*, 692 N.E.2d at 1156.

352. JPMorgan Chase Bank, N.A. v. Earth Foods, Inc., 939 N.E.2d 487, 499 (Ill. 2010); *Herman*, 903 N.E.2d at 860.

353. Crittenden v. Cook Cnty. Comm'n on Human Rights, 2012 IL App (1st) 112437, ¶ 45, 973 N.E.2d 408, 422.

354. Van's Material Co. v. Dep't of Revenue, 545 N.E.2d 695, 703 (Ill. 1989).

355. *Rennick*, 692 N.E.2d at 1156.

356. Pielet v. Pielet, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000, 1007; Gerdau Ameristeel US, Inc. v. Broeren Russo Constr., Inc., 2013 IL App (4th) 120547, ¶ 25, 992 N.E.2d 27, 32. This can also occur where one party files a summary judgment motion and the other files a motion for judgment on the pleadings. *See* State Bank of Cherry v. CGB Enters., Inc., 2013 IL 113836, ¶¶ 64-66, 984 N.E.2d 449, 467-68.

357. Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1223 (Ill. 1992) ("[T]he mere allegation that material factual disputes exist does not create a triable issue of fact."); Triple R Dev., LLC v. Golfview Apartments I, L.P., 2012 IL App (4th) 100956, ¶ 16, 965 N.E.2d 452, 458.

to render summary judgment.[358] The court may review the record to determine if the facts are actually disputed.[359]

Whether a question of fact exists will depend on the case and the type of litigation. For example, the question may depend on the value of shopping-network merchandise or the edibleness of prison food.[360] In a tort action, issues that are commonly reserved for the trier of fact include breach of duty,[361] existence of proximate cause,[362] intent,[363] motive,[364] consent,[365] and scope of employment.[366] Whether a duty of care is owed is a question of law but may be dependent upon operative facts.[367] In a contract action, issues commonly reserved for the trier of fact include breach,[368] waiver,[369] and ambiguities in the writing requiring admission of extrinsic evidence.[370] Questions of law include whether a contract is ambiguous and interpretation of a contract provision.[371] In a contract action, disposition by summary judgment is generally proper where there is no dispute as to the contractual language and formation of the agreement and only the language's effect and validity of the contract are at issue.[372] Summary judgment can be utilized in divorce actions on issues such as premarital and settlement agreements

358. *Pielet*, 2012 IL 112064, ¶ 28, 978 N.E.2d at 1007.

359. *See In re* Application of the Douglas Cnty. Treasurer, 2014 IL App (4th) 130261, ¶¶ 44-46, 5 N.E.3d 214, 225-26.

360. Mulligan v. QVC, Inc., 888 N.E.2d 1190, 1194 (Ill. App. Ct. 2008). In an interesting case, the Illinois Appellate Court, Fourth District, split over whether the Illinois Department of Corrections' "meal loaf" was edible. Arnett v. Snyder, 769 N.E.2d 943 (Ill. App. Ct. 2001) (the case appendix includes a recipe for the meal loaf).

361. Adams v. N. Ill. Gas Co., 809 N.E.2d 1248, 1257 (Ill. 2004); Mazin v. Chi. White Sox, Ltd., 832 N.E.2d 827, 833 (Ill. App. Ct. 2005).

362. Wiedenbeck v. Searle, 895 N.E.2d 1067, 1070 (Ill. App. Ct. 2008); Hussung v. Patel, 861 N.E.2d 678, 684 (Ill. App. Ct. 2007); *but see* Governmental Interinsurance Exch. v. Judge, 850 N.E.2d 183 (Ill. 2006) (upholding summary judgment where element of proximate cause was absent from plaintiff's case).

363. Borchers v. Franciscan Tertiary Province of Sacred Heart, Inc., 2011 IL App (2d) 101257, ¶ 30, 962 N.E.2d 29, 39; Schroeder v. Winyard, 873 N.E.2d 35, 44 (Ill. App. Ct. 2007).

364. Zuccolo v. Hannah Marine Corp., 900 N.E.2d 353, 359 (Ill. App. Ct. 2008).

365. Curtis v. Jaskey, 759 N.E.2d 962, 967 (Ill. App. Ct. 2001).

366. Bagent v. Blessing Care Corp., 862 N.E.2d 985, 992 (Ill. 2007).

367. Barnett v. Zion Park Dist., 665 N.E.2d 808, 812 (Ill. 1996); Zokhrabov v. Jeung-Hee Park, 2011 IL App (1st) 102672, ¶ 3, 963 N.E.2d 1035, 1038. *See* Simpkins v. CSX Transp., Inc., 2012 IL 110662, ¶¶ 14-21, 965 N.E.2d 1092, 1096-98 (discussing common law negligence requirements and the duty analysis in Illinois).

