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2 Pleadings and Motions in Business and Commercial Cases

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I. [2.1] INTRODUCTION

This chapter discusses pleadings and motions in business and commercial cases. This chapter incorporates and highlights two major "overhauls" of the Federal Rules of Civil Procedure: (a) the 2007 "Style Project," which aspired to further simplify and clarify federal procedure (see Committee Notes on Rules — 2007 Amendment at www.law.cornell.edu/rules/frcp/rule_1); and (b) the 2009 "Time-Computation Project," which was designed "to make the method of computing time consistent, simpler, and clearer" (see Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States: Time-Computation Project, p. 1, www.uscourts.gov/uscourts/rulesandpolicies/rules/supreme%20court%202008/excerpt_st_bk.pdf).

Business and commercial litigation under both the state and federal rules is a large umbrella covering a wide variety of causes of action, ranging from small claims to "bet your company" litigation. The factual and legal issues involved are often complex, and, particularly in high-stakes cases, the parties are typically represented by skilled and experienced attorneys who may specialize in a particular industry. While pleadings and motions in business and commercial cases are, by and large, governed by the general rules of civil procedure in both state and federal courts, careful attention to the applicable rules of practice and procedure is all the more important when the claims are complicated, opposing counsel is highly competent, and the potential consequences are considerable.

II. PLEADINGS

A. [2.2] Fact Pleading in State Court

Traditionally, practitioners and jurists distinguished between pleading in state court and federal court by noting that state court uses the "fact-pleading" standard, while federal court uses the "notice-pleading" standard. Under the Illinois fact-pleading standard, the pleader is required to set out "ultimate facts" that support his or her cause of action. *Johnson v. Matrix Financial Services Corp.*, 354 Ill.App.3d 684, 820 N.E.2d 1094, 1105, 290 Ill.Dec. 27 (1st Dist. 2004) (noting difference between federal notice-pleading standard and Illinois' fact-pleading standard). Section 2-603 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, which governs the form of pleadings, provides that "[a]ll pleadings shall contain a plain and concise statement of the pleader's cause of action." 735 ILCS 5/2-603(a). The Illinois Supreme Court has interpreted this provision as requiring "facts essential to [a] cause of action." *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 430 N.E.2d 976, 984, 58 Ill.Dec. 725 (1981) (discussing §33 of former Civil Practice Act (Ill.Rev.Stat. (1977), c. 110, ¶33), which was predecessor to §2-603), quoting Historical and Practice Notes, S.H.A. (1968), c. 110, ¶42. Under the fact-pleading standard, a complaint that "merely paraphrases the law, 'as though . . . to say that (the pleader's) case will meet the legal requirements, without stating the facts,' is insufficient." 430 N.E.2d at 984, quoting Historical and Practice Notes, S.H.A. (1968), c. 110, ¶42. Thus, a plaintiff must bring a claim within a legally recognized cause of action rather than allege mere conclusions. *Bell v. Hutsell*, 2011 IL 110724, ¶9, 955 N.E.2d 1099, 353 Ill.Dec. 288 (reciting well-established rule in Illinois that while plaintiff is not required to set forth evidence in complaint, plaintiff must allege specific

facts, not unsupported conclusions). In Illinois, conclusions of fact will not suffice to state a cause of action, regardless of whether they generally inform the defendant of the nature of the claim against him or her. *Edelman, Combs & Latturner v. Hinshaw & Culbertson,* 338 Ill.App.3d 156, 788 N.E.2d 740, 750, 273 Ill.Dec. 149 (1st Dist. 2003). Rather, in Illinois state courts, the pleader is required to set out ultimate facts that support his or her cause of action. *Id.*

Generally speaking, a litigant in Illinois state court must plead facts with greater particularity than is required in federal court, discussed in §2.3 below. However, the specificity required by the fact-pleading standard sometimes conflicts with the concept used in both federal and state courts that courts are to construe pleadings liberally to do substantial justice between the parties, and that the cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitle the plaintiff to recover. *Borowiec v. Gateway 2000, Inc.,* 209 Ill.2d 376, 808 N.E.2d 957, 961 – 962, 283 Ill.Dec. 669 (2004). Notwithstanding the provisions regarding liberal construction contained in 735 ILCS 5/2-603(c) and 5/2-612(b), however, courts have stated that these provisions do not authorize notice pleading. *Knox College, supra,* 430 N.E.2d at 985 – 986; *Edelman, Combs & Latturner, supra.*

B. [2.3] Notice Pleading in Federal Court and the Impact of *Bell Atlantic v. Twombly* on the Federal Notice-Pleading Standard

Pleading in federal court is governed by Fed.R.Civ.P. 8, which requires only

(1) a short and plain statement of the grounds for the court's jurisdiction . . . ;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief. Fed.R.Civ.P. 8(a).

Generally speaking, this means that a pleader must provide the opponent with fair notice of the claim and proposed relief, such that the opponent is able to formulate a response. *Swanson v. Citibank, N.A.,* 614 F.3d 400, 404 (7th Cir. 2010) (noting that under Fed.R.Civ.P. 8, plaintiff need not plead specific facts, but only give defendant "fair notice" of what plaintiff's claim is and basis for that claim); *Hefferman v. Bass,* 467 F.3d 596, 599 (7th Cir. 2006) (describing federal notice-pleading standard and noting that in contrast to fact-pleading standard in Illinois state court, plaintiff need not allege each specific fact giving rise to claim).

Readers of this handbook are undoubtedly familiar with *Conley v. Gibson,* 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99, 102 (1957), the U.S. Supreme Court case that established the "no set of facts" notice-pleading standard used by federal courts for 50 over years. Under this standard, and in contrast to the fact-pleading standard, plaintiffs were not required to include as much detail as would be required in state court. *See, e.g., Veazey v. Communications & Cable of Chicago, Inc.,* 194 F.3d 850, 854 (7th Cir. 1999) (noting that "[t]*he only function the pleadings must serve is to give notice of the claim; the development of legal theories and the correlation of facts to theory come later in the process*") [Emphasis added by *Veazey*.], quoting *International Marketing, Ltd. v. Archer-Daniels-Midland Co.,* 192 F.3d 724, 733 (7th Cir. 1999). However, in 2007, the U.S.

Supreme Court abruptly retired this longstanding standard in favor of a more refined standard that some practitioners have interpreted as being more similar to the fact-pleading standard than the more relaxed notice-pleading standard. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1974 (2007), the U.S. Supreme Court held that the complaint must contain "enough facts to state a claim to relief that is plausible on its face." In 2009, the Court expanded its holding further, noting that the "new" standard set forth in *Twombly* applies to all civil actions. *See Ashcroft v. Iqbal,* 556 U.S. 662, 173 L.Ed.2d 868, 129 S.Ct. 1937, 1949 (2009) (noting that Fed.R.Civ.P. 8 requires more than just "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"); *Wilson v. Ryker,* 451 Fed.Appx. 588, 589 (7th Cir. 2011) (citing *Iqbal* and noting that while pleading standard set forth by Fed.R.Civ.P. 8 and *Iqbal* does not require detailed factual allegations, it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"), quoting *Iqbal, supra,* 129 S.Ct. at 1949.

When the Supreme Court issued *Twombly* and *Iqbal,* many practitioners considered whether the landscape of federal notice pleading had dramatically changed and would result in stricter pleading requirements and, consequently, more frequent use of Fed.R.Civ.P. 12(b) to attempt dismissal of complaints for failure to state a claim. However, at least in the Seventh Circuit, the general sentiment is that *Twombly* has not resulted in any dramatic change in the notice-pleading standard. *See, e.g., Swanson, supra* (noting that Supreme Court "was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system")*; Bissessur v. Indiana University Board of Trustees,* 581 F.3d 599, 603 (7th Cir. 2009) ("Our system operates on a notice pleading standard; *Twombly* and its progeny do not change this fact."). *See also Smith v. Phoenix Seating Systems, LLC,* No. 09-568-GPM, 2010 WL 455508 at *2 (S.D.Ill. Feb. 3, 2010) (applying standard set forth in *Twombly* and *Conley, supra,* and denying motion to dismiss for failure to state claim). Moreover, a survey conducted by the Chief Counsel to the Federal Rules Committee of caselaw applying the *Twombly* and *Iqbal* rulings has concluded that "the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency. Instead, the appellate courts are taking a context-specific approach to applying *Twombly* and *Iqbal* and are instructing the district courts to be careful in determining whether to dismiss a complaint. See Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee regarding Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal,* p. 4 (Nov. 23, 2011), www.uscourts.gov/uscourts/rulesandpolicies/rules/iqbalmemo_112311.pdf.

Nevertheless, the *Twombly* and *Iqbal* decisions, as well as more recent cases interpreting these holdings, are still important for practitioners of business and commercial litigation to study in that the Supreme Court's specific concern in *Twombly* "was with the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement that would spare the defendant that burden." *See Cooney v. Rossiter,* 583 F.3d 967, 971 (7th Cir. 2009) (noting that height of "new" pleading requirement is relative to circumstances and that complexity of litigation is one of considerations to be taken into account by court in determining whether complaint adequately states claim); *Smith v. Duffey,* 576 F.3d 336 (7th Cir. 2009) (noting that one of Court's concerns in *Twombly* was that defendant in complex litigation should not be put to cost of pretrial discovery, which cost can be so steep as to coerce settlement on terms favorable to plaintiff, even when claim is very weak). Practitioners should therefore familiarize themselves with the standard articulated by the Supreme Court in *Twombly* and caselaw in the Seventh Circuit that has further interpreted and refined the standard in Illinois.

Notwithstanding the holdings in *Twombly* and *Iqbal*, as a general rule, Fed.R.Civ.P. 8 as interpreted by the Seventh Circuit still requires only that the complaint state a claim, not that it plead the facts that, if true, would establish that the claim was valid. *Swanson, supra* (noting that rulings in *Twombly* and other cases interpreting Fed.R.Civ.P. 8 did not cast any doubt on validity of Fed.R.Civ.P. 8)*; Cooney, supra*, 583 F.3d at 971 ("determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"), quoting *Iqbal, supra*, 129 S.Ct. at 1950. As articulated in *Twombly*, a claim is "plausible on its face" when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, supra*, 129 S.Ct. at 1949, quoting *Twombly, supra*, 127 S.Ct. at 1974. "This said, in examining the facts and matching them up with the stated legal claims, we give 'the plaintiff the benefit of imagination, so long as the hypotheses are consistent with the complaint.' " *Phoenix Seating Systems, supra*, 2010 WL 455508 at *2, quoting *Bissessur, supra*, 581 F.3d at 602 – 603. Practitioners should note that while Fed.R.Civ.P. 8 was significantly restructured during the 2007 Style Project, it is apparent that the courts are embracing the drafters' admonition that these revisions are only stylistic and effect no substantive change. As noted above, practitioners should stay up to date with the most recent interpretations of *Twombly* and *Iqbal* to ensure their pleadings are defensible.

C. [2.4] The Complaint

The complaint is the initial pleading that sets forth the plaintiff's cause of action or claim for relief and commences the lawsuit. 735 ILCS 5/2-603; Fed.R.Civ.P. 8. Under either the fact-pleading or notice-pleading standard, the plaintiff's allegations must be sufficient to bring the claim within the scope of a legally recognized cause of action. The purpose of the complaint is twofold: (1) to set forth the facts giving rise to the plaintiff's cause of action against the defendant in a way that reasonably informs the opposing party of the nature of the claim(s) being brought against it; and (2) to do so in a way that staves off — or forces one's opponent to carefully consider filing — a motion to dismiss for failure to state a claim. To the extent counsel for the plaintiff can avoid unnecessary motion practice by drafting a strong complaint, he or she should, as such practice will increase significantly the costs of litigation before the parties can begin the discovery process. Generally, it is the complaint that identifies the subject matter of the action and defines the relevancy limits for discovery.

1. [2.5] Considerations Prior to Drafting

Before commencing the drafting process, practitioners should carefully consider not only all of the pertinent facts to their client's case (both favorable and harmful) but also the legal theories involved. Practitioners should attempt to gather all relevant facts by interviewing relevant witnesses and gathering and reviewing all pertinent documents (including all relevant e-mails and electronically stored documents and information) to ascertain the factual circumstances underlying the cause of action and the strengths and potential weaknesses of the case. Practitioners should also conduct a thorough review of all relevant caselaw to ensure they adequately "fit" the facts within the appropriate legal framework and do so in a way that informs and enables the practitioner to plead around any grounds for dismissal his or her opponent will

consider. The complaint is the first opportunity to present the plaintiff's legal theory of the case and "story" to the judge and opposing party. Therefore, it is important to gather all pertinent facts and perform the necessary legal research prior to filing the complaint, as the plaintiff will be limited to pursuing only the legal theories and causes of action asserted in the complaint.

The importance of this concept as applied to state practice is illustrated in *Gold Realty Group Corp. v. Kismet Café, Inc.*, 358 Ill.App.3d 675, 832 N.E.2d 403, 295 Ill.Dec. 252 (1st Dist. 2005). In *Gold Realty*, the plaintiff landlord filed an action against the defendant tenants, seeking unpaid rent and possession of a building that had been destroyed in a fire. The plaintiff moved for, and obtained, summary judgment on a legal theory that was not contained in the complaint.

On appeal, the appellate court considered whether the plaintiff could move for summary judgment based on allegations and a legal theory not contained in the initial pleading. The court noted that a summary judgment motion, like all dispositive motions, considers the pleadings to determine what the issues are. 832 N.E.2d at 407, citing *Olivieri v. Coronet Insurance Co.*, 173 Ill.App.3d 867, 528 N.E.2d 986, 988, 124 Ill.Dec. 95 (1st Dist. 1987), and *Metropolitan Sanitary District of Greater Chicago v. Anthony Pontarelli & Sons, Inc.*, 7 Ill.App.3d 829, 288 N.E.2d 905, 911 – 912 (1st Dist. 1972). The court reversed the trial court's ruling on summary judgment, reasoning that the plaintiff never pleaded the theory asserted on summary judgment and never sought to amend the complaint. The appellate court rejected the plaintiff's contention that the facts contained in the complaint were sufficient to give the defendants notice of the unpleaded legal theory. Specifically, the court held that "[t]he theory on which the plaintiff was awarded possession of the premises *never was pled in its complaint*, directly or indirectly." [Emphasis added.] 832 N.E.2d at 407. Thus, the plaintiff could not be awarded judgment based on a theory it had not alleged in its complaint.

The Illinois appellate court revisited this issue in *Filliung v. Adams*, 387 Ill.App.3d 40, 899 N.E.2d 485, 326 Ill.Dec. 268 (1st Dist. 2008). In *Filliung*, the appellate court affirmed the trial court's order granting the defendant's motion to strike the plaintiff's motion for summary judgment because the latter motion was based on facts not pleaded in the complaint. The court noted that "if a plaintiff desires to place issues in controversy that were not named in the complaint, the proper course of action is to move to amend the complaint." 899 N.E.2d at 496, citing *Gold Realty, supra*.

Gold Realty and *Filliung* illustrate the importance of both developing legal theories prior to filing the initial pleading, as well as adhering to the pleading rules set forth in the Code of Civil Procedure and seeking amendment when necessary to conform to additional facts uncovered during discovery. As the court in *Gold Realty* stated, though its decision may have seemed "hypertechnical," the rules governing pleading and motion practice exist for a reason, *i.e.*, to foster efficiency, fairness, order, and predictability. 832 N.E.2d at 407. It is with these principles in mind that the authors begin this chapter's discussion of pleading practice.