368. Covinsky v. Hannah Marine Corp., 903 N.E.2d 422, 426 (Ill. App. Ct. 2009).

369. Giannetti v. Angiuli, 635 N.E.2d 1083, 1090 (Ill. App. Ct. 1994).

370. Loyola Academy v. S&S Roof Maint., Inc., 586 N.E.2d 1211, 1215 (Ill. 1992); *see* Thompson v. Gordon, 948 N.E.2d 39, 47-48 (Ill. 2011) ("[A] contract is not rendered ambiguous merely because the parties disagree on its meaning.").

371. Richard W, McCarthy Trust Dated September 2, 2004, v. Ill. Cas. Co., 946 N.E.2d 895, 902-03 (Ill. App. Ct. 2011); William Blair & Co., LLC v. FI Liquidation Corp., 830 N.E.2d 760, 769 (Ill. App. Ct. 2005). *See* Standard Mut. Ins. Co. v. Lay, 2013 IL 114617, ¶¶ 23-36, 989 N.E.2d 591, 597-601 (interpreting terms of insurance contract on motion for summary judgment).

372. *Giannetti*, 635 N.E.2d at 1090.

(i.e., contract claims) and valuation and characterization of assets.[373] In short, there is no hard-and-fast rule about whether something is a factual issue. That will depend on the circumstances of each case.

D. Affidavits and Summary Judgment Motions

Illinois Supreme Court Rule 191 governs affidavits submitted in support of summary judgment motions.[374] As we have previously discussed, the movant must provide an affidavit complying with Rule 191 that shows the affiant is competent to testify to the facts stated in the affidavit. Where the movant supplies uncontradicted facts that warrant judgment in his or her favor, the nonmovant cannot rely on the pleadings to create an issue of material fact.[375] Nor can the nonmovant raise an issue of material fact by mere argument.[376] Because the nonmovant admits the facts—not legal or factual conclusions—contained in an unopposed affidavit, it is incumbent upon the nonmovant to oppose the movant's factual averments with a counteraffidavit.[377] The nonmovant can use two lines of attack by pointing out an affidavit's failure to comply with Rule 191 by pointing out its deficiencies and file a counteraffidavit presenting contradicting—but truthful—evidence. It bears repeating that failure to file a counteraffidavit can quickly spell defeat for your client.

A problem can arise where the nonmovant does not have access to information necessary to oppose the movant's affidavit because discovery has not occurred or because the person with the information will not respond. Where the nonmovant believes additional discovery is necessary, she may seek a continuance and file an affidavit that states she needs additional discovery in order to respond.[378] Where the person with the information cannot be reached or will not respond, Rule 191(b) provides that the affiant may name the person who would know the information and what the person would testify to if sworn.[379] However, the nonmovant should not be required to comply with Rule 191(b) when the defendant files a premature *Celotex*-type motion, because the nonmovant may not know

373. *In re* Marriage of Dann, 2012 IL App (2d) 100343, 973 N.E.2d 498 (characterization of assets); *In re* Marriage of Heroy, 895 N.E.2d 1025, 1056 (Ill. App. Ct. 2008) (same); *In re* Marriage of Braunling, 887 N.E.2d 759, 761 (Ill. App. Ct. 2008) (premarital agreements).

374. *See* discussion *supra* Part VI.

375. *See supra* note 324 and accompanying text.

376. Outboard Marine Corp. v. Liberty Mut. Ins., Co., 607 N.E.2d 1204, 1223 (Ill. 1992).

377. Burks Drywall, Inc. v. Washington Bank & Trust Co., 442 N.E.2d 648, 654 (Ill. App. Ct. 1982); Thurman v. Champaign Park Dist., 2011 IL App (4th) 101024, ¶ 21, 960 N.E.2d 18, 25 (quoting Raintree Homes, Inc. v. Village of Long Grove, 807 N.E.2d 439, 447 (Ill. 2004)); Fabiano v. City of Palos Hills, 784 N.E.2d 258, 269 (Ill. App. Ct. 2002) (court must disregard police officers' conclusions that medical examinations were consistent with sexual abuse).

378. Kane v. Motorola, Inc., 779 N.E.2d 302, 311 (Ill. App. Ct. 2002).

379. ILL. SUP. CT. R. 191(b) (effective Jan. 4, 2013).

what the witnesses will testify to before discovery is taken and will be unable to comply with Rule 191(b).[380]

E. Examples

In determining whether a summary judgment motion is proper, consider the following examples.