2. Drafting the Complaint

a. [2.6] General Suggestions

A complaint should be straightforward and concise. Overly verbose or repetitious language may not destroy the sufficiency of the complaint, but it could decrease its effectiveness. Practitioners should present a clear, concise recitation of the facts giving rise to the cause of action asserted, using plain English and short sentences. The complaint provides the first opportunity to control the vocabulary used to describe key events and concepts in the case, and careful attention should be given to defining key terms and selecting words that provide the desired impact on the reader. The complaint also provides an opportunity to signal to the opponent that the practitioner has conducted his or her due diligence and has investigated the facts supporting the claims asserted.

b. [2.7] Practical Considerations

The complaint is the "story" of how the plaintiff has been wronged by the defendant. Usually, the most effective way to organize the complaint is to tell this story in chronological fashion. Practitioners should always keep in mind the elements that are needed to plead a cause of action. Thus, for example, if a party is alleging breach of contract, it should include facts and allegations to support the existence of a valid and enforceable contract through the plaintiff's offer to enter into the contract, the defendant's acceptance of the plaintiff's offer, the plaintiff's performance of the contract, the defendant's breach of the contract, and the plaintiff's injury resulting from this breach.

When drafting the complaint, the practitioner also should anticipate the likely response by the defendant. The drafter should avoid allegations that are easy for the defendant to deny because they include unnecessarily contentious modifiers or are combined with more controvertible allegations. A simple allegation that the defendant "did not pay" may be more difficult to deny than that the defendant "wrongfully refused to pay" or that the defendant "refused to pay and otherwise breached the contract." To the extent possible, key factual allegations should be stated in separate paragraphs. For example, it may be more effective to set forth a defendant's complained-of conduct in paragraphs separate from the characterization of this conduct as wrongful. A single paragraph that alleges that "the defendant engaged in the following fraudulent conduct" and then lists this conduct in subparagraphs may provide an opportunity for the defendant to deny the entire paragraph when it is only the pleader's characterization of the conduct as fraudulent that is deniable.

c. [2.8] Alleging Facts "Upon Information and Belief" and Incorporating Facts by Reference

In state practice, §2-605(a) of the Code of Civil Procedure expressly allows any pleading, including verified pleadings, to contain allegations "upon information and belief." 735 ILCS 5/2-605(a). *See Cohen v. Smith,* 269 Ill.App.3d 1087, 648 N.E.2d 329, 336, 207 Ill.Dec. 873 (5th Dist. 1995).

Although there is no express authorization in the federal rules for pleading "upon information and belief," the Seventh Circuit has approved the use of such pleading under Fed.R.Civ.P. 8, and district courts in this circuit have declined to dismiss claims based on information and belief, even after *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1974 (2007). *See Brown v. Budz*, 398 F.3d 904, 914 (7th Cir. 2005) (holding that allegations based on information and belief should be allowed in federal practice, particularly given matters peculiarly within knowledge of defendants); *Smith v. Harvey*, No. 08 C 816, 2010 WL 1292473 at *4 (N.D.Ill. Mar. 29, 2010) (noting that while Supreme Court in *Twombly* and *Iqbal* made clear that conclusional allegations do not satisfy Fed.R.Civ.P. 8(a), the Court "did not strike [the phrase 'upon information and belief'] from the lexicon when it made the pleading rules more demanding"). However, if a pleader is alleging fraud or mistake, he or she must take special caution to ensure that both Fed.R.Civ.P. 9(b) and 11 are followed regarding pleading with particularity.

In both state and federal practice, allegations of fraud may not be pleaded "upon information and belief." *See Bankers Trust Co. v. Old Republic Insurance Co.,* 959 F.2d 677, 683 – 684 (7th Cir. 1992) (noting that allegations of fraud based on information and belief are improper under Fed.R.Civ.P. 9(b) and 11); *Grossman v. Waste Management, Inc.,* No. 83 C 2167, 1983 WL 1370 at *6 (N.D.Ill. Sept. 9, 1983) (reciting general rule that allegations of fraud may not be pleaded "on information and belief" under Fed.R.Civ.P. 9(b), but that such allegations are sufficient if complaint includes factual basis for assertions made on information and belief); *Boatwright v. Delott,* 267 Ill.App.3d 916, 642 N.E.2d 875, 877, 205 Ill.Dec. 10 (1st Dist. 1994) (noting that complaint alleging fraud must set out facts with specificity, particularity, and certainty under Illinois procedural law governing pleadings). For further discussion on the heightened pleading standards for fraud in state and federal practice, see §2.16 below.

Both state and federal rules permit the pleader to incorporate earlier allegations by reference in later counts rather than repeating detailed factual allegations in each count. See Illinois Supreme Court Rule 134; Fed.R.Civ.P. 10(c). The following is a commonly used example of such a pleading:

Count I
Breach of Contract

20. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 19 of this Complaint as Paragraph 20 as if set forth fully herein.

3. [2.9] Elements of the Complaint

As discussed in §2.2 above, §2-603 of the Code of Civil Procedure requires that a complaint contain "a plain and concise statement of the pleader's cause of action." 735 ILCS 5/2-603(a). In federal practice, Fed.R.Civ.P. 8(a) requires that the complaint contain

(1) a short and plain statement of the grounds for the court's jurisdiction . . . ;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

The complaint must include information that will reasonably inform the opposing party of the nature of the claim that is being brought. *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 430 N.E.2d 976, 984, 58 Ill.Dec. 725 (1981); *Thompson v. Illinois Department of Professional Regulation,* 300 F.3d 750, 753 (7th Cir. 2002). Allegations in a complaint must be well-grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. S.Ct. Rule 137; Fed.R.Civ.P. 11(b).

In state practice, the pleading party must state in the body of its pleading the names of all parties for and against whom relief is sought. 735 ILCS 5/2-401(c).

4. Format

a. [2.10] Pleading Actions at Law and in Equity

Practitioners in business and commercial litigation often must bring actions both at law, for damages, and in chancery, for equitable relief (*i.e.*, injunctive relief, rescission, specific performance). In state practice, S.Ct. Rule 135 is the specific provision that governs pleadings seeking equitable relief. If a practitioner in state practice must bring an action for both legal and equitable relief, the actions must be pleaded in separate counts, labeled as "separate action at law" and "separate action in chancery." S.Ct. Rule 135(b). This requirement applies to complaints, answers, counterclaims, third-party claims, and "any other pleadings wherever legal and equitable matters are permitted to be joined." *Id.* Practitioners must also check with the appropriate circuit court rules to determine how to label a cause of action being brought at law or in chancery, or both. For example, the Circuit Court of Cook County requires a pleading for a complaint being brought at law to contain the following heading at the top of the complaint: "IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, LAW DIVISION." A complaint being brought in chancery would be entitled, "IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CHANCERY DIVISION." Cook County Circuit Court General Order No. 6.1(a).

Federal practice has no similar provision regarding the labeling of complaints seeking both legal and equitable relief.

b. [2.11] Caption

In state practice, the caption must include the following:

1. the name of the court;

2. the name of the county and state where the action is commenced;

3. the words "at law," "in chancery," or other designation conforming to both S.Ct. Rule 135 and the organization of the respective circuit court;

4. the names of the parties;

5. the case number assigned to the complaint by the clerk of the court; and

6. the name of the pleading, which in the case of the complaint is indicated by "Complaint" or "Verified Complaint."

Again, practitioners must always check each court's local rules, as well as the assigned judge's standing order, if available, to ensure that the pleading conforms to the applicable rules. The local rules for each district court generally are available online at the courts' respective websites.

c. [2.12] Jurisdictional Allegations

In both state and federal practice, the allegations stating the grounds for jurisdiction generally follow the caption and introductory paragraph. These jurisdictional allegations include the residence of the plaintiff and defendant giving rise to the appropriate forum and venue. In state practice, the plaintiff must allege facts to demonstrate that the court can exercise personal jurisdiction over the defendant. If the defendant is not a resident of Illinois, the plaintiff must allege facts to establish that the state court's exercise of personal jurisdiction over the nonresident defendant under Illinois' long-arm statute (735 ILCS 5/2-209) satisfies due process. In doing so, the plaintiff must meet the following criteria: (1) that the nonresident defendant had minimum contacts with Illinois such that the defendant had fair warning that he or she may be required to defend himself or herself there; (2) that the action arose out of or relates to the defendant's contacts with Illinois; and (3) that it is reasonable to require the defendant to litigate in Illinois. *Ores v. Kennedy*, 218 Ill.App.3d 866, 578 N.E.2d 1139, 1144, 161 Ill.Dec. 493 (1st Dist. 1991). If the contacts between the defendant and Illinois are sufficient to satisfy the requirements of due process, then the requirements of the Illinois long-arm statute have been met, and no other inquiry is necessary. *Zazove v. Pelikan, Inc.*, 326 Ill.App.3d 798, 761 N.E.2d 256, 260, 260 Ill.Dec. 412 (1st Dist. 2001).

Practitioners in business and commercial litigation generally will not have difficulty establishing personal jurisdiction, as nonresident commercial defendants either will have Illinois branch offices, execute contracts in Illinois or that are to be performed in Illinois, commit the tortious act at issue in Illinois, or established minimum contacts through the "stream of commerce" theory. See generally 735 ILCS 5/2-209; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559, 567 (1980) (stating that forum state may assert personal jurisdiction over nonresident defendant corporation that delivers its products into stream of commerce with expectation that they will be purchased in forum state); *Autotech Controls Corp. v. K.J. Electric Corp.*, 256 Ill.App.3d 721, 628 N.E.2d 990, 995 – 996, 195 Ill.Dec. 526 (1st Dist. 1993) (holding that court may exercise jurisdiction over nonresident corporate defendant purchaser who engaged in commercial relationship with Illinois corporation through placing of orders to Illinois plaintiff). However, as more and more transactions occur on the Internet, where buyer and seller may never have any personal contact, practitioners should conduct their due diligence to ensure that the court has personal jurisdiction over a nonresident defendant. *See Bombliss v. Cornelsen*, 355 Ill.App.3d 1107, 824 N.E.2d 1175, 1180, 291 Ill.Dec. 925 (3d Dist. 2005) (noting that "[t]he type of Internet activity that is sufficient to establish

personal jurisdiction remains an emerging area of jurisprudence"); *Larochelle v. Allamian,* 361 Ill.App.3d 217, 225, 836 N.E.2d 176, 296 Ill.Dec. 761 (2d Dist. 2005) (same). Illinois courts have found that "jurisdiction may be asserted if the defendant transacts business in foreign jurisdictions via an interactive website where contracts are completed online and the defendant derives profits directly from web-related activity." *Bombliss, supra,* 824 N.E.2d at 1180. *See also LaRochelle, supra,* 836 N.E.2d at 184 – 185. However, "jurisdiction does not attach where the nonresident maintains a passive website that merely provides information about the defendant's products." *Bombliss, supra,* 824 N.E.2d at 1180. *See also LaRochelle, supra,* 836 N.E.2d at 184. A website may be interactive in that it allows customers to communicate regarding the defendant's product or services. *Bombliss, supra,* 824 N.E.2d at 1180; *LaRochelle, supra,* 836 N.E.2d at 185. In federal court, whether personal jurisdiction is established for these websites depends on the level of interactivity and the commercial nature of the information exchanged. *Bombliss, supra,* 824 N.E.2d at 1180; *Larochelle, supra,* 836 N.E.2d at 185. *See also Jennings v. AC Hydraulic A/S,* 383 F.3d 546 (7th Cir. 2004); *Berthold Types Ltd. v. European Mikrograf Corp.,* 102 F.Supp.2d 928, 932 – 933 (N.D.Ill. 2000).

In federal practice, Fed.R.Civ.P. 8(a) specifically requires that the pleading contain "a short and plain statement of the grounds" on which the court's jurisdiction depends. The jurisdictional statement either must include the federal law or statute giving rise to a federal question under 28 U.S.C. §1331 or explicitly set forth the citizenship of the plaintiff and defendant that gives rise to complete diversity under 28 U.S.C. §1332.

Limited liability companies (LLCs), which have become increasingly common as business entities, are frequently named as plaintiffs or defendants in commercial litigation. Practitioners should be aware of a specific requirement in the Seventh Circuit relating to the citizenship of LLCs. When the basis for federal jurisdiction is diversity rather than federal-question jurisdiction, practitioners should take caution that in the Seventh Circuit, the citizenship of an LLC is determined not by reference to the state where the LLC was formed or where it has its principal place of business, but rather by reference to the citizenship of each of the LLC's members. *Cosgrove v. Bartolotta,* 150 F.3d 729, 731 (7th Cir. 1998) (establishing rule in Seventh Circuit that citizenship of LLC is based on citizenship of each individual member). *See also Mutual Assignment & Indemnification Co. v. Lind-Waldock & Co.,* 364 F.3d 858, 861 (7th Cir. 2004) (recognizing rule established in *Bartolotta*)*; MTC Development Group, LLC v. Lewis,* No. 11 C 7062, 2011 WL 5868236 at *3 (N.D.Ill. Nov. 20, 2011) (noting that it has been law in Seventh Circuit since *Bartolotta* that citizenship of LLC is determined not by reference to where LLC was formed but by reference to citizenship of each member). Failure to properly name the citizenship of each individual member of the party LLC to advise the court that complete diversity of citizenship exists could lead to dismissal of a complaint or an unfavorable attorneys' fees ruling based on improper removal. *See, e.g., Cosgrove, supra,* 150 F.3d at 731 (noting that failure to identify citizenship of individual member LLCs could result in dismissal of complaint for lack of subject-matter jurisdiction); *MTC Development Group, supra,* 2011 WL 5868236 at **2 – 3 (awarding attorneys' fees to plaintiff based on defendant's failure to properly identify citizenship of LLC parties, when removal was improper because diversity of citizenship was lacking).

Federal-question jurisdiction exists only when the federal question is presented on the face of the plaintiff's complaint, by invocation of the appropriate federal statute or law. *Burda v. M. Ecker Co.,* 954 F.2d 434, 438 (7th Cir. 1992). Similarly, if a plaintiff relies on diversity

jurisdiction but fails to allege the citizenship of the parties, the court will dismiss the complaint for want of jurisdiction. *See America's Best Inns, Inc. v. Best Inns of Abilene, L.P.,* 980 F.2d 1072, 1074 (7th Cir. 1992). Moreover, in the case of diversity jurisdiction, if the defendant is not a resident of Illinois, the plaintiff also has the burden of showing that jurisdiction is proper under the Illinois long-arm statute. *RAR, Inc. v. Turner Diesel, Ltd.,* 107 F.3d 1272, 1276 (7th Cir. 1997).

d. [2.13] Claims

The complaint may contain as many causes of action as a plaintiff has. In both state and federal practice, each cause of action must be separately designated and numbered. 735 ILCS 5/2-613(a); Fed.R.Civ.P. 10(b). If the plaintiff is bringing a cause of action under a statute, S.Ct. Rule 133(a) requires that the plaintiff cite to the statute in connection with the allegation. Practitioners bringing a cause of action for breach of contract in state court should also keep in mind S.Ct. Rule 133(c), which provides that if a party is pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his or her part.

Both state and federal practice permits pleading in the alternative. When a party is in doubt as to the truth of one or more statements of fact, the party may state them in the alternative. 735 ILCS 5/2-613(b); Fed.R.Civ.P. 8(d)(2). Thus, for example, a party may plead in the same complaint a cause of action for breach of contract and, in the alternative, promissory estoppel. *See, e.g., Wagner Excello Foods, Inc. v. Fearn International, Inc.,* 235 Ill.App.3d 224, 601 N.E.2d 956, 176 Ill.Dec. 258 (1st Dist. 1992); *Challenge Aspen v. King World Productions Corp.,* No. 00 C 6868, 2001 WL 969081 at *2 (N.D.Ill. Aug. 23, 2001).

(1) [2.14] Use of separate counts

In state and federal practice, each separate cause of action on which a separate recovery might be had must be stated in a separate count. Each count must be separately pleaded, designated, and numbered. Each count must also be divided into paragraphs numbered consecutively, with each paragraph containing a separate allegation. 735 ILCS 5/2-603(b); Fed.R.Civ.P. 10(b). Practitioners should always check the appropriate district court's local rules, as well as the individual judge's standing order, to ensure all specific formatting requirements are met.

(2) [2.15] Use of exhibits

When the allegations in a complaint being brought in state court are based on a writing, as many business and commercial litigation cases are, the pleading must attach the writing forming the basis of the cause of action, provided that the plaintiff has access to this writing. 735 ILCS 5/2-606. Section 2-606 states in pertinent part, "If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." Thus, if a plaintiff purports to allege a breach of contract action, for example, the plaintiff must attach the

contract forming the basis of the plaintiff's action as an exhibit to the complaint. *See also Bajwa v. Metropolitan Life Insurance Co.,* 208 Ill.2d 414, 804 N.E.2d 519, 531, 281 Ill.Dec. 554 (2004). Importantly, when the exhibit conflicts with the averments in the complaint, the exhibit controls. *Id.*

Federal pleading practice does not require the plaintiff to attach to the complaint the document forming the basis of its cause of action. However, it is important to keep in mind that, as in state practice, if any exhibit is attached and it conflicts with the allegations in the complaint, the exhibit controls. See Fed.R.Civ.P. 10(c); *London v. RBS Citizens, N.A.,* 600 F.3d 742, 747 n.5 (7th Cir. 2010) (noting that in event of conflict between complaint and attachment thereto that forms basis of plaintiffs' claims, attachment prevails and dismissal is warranted if attachment negates plaintiffs' claims). Moreover, if a defendant moves to dismiss a complaint pursuant to Fed.R.Civ.P. 12(b) and attaches a document that is referenced in the complaint and that could defeat the plaintiff's claim, the court can consider such a document as well. *See Venture Associates Corp. v. Zenith Data Systems Corp.,* 987 F.2d 429, 431 (7th Cir. 1993) (noting that documents that defendant attaches to motion to dismiss are considered part of pleadings if they are referred to in plaintiff's complaint and are central to his or her claim).

(3) Consideration for certain claims

(a) [2.16] Pleading fraud or mistake

In both state and federal practice, a complaint alleging fraud is measured against a heightened pleading standard that requires an elevated degree of particularity. In addition to Illinois' fact-pleading standard, a complaint alleging fraud in Illinois must set out facts with specificity, particularity, and certainty under Illinois procedural law governing pleadings. *Board of Education of City of Chicago v. A, C & S, Inc.,* 131 Ill.2d 428, 546 N.E.2d 580, 594, 137 Ill.Dec. 635 (1989); *Cwikla v. Sheir,* 345 Ill.App.3d 23, 801 N.E.2d 1103, 1110, 280 Ill.Dec. 158 (1st Dist. 2003) (noting high standard of specificity required for fraud); *Small v. Sussman,* 306 Ill.App.3d 639, 713 N.E.2d 1216, 1221, 239 Ill.Dec. 366 (1st Dist. 1999). The Illinois Supreme Court has described this standard as requiring specific allegations of facts from which fraud is a necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations, and to whom they were made. *A, C & S, supra,* 546 N.E.2d at 594. *See also Green v. Rogers,* 234 Ill.2d 478, 917 N.E.2d 450, 460 (2009) (noting standard of higher specificity for pleading fraud established in *A, C & S*). In other words, a pleader must do more than simply allege the elements of fraud. Practitioners should therefore take special care to ensure that allegations of fraud are pleaded with a particular degree of specificity, including "what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Prime Leasing, Inc. v. Kendig,* 332 Ill.App.3d 300, 773 N.E.2d 84, 92, 265 Ill.Dec. 722 (1st Dist. 2002), quoting *People ex rel. Peters v. Murphy-Knight,* 248 Ill.App.3d 382, 618 N.E.2d 459, 463, 187 Ill.Dec. 868 (1st Dist. 1993). The heightened pleading standard applies to fraud claims brought both under Illinois common law and the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* See 815 ILCS 505/2; *Connick v. Suzuki Motor Co.,* 174 Ill.2d 482, 675 N.E.2d 584, 591, 221 Ill.Dec. 389 (1996) (evaluating allegations of common-law and statutory fraud using heightened pleading standard required for fraud); *Freedom Mortgage Corp. v. Burnham Mortgage, Inc.,* 720 F.Supp.2d 978, 1003 – 1004

(N.D.Ill. 2010). Importantly, an allegation of fraud based on information and belief cannot be sustained, unless the facts on which the belief is founded are stated in the pleadings. *Green, supra,* 917 N.E.2d at 461.

When pleading fraud or mistake in federal court, litigants must comply with the codified specificity requirements set forth in Fed.R.Civ.P. 9. Fed.R.Civ.P. 9(b) states, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b) requires that a party plead fraud and mistake with particularity; however, a party may plead malice, intent, knowledge, and other conditions of mind generally. Because fraud is a serious allegation that can have a stigmatizing effect on a defendant, the rules require that these claims be pleaded with particularity (1) to ensure that the defendant has fair notice of the plaintiff's claim, (2) to safeguard the defendant against spurious accusations and the potential harm to the defendant's reputation, (3) to reduce the possibility that a meritless fraud claim can remain in the case by requiring a certain degree of investigation prior to discovery, and (4) to protect the defendant against "strike" suits. *See Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777 (7th Cir. 1994). Notably, claims sounding in fraud are subject to the heightened pleading standard of Fed.R.Civ.P. 9(b), regardless of whether the word "fraud" actually appears in the complaint. *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007); *Kennedy v. Venrock Associates*, 348 F.3d 584, 594 (7th Cir. 2003). This arises frequently in the context of shareholder derivative disputes or in securities litigation in which a plaintiff attempts to plead around the heightened pleading standard in Fed.R.Civ.P. 9. However, courts will still apply Fed.R.Civ.P. 9(b) if the complaint essentially alleges fraud. *See, e.g., Oakland County Employees' Retirement System v. Massaro,* 736 F.Supp.2d 1181 (N.D.Ill. 2010) (applying Fed.R.Civ.P. 9(b) to derivative shareholder complaint and dismissing for failure to state claim).

The combination of the notice-pleading standard and the particularity requirements of Fed.R.Civ.P. 9 may present a vexing problem to a plaintiff seeking to plead fraud. Generally speaking, a plaintiff must allege more than mere conclusory allegations or the technical elements of fraud. Seventh Circuit caselaw interprets Fed.R.Civ.P. 9(b) to require the plaintiff to fill in the first paragraph of any newspaper story — the who, what, when, where, and how of the alleged scheme. *Ackerman v. Northwestern Mutual Life Insurance Co.*, 172 F.3d 467, 469 (7th Cir. 1999) (noting that heightened pleading standard under Fed.R.Civ.P. 9(b) for fraud is required, in part, because charges of fraud ask courts to in effect rewrite parties' contract or otherwise disrupt established relationships). Thus, as a general rule, the pleader should allege (1) the time, place, and contents of the false representations or omissions, with an explanation of why they were fraudulent; (2) the identity of the person making the misrepresentations; (3) how the misrepresentations misled the plaintiff; and (4) what the speaker gained from the fraud. *See, e.g., Trans Helicoptere Service v. Jet Support Services, Inc.*, No. 03 C 0498, 2004 WL 725700 at **3 – 4 (N.D.Ill. Mar. 30, 2004).

Generally speaking, pleading allegations of fraud based on information and belief is improper under both Fed.R.Civ.P. 9(b) and 11. *See Bankers Trust Co. v. Old Republic Insurance Co.*, 959 F.2d 677, 683 – 684 (7th Cir. 1992). In the Seventh Circuit, the court will relax the particularity requirement if the facts necessary to plead fraud or mistake are peculiarly within the defendant's knowledge. *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1051 (7th Cir. 1998). However, when pleading such facts on information and belief, allegations of fraud must be

accompanied by a statement of the facts on which the belief is founded. *Bankers Trust Co., supra.* Similarly, alleging facts on information and belief is permissible when these allegations are verifiable by public information or by a government agency. *See Grossman v. Waste Management, Inc.,* No. 83 C 2167, 1983 WL 1370 at *7 (N.D.Ill. Sept. 9, 1983).

(b) [2.17] Private Securities Litigation Reform Act

A complaint brought under the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub.L. No. 104-67, 109 Stat. 737, contains its own heightened pleading standard. 15 U.S.C. §78u-4(b). Briefly, causes of action under the PSLRA allege securities fraud and insider trading based on acts that allegedly misled investors in publicly traded corporations. Under the PSLRA, such a securities fraud complaint must (1) "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement . . . is made on information and belief, . . . state with particularity all facts on which that belief is formed"; and (2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. §§78u-4(b)(1), 78u-4(b)(2)(A). Plaintiffs alleging such a cause of action must not only plead a violation with particularity but also "marshal sufficient facts to convince a court at the outset that the defendants likely intended 'to deceive, manipulate, or defraud.' " *Makor Issues & Rights, Ltd. v. Tellabs, Inc.,* 437 F.3d 588, 594 – 595 (7th Cir. 2006), quoting *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 47 L.Ed.2d 668, 96 S.Ct. 1375, 1381, n.12 (1976).

(c) [2.18] Demand futility under Fed.R.Civ.P. 23.1

Pursuant to Fed.R.Civ.P. 23.1, before bringing a shareholder derivative action in federal court to enforce a corporate right, a shareholder must either make a demand on the corporation's board of directors or state with particularity why demand is excused. *Starrels v. First National Bank of Chicago,* 870 F.2d 1168, 1170 (7th Cir. 1989). Derivative plaintiffs must plead with particularity either the efforts they have made to obtain the desired action from the board or the reasons such efforts would be futile. *Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90, 114 L.Ed.2d 152, 111 S.Ct. 1711, 1716 (1991). The failure to adequately allege demand futility is a common basis for moving to dismiss. However, in contrast to a motion to dismiss for failure to state a claim, a motion to dismiss for failure to make a demand is not intended to test the legal sufficiency of the plaintiff's substantive claim. "Rather, its purpose is to determine who is entitled, as between the corporation and its shareholders, to assert the plaintiff's underlying substantive claim on the corporation's behalf." *In re Veeco Instruments, Inc. Securities Litigation,* 434 F.Supp.2d 267, 273 (S.D.N.Y. 2006), quoting *Levine v. Smith,* No. 8833, 1989 WL 150784 at *5 (Del.Ch. Nov. 27, 1989).

(d) [2.19] Racketeer Influenced and Corrupt Organizations Act

A litigant who wishes to plead a cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, *et seq.,* must take extra caution to adhere to the specific pleading requirements governing these claims. Fraud allegations pleaded under RICO must be stated with particularity. *Lachmund v. ADM Investor Services, Inc.,* 191 F.3d 777, 782 (7th Cir. 1999). As of the mid-1990s, most federal courts implemented separate requirements for RICO causes of action. These special rules require the pleader to answer a series of questions that

supplement the RICO allegations of the complaint. This is known as the "RICO case statement," which is required by many judicial districts. RICO case statements, which are generally compelled by Fed.R.Civ.P. 12(e), governing the filing of a more definite statement, require pleaders to articulate the factual predicates and legal theory underlying federal civil racketeering claims.

Practitioners should always check the standing order of the judge before whom they are appearing to determine whether a RICO case statement is necessary and to determine the correct format. Certain judges will strike entire complaints for failing to file a proper RICO case statement. *See, e.g., Res Environmental Services, Inc. v. Sulik,* No. 06 C 2649, 2006 WL 1444804 (N.D.Ill. May 18, 2006).

A plaintiff may also bring a civil RICO cause of action in state court. Illinois courts will use federal caselaw to determine whether a RICO claim is sufficient to state a cause of action. *See Bank of Northern Illinois v. Nugent,* 223 Ill.App.3d 1, 584 N.E.2d 948, 955, 165 Ill.Dec. 514 (2d Dist. 1991). *See also Allenson v. Hoyne Savings Bank,* 272 Ill.App.3d 938, 651 N.E.2d 573, 577, 209 Ill.Dec. 395 (1st Dist. 1995). However, there is no RICO case statement required in state practice as in federal practice. A party who wishes to bring a civil RICO claim in state court should look to federal caselaw to determine the factual specificity required.

(e) [2.20] Class actions

The Class Action Fairness Act of 2005 (CAFA), Pub.L. No. 109-2, 119 Stat. 4, changed class action practice in several ways, some of which are relevant in the pleadings and motions context. See 28 U.S.C. §1332(d). "Class action" is defined in 28 U.S.C. §1332(d)(1)(B) as any action filed pursuant to Fed.R.Civ.P. 23 or any analogous state rule or statute. Specifically, CAFA expanded federal-diversity jurisdiction to cover most class actions, provided that they are not directed at state governmental action. Second, CAFA authorized removal of class actions from state courts (provided that certain conditions are met), limited the ability of federal courts to remand them, and authorized accelerated appellate review. Third, CAFA confers federal jurisdiction over any class action if (1) the claims of all plaintiffs aggregated together exceed $5 million, and (2) at least one plaintiff is diverse from at least one defendant.

e. [2.21] Prayer for Relief

In state practice, the pleader must include a prayer for relief for every count in the complaint. 735 ILCS 5/2-604. If seeking damages, general damages are implied by law and presumed to have accrued from the wrong complained of and need not be specifically pleaded in the complaint. Often, the prayer for relief will assert that the plaintiff has been "damaged in an unspecified amount to be determined at trial." In contrast, special damages, such as punitive damages, must be specifically pleaded. Illinois law requires only that the prayer for relief conform to the facts alleged in the pleadings. Therefore, a request for money damages must be supported by allegations giving rise to the award of these damages. *See Wolfe v. Wolfe,* 81 Ill.App.3d 833, 401 N.E.2d 1111, 37 Ill.Dec. 18 (1st Dist. 1980) (noting that money damages will not be awarded when plaintiff has failed to allege breach of fiduciary duty giving rise to award of these damages).

Fed.R.Civ.P. 8(a) provides that a pleading asserting a claim for relief must demand judgment for the relief to which the pleader believes it is entitled. However, Fed.R.Civ.P. 8 does not require a separate prayer for relief for each count, and the pleader need make only one demand for relief, regardless of the number of claims asserted. See 5 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE §1255 (3d ed. 2004, Supp. 2011) (Wright); *Bartz v. Carter,* 709 F.Supp. 827, 829 (N.D.Ill. 1989).

As stated in §2.13 above, it is permissible in both state and federal practice to plead in the alternative. In state practice, §§2-604 and 2-613(b) of the Code of Civil Procedure permit alternative pleading, even when the counts are contradictory or inconsistent. 735 ILCS 5/2-604, 5/2-613(b). *See also Gironda v. Paulsen,* 238 Ill.App.3d 1081, 605 N.E.2d 1089, 1091, 179 Ill.Dec. 75 (2d Dist. 1992). Thus, for example, a plaintiff may seek alternative relief on contradictory causes of action such as breach of contract or quantum meruit. Similarly, alternative pleading is permissible under Fed.R.Civ.P. 8(a) and 8(d)(2). *See Alper v. Altheimer & Gray,* 257 F.3d 680, 687 (7th Cir. 2001); *Equity Builders & Contractors, Inc. v. Russell,* 406 F.Supp.2d 882, 889 (N.D.Ill. 2005).

f. [2.22] Verification

Verification of a pleading is a procedural formality in state practice that is designed as a deterrent to frivolous allegations. *In re Andrea D.,* 342 Ill.App.3d 233, 794 N.E.2d 1043, 1053, 276 Ill.Dec. 793 (2d Dist. 2003). A verification of a pleading is a statement under oath that the pleading is true. Any pleading may be verified, and if any pleading is so verified, every subsequent pleading must also be verified, unless excused by the court. 735 ILCS 5/2-605(a); *Pinnacle Corp. v. Village of Lake in the Hills,* 258 Ill.App.3d 205, 630 N.E.2d 502, 506, 196 Ill.Dec. 567 (2d Dist. 1994). However, if a pleading is amended, it need not be verified if the original pleading was verified. *Andrea D., supra*. Corporations may verify a pleading by the oath of any officer or agent having knowledge of the facts. 735 ILCS 5/2-605(a).

Section 2-605(a) of the Code of Civil Procedure provides that "[a]ny pleading, although not required to be sworn to, may be verified by the oath of the party filing it or of any other person or persons having knowledge of the facts pleaded." The usual form of verification of a pleading is that the party verifying has read or heard the pleading subscribed by him or her and knows the contents thereof, and that the same is true of his or her own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he or she believes to be true. The verification is usually attached as a separate page, at the end of the pleading. In pleadings that are verified, the several matters stated shall be stated positively or on information and belief only, according to the fact. *Id.*

Factual assertions in verified pleadings constitute judicial admissions that bind the party who makes them. *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.,* 306 Ill.App.3d 115, 713 N.E.2d 686, 239 Ill.Dec. 155 (1st Dist. 1999); *Winnetka Bank v. Mandas,* 202 Ill.App.3d 373, 559 N.E.2d 961, 975, 147 Ill.Dec. 621 (1st Dist. 1990) ("It is well established that a fact admitted in a verified pleading is a formal, conclusive judicial admission which is binding on the pleader and which dispenses wholly with proof of that fact."). Admissions in verified pleadings that have been withdrawn or amended are binding on the pleader, unless the amended pleading

discloses that the admissions contained in the prior verified pleading were made through mistake or inadvertence. *In re Marriage of O'Brien,* 247 Ill.App.3d 745, 617 N.E.2d 873, 187 Ill.Dec. 416 (4th Dist. 1993).

There is no general verification requirement or provision in federal practice, even when allegations are made on information and belief. Fed.R.Civ.P. 11(a) states, "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." *See also Farzana K. v. Indiana Department of Education,* 473 F.3d 703, 705 (7th Cir. 2007) (noting absence of any verification provision or requirement in federal rules).

g. [2.23] Jury Demand

A plaintiff in either state or federal court who wishes to have a trial by jury must file a demand with the clerk of the appropriate court at the time the action is commenced. 735 ILCS 5/2-1105(a); Fed.R.Civ.P. 38(b). In both state and federal practice, the failure to make the proper demand for jury will result in waiver of the right to a jury trial. 735 ILCS 5/2-1105(a); Fed.R.Civ.P. 38(d). The demand of a plaintiff for a jury may be made directly on the complaint, and the demand of a defendant for a trial by jury must be filed with its answer. 735 ILCS 5/2-1105(a); *Beal v. Booras,* 32 Ill.App.2d 304, 177 N.E.2d 717 (2d Dist. 1961). Alternatively, a separate demand in writing may be made by either party. 735 ILCS 5/2-1105(a). The constitutional or statutory right to demand a trial by jury does not need to be separately captioned as a separate instrument or otherwise. 177 N.E.2d at 718.

In federal practice, Fed.R.Civ.P. 38(b) requires the party seeking a trial by jury (1) to serve on the other parties a demand in writing at the time the action is commenced and not later than 14 days after the service of the last pleading directed to the issue, and (2) to file the demand with the clerk of the court in compliance with Fed.R.Civ.P. 5(d). As in state court, the jury demand may be made directly on the first page of the complaint or answer. The civil cover sheet available on each district court's website, which must be filed along with any initial pleading, contains a "check box" indicating whether the plaintiff demands trial by jury. However, practitioners should always ensure that the separate jury demand is endorsed directly on the complaint or answer to avoid waiving the right to a jury trial.

5. [2.24] Applicable Local Rules

The practitioner must always keep in mind applicable local rules and standing orders before filing the initial pleading, as well as any subsequent motion or other paper. The local rules for the Northern, Central, and Southern Districts of Illinois are available online at each respective court's website: www.ilnd.uscourts.gov, www.ilcd.uscourts.gov, www.ilsd.uscourts.gov. Moreover, most district court judges post their standing orders online.

6. Other Considerations

a. [2.25] Filing an Appearance — General vs. Special

Every party must file an appearance at the time it files its first pleading. S.Ct. Rule 101(d) requires that a defendant file its appearance within 30 days after service, in the form provided by

Rule 101. In state practice, the format of the appearance is generally governed by local court rules or custom and practice and typically is a single-page document in which the attorney formally declares his or her appearance and representation of a party in the case. There may be strategic reasons why a practitioner who has been retained may wish to wait before filing his or her appearance. For example, if a plaintiff files a complaint for injunctive relief and a motion for emergency injunctive relief, counsel for the defendant may consider not filing his or her appearance until the day the hearing on the motion for emergency injunctive relief is heard, to preserve an element of surprise.

In 2000, the Illinois legislature amended §2-301 of the Code of Civil Procedure (735 ILCS 5/2-301), governing the filing of appearances, to eliminate the need for filing a "special" appearance. In the past, a litigant would be required to file such "special appearance" for the purpose of attacking the court's jurisdiction. However, because this requirement frequently led to confusion, the amendment provided that as long as a party objects to the court's jurisdiction in some way prior to filing the party's initial motion or other pleading, the party does not waive the objections to the court's jurisdiction. *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill.App.3d 593, 846 N.E.2d 1021, 1024 – 1025, 301 Ill.Dec. 418 (2d Dist. 2006) (interpreting amendment to §2-301 and holding that filing of general appearance does not waive party's right to make jurisdictional objection, even when defendant participated in written discovery).

The Federal Rules of Civil Procedure do not distinguish between a general or special appearance. In federal practice, each of the federal district courts has a specific, fillable appearance form to be filed by the attorney of record for each party. Practitioners should check the appropriate federal court's website to obtain a copy of its federal appearance form. Additionally, electronic case filing (ECF) is now standard practice in all federal courts, and all practitioners should ensure that they are registered for ECF as required by the courts and will therefore receive all filings by ECF, including notices of appearances, pleadings, and all motions.

b. [2.26] Summons

In both state and federal practice, all complaints must be accompanied by a summons. In state practice, the filing of summonses is governed by §2-201 of the Code of Civil Procedure (735 ILCS 5/2-201) and S.Ct. Rule 101. Section 2-201(a) simply provides that an action is commenced by the filing of the complaint and accompanying issuance of the summons and that the form of the summons shall conform to the applicable rule. Rule 101 provides a general format for a summons. S.Ct. Rule 103 provides the format for the issuance of an alias summons. At times, in order to expedite service on a defendant, practitioners will opt to appoint a private special process server to serve the defendant. Generally, such requests must be made by motion, which is usually routine and granted as a matter of course. Practitioners who choose to request appointment of a special process server should check local court rules and the individual judge's standing order, if any, for the proper procedure governing such motions.

Practitioners of business and commercial litigation may sometimes need to use §2-203.1, which allows a party to request service by alternate means by special order of the court. This device may be necessary to serve a foreign defendant or a defendant who is evading service, particularly when the plaintiff has been communicating with the defendant primarily by e-mail or through the Internet. Under §2-203.1, a plaintiff may "move, without notice, that the court enter

an order directing a comparable method of service." 735 ILCS 5/2-203.1. The motion must be accompanied "with an affidavit stating the nature and extent of the investigation made to determine the whereabouts of the defendant and the reasons why service is impractical . . . including a specific statement showing that a diligent inquiry as to the location of the individual defendant was made and reasonable efforts to make service have been unsuccessful." *Id.* The court may then "order service to be made in any manner consistent with due process." *Id.* Under this provision, a plaintiff can seek to have service effectuated by e-mail, Federal Express, certified mail, or the like. The practitioner should always take care to keep a verifiable record of when service was effectuated, including a record that the e-mail was sent and/or received, if possible, and tracking numbers for any private carriers used to serve the complaint and summons.

Once service is effectuated, the summons will require the defendant to file an answer or otherwise file an appearance within 30 days after service. S.Ct. Rules 101(d), 181(a).

Summonses in federal practice are governed by Fed.R.Civ.P. 4. As with the appearance form, the summons form is available online in a fillable format on all of the district court websites. Further, a standardized federal form summons, available at www.uscourts.gov/forms/uscforms.html, was approved by the United States Supreme Court. Special circumstances, such as effecting service on a foreign defendant, are also set forth in Fed.R.Civ.P. 4(f). In such cases, litigants may be required to follow the Hague Convention requirements, which can significantly delay service on a potential foreign defendant.

c. [2.27] Service and Waiver of Service

In state practice, a plaintiff may make a request that the defendant waive personal service. Section 2-213 of the Code of Civil Procedure (735 ILCS 5/2-213) and S.Ct. Rule 101(f) govern waiver of service. Section 2-213 provides the procedure for requesting waiver, while Rule 101(f) provides the format to be followed.

A defendant who returns a timely waiver of service does not waive any objection to venue or to the jurisdiction of the court over the defendant. 735 ILCS 5/2-213(b). A waiver of service gives the defendant 60 days, rather than 30 days, to appear and answer or otherwise plead. 735 ILCS 5/2-213(c). In state practice, a defendant may refuse to waive service of summons. 735 ILCS 5/2-213(e). If the defendant does not return the waiver, the plaintiff must serve summons on this defendant as otherwise provided in the Code of Civil Procedure and the Supreme Court Rules. *Id.*

In federal practice, a plaintiff may also request the defendant to waive service of summons. See Fed.R.Civ.P. 4(d). However, federal practice differs from state practice in that all defendants, with the exception of certain specific defendants, are required to waive service when requested to avoid the costs of personal service of process. Pursuant to Fed.R.Civ.P. 4(d), a defendant is duty-bound to avoid the unnecessary costs of formal personal service of process or risk being taxed with the costs of service and associated attorneys' fees. Thus, unless a defendant falls under one of the exceptions stated in Fed.R.Civ.P. 4, the defendant must waive service when requested. If a plaintiff requests waiver of service and the defendant ignores the request or refuses to waive, the plaintiff must proceed with formal service of process in accordance with Fed.R.Civ.P. 4(e), 4(f), or 4(h).

As with state practice, a defendant who waives formal service of process does not lose the right to contest venue and jurisdiction. Waiving formal service waives only objections to service and to the form of process. The incentive for waiving formal service of process is that the defendant's time for responding to the complaint is tripled — from 21 days (following personal service pursuant to Fed.R.Civ.P. 12) to 60 days from the date the request for waiver was sent.

d. [2.28] Disclosure Statement (Federal Court)

Fed.R.Civ.P. 7.1, which was added to the Federal Rules of Civil Procedure in 2002, requires all nongovernmental corporate parties to file a financial disclosure along with its first appearance, pleading, motion, or response. The statements must (1) identify each parent corporation and publicly held corporation owning ten percent or more of its stock or (2) state that no such corporation exists. *Id.* The purpose of the Fed.R.Civ.P. 7.1 disclosure statement is to allow the assigned judge to make a properly informed decision on whether certain financial interests require his or her disqualification in certain cases.

D. The Answer

1. [2.29] General Conditions

Both the Code of Civil Procedure and the Federal Rules of Civil Procedure require that a pleader's defense be set forth plainly and concisely in his or her answer. 735 ILCS 5/2-603(a); Fed.R.Civ.P. 8(b). Section 2-603(a) of the Code of Civil Procedure requires "a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply." Fed.R.Civ.P. 8(b)(1)(A) requires a party to "state in short and plain terms" his or her defenses to each claim asserted and to admit or deny liability. Perhaps the most important thing for the practitioner to remember when practicing in either state or federal court is that when answering a complaint, allegations in complaints that have not explicitly been denied will be deemed admitted and taken as true. *See Pinnacle Corp. v. Village of Lake in the Hills*, 258 Ill.App.3d 205, 630 N.E.2d 502, 506, 196 Ill.Dec. 567 (2d Dist. 1994); Fed.R.Civ.P. 8(b).

Defendants in federal court are given 21 days from the date of service to file an answer or other responsive pleading to the complaint, unless they agree to waive service of process (see §2.27 above). All practitioners should be aware of the amendments to Fed.R.Civ.P. 6 regarding calculation of time. These amendments were effective December 1, 2009.

Before determining whether to file an answer or a motion to attack the pleading, it is important to (a) interview the client, gather and review pertinent documents, and investigate other possible sources of information; (b) determine facts regarding jurisdiction, venue, and removal, which all must be raised within the time allowed for the defendant's initial pleading; (c) review all facts and research applicable law with respect to both the merits of the plaintiff's action and all available defenses, including statute of limitations and other affirmative defenses; and (d) consider other possible claims and parties, including counterclaims, joinder of indispensable parties, and any third-party claims.

2. Format

a. [2.30] Form of Denial

Section 2-610(a) of the Code of Civil Procedure (735 ILCS 5/2-610(a)) requires that every answer contain an explicit admission or denial of each allegation of the pleading to which it relates. Denials must not be evasive but must fairly answer the substance of each allegation denied. Thus, the answer should specifically and directly admit or deny each material allegation in the complaint or state a lack of knowledge with respect thereto and the reason therefor. Litigants should keep in mind that a denial of the plaintiff's allegations, without reasonable cause and if found to be untrue, may result in the imposition of sanctions under both S.Ct. Rule 137 and Fed.R.Civ.P. 11.

In federal practice, Fed.R.Civ.P. 8(b) provides that a party shall "state in short and plain terms its defenses to each claim asserted against it" and shall admit or deny the allegations asserted against it by an opposing party. As in state practice, Fed.R.Civ.P. 8(b) offers the pleader three basic options — admit, deny, or deemed deny because the pleader lacks the knowledge or information to respond.

When practicing in federal court, litigants should always check local rules and each judge's standing order for specific requirements with respect to the content of the answer. For example, N.D.Ill. Local Rule 10.1 states that "[r]esponsive pleadings shall be made in numbered paragraphs each corresponding to and stating a concise summary of the paragraph to which it is directed." Further, practitioners should familiarize themselves with a particular judge's interpretation of Fed.R.Civ.P. 8(b) when forming an answer. For example, certain jurists will strike an answer if it does not adequately follow the requirements of Fed.R.Civ.P. 8(b) regarding the basis for denying an allegation. *See, e.g., Plotzke v. United Financial Group,* No. 93 C 3967, 1993 WL 388698 (N.D.Ill. Sept. 13, 1993) (striking paragraphs in answer sua sponte because pleader failed to sufficiently specify basis for denial based on lack of knowledge).

b. [2.31] Allegations of Lack of Knowledge

In state practice, when a defendant asserts that he or she lacks knowledge sufficient to form a belief as to the truth of an allegation, the defendant must attach an affidavit attesting to the truth of his or her lack of knowledge. 735 ILCS 5/2-610(b). The failure to do so will deem the allegation admitted even if the defendant stated lack of knowledge in his or her responsive pleading. *Bank of Ravenswood v. Domino