Example 1: Henry files a defective design strict liability action against Automation Co. Henry was injured while making adjustments inside Automation's product. The product did not require someone to be inside the product, while it was running, to make adjustments. At a deposition, Henry's expert testifies he has no opinion regarding any of the specific allegations of design defect. Henry adopts Automation's statement of uncontested facts, including the fact that the product would not be inherently dangerous if it did not require the operator to be inside in order to make adjustments. Automation files a *Fooden*-type summary judgment motion asserting that all the possible evidence has been presented and Henry did not show the product was defective. Because Henry was required to set forth expert opinion testimony that the product was defectively designed, causing it to be unreasonably dangerous, and did not, summary judgment is proper.[381]

Example 2: Murray files a section 1983 action against Village for damages as a result of a motor vehicle repossession. Village moves for summary judgment on the basis that its actions are protected by immunity and submits an affidavit from the police officer involved. The affidavit asserts the Village police department does not have a policy or plan to become involved in private repossessions. Because the police officer's affidavit can only go as to his personal knowledge and cannot establish the police department did not have such a policy or plan, summary judgment is improper.[382]

Example 3: Howard sues Insurance Company for fraudulent misrepresentation concerning a life insurance policy. Howard alleges the Insurance Company told him he could withdraw money from the account without penalty. The elements of fraudulent misrepresentation include a false statement of material fact, the plaintiff relied on the misrepresentation, and the defendant intended the plaintiff to rely on the misrepresentation.[383]

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380. Williams v. Covenant Med. Ctr., 737 N.E.2d 662, 671 (Ill. App. Ct. 2000).

381. Example based on *Henry v. Panasonic Factory Automation Co.*, 917 N.E.2d 1086 (Ill. App. Ct. 2009). *See also* Kleiss v. Bozdech, 811 N.E.2d 330 (Ill. App. Ct. 2004) (trial court should not have considered which parties' experts were more persuasive on summary judgment motion).

382. Example based on *Murray v. Poani*, 2012 IL App (4th) 120059, 980 N.E.2d 1275.

383. Freedberg v. Ohio Nat'l Ins. Co., 2012 IL App (1st) 110938, ¶ 36, 975 N.E.2d 1189, 1199.

Howard, at a deposition, testifies he could not remember the "exact verbiage" the insurance agent told him about whether he could make withdraws without penalty. Insurance Company moves for summary judgment on the basis that Howard has not produced any facts to support his fraudulent misrepresentation claim. Because Howard has not produced evidence that Insurance Company made a false statement, or that it intended he rely on the misrepresentation, summary judgment is proper.[384]

## X. SECTION 2-619.1 COMBINED MOTION PRACTICE

Section 2-619.1 of the Code permits a combined motion pursuant to section 2-615, section 2-619, and section 2-1005. A section 2-619.1 combined motion must be (1) in parts; (2) with each part limited to and specifying that it is made under one of sections 2-615, 2-619, or 2-1005; and (3) with each part clearly showing the points or grounds relied upon under the section upon which it is based.[385] The court will first consider and rule on the part pursuant to section 2-615, then proceed to the section 2-619 motion, and conclude with the section 2-1005 motion.[386] This procedure retains each section's procedural requirements and ensures that the cause of action is legally sufficient before addressing factual issues.

Section 2-619.1 does not authorize the commingling of distinctive claims pursuant to sections 2-615, 2-619, and 2-1005.[387] In fact, section 2-619.1 was the legislative response to the "slipshod" practice of hybrid motions combining section 2-615 and section 2-619-based arguments.[388] Courts look disapprovingly on commingled claims because an attempt to argue "multiple claims in a single motion might serve only to complicate and confuse" and ignores the procedural distinctions between sections 2-615, 2-619, and 2-1005.[389] Hybrid motions complicate matters because section 2-615 motions attack the legal sufficiency of the complaint while section 2-619 motions admit the legal sufficiency and assert an affirmative matter outside the complaint, and section 2-1005 motions assert that there is

384. Example based on *Freedberg*, 2012 IL App (1st) 110938, 975 N.E.2d 1189.

385. 735 ILL. COMP. STAT. 5/2-619.1 (2012).

386. *See* Janes v. First Fed. Sav. & Loan Ass'n of Berwyn, 312 N.E.2d 605, 609 (Ill. 1974) ("When, and only when, a legally sufficient cause of action had been stated should the court have entertained the motions for summary judgment and considered the affidavits filed in support thereof.").

387. Reynolds v. Jimmy John's Enters., LLC, 2013 IL App (4th) 120139, ¶ 20, 988 N.E.2d 984, 990; Howle v. Aqua Ill., Inc., 2012 IL App (4th) 120207, ¶ 72, 978 N.E.2d 1132, 1145; Jenkins v. Concorde Acceptance Corp., 802 N.E.2d 1279, 1276 (Ill. App. Ct. 2003); N. Trust Co. v. County of Lake, 818 N.E.2d 389, 398 (Ill. App. Ct. 2004).

388. Higgins v. Richards, 937 N.E.2d 215, 220 (Ill. App. Ct. 2010) (quoting Talbert v. Home Sav. of Am., 638 N.E.2d 354, 357 (Ill. App. Ct. 1994)).

389. *Howle*, 2012 IL App (4th) 120207, ¶ 72, 978 N.E.2d at 1145; *see also Reynolds*, 2013 IL App (4th) 120139, ¶ 20, 988 N.E.2d at 990-91.

no genuine issue of material fact. By combining all these arguments in one tangled motion, you would be making conflicting and illogical arguments. A hybrid motion also can create conflicting fact-based arguments, as section 2-615 and 2-619 motions admit the factual sufficiency of the complaint while a *Celotex*-type summary judgment motion asserts that the plaintiff cannot prove his or her case. The Illinois Supreme Court has expressly rejected the hybrid practice where the movant challenged the legal sufficiency of the complaint while also answering the complaint, filing affidavits stating facts, and demanding judgment on the merits.[390] Where a motion does not comply with section 2-619.1, comingles claims, or creates unnecessary complication and confusion, the trial court should reject the motion and give the movant the opportunity to file a motion in compliance with section 2-619.1, or file separate motions under sections 2-615, 2-619, or 2-1005 to avoid improper commingling of claims.[391]

In order to properly draft a section 2-619.1 motion, one should consider a section 2-619.1 combined motion as three separate motions contained in one document. For example, the defendant may file a combined motion with one part relying on a section 2-615 basis, such as failure to state a claim, and a second part relying on a section 2-619 basis, such as the plaintiff does not have standing.[392] Do not be fooled by those who file a section 2-619.1 motion without properly labeling the individual parts, or only file a single part. As section 2-619.1 requires the motion to be limited to and specify which section of the Code the part is pursuant to, the motion does not comply with section 2-619.1. Common sense suggests that if the motion is pursuant to a single section the motion should be filed pursuant to the appropriate section and not section 2-619.1 as it is not a combined motion, but a single motion.

Section 2-619.1 of the Code permits combined motions but does not permit the movant to ignore the procedural distinctions between sections 2-615, 2-619, and 2-1005 and throw everything into the motion and see what sticks.[393]

## XI. CONCLUSION

Understanding the commonly used pretrial motions in Illinois and knowing their distinctions is critical to a productive and successful practice. I cannot guarantee that by using the information provided you will win your motion or successfully defend against a motion—each case and judge is

390. *Janes*, 312 N.E.2d at 609.
391. *Howle*, 2012 IL App (4th) 120207, ¶ 73, 978 N.E.2d at 1145.
392. 735 ILL. COMP. STAT. 5/2-619(a)(9) (2012); Jackson v. Randle, 2011 IL App (4th) 100790, ¶ 12, 957 N.E.2d 572, 574-75.
393. *Reynolds*, 2012 IL App (4th) 120139, ¶ 20, 988 N.E.2d at 990.

unique. Hopefully, I can help you look like the knowledgeable and prepared attorney you are. To return to our net analogy, you should be able to use the pretrial motions as a series of nets to catch the nonmeritorious and factually baseless claims before wasting your client's time and money on a trial.

With the information provided in this Article you should be able to know which type of motion is appropriate. A rough rule of thumb for determining the right motion involves where the case is in the discovery process. Section 2-615 and section 2-619 motions are typically used early in the litigation and before discovery. Section 2-1005 motions for summary judgment are generally used after discovery has commenced. To put everything together one last time: A section 2-615(a) motion is properly used to argue that the complaint fails to allege a valid cause of action. A section 2-615(e) motion is properly used to request a judgment on the pleadings. A section 2-619(a) motion is proper where the plaintiff's cause of action is barred because of an outside matter—remember the outside matter is not just the defendant's version of the facts. A section 2-1005 summary judgment motion is proper where no genuine issue of material fact exists, or the plaintiff cannot prove a critical element of the case. You should also be able to draft and effectively respond to an opponent's section 2-615, 2-619, or 2-1005 motion. Do not be fooled by the motion's title and look at the substance of the motion to identify the real arguments. Consider whether the movant has filed the appropriate motion and met the applicable burden, then attack the merits of the motion.

Remember to always practice ethically and with integrity. It will help build a solid reputation and career and you only get one chance to establish your reputation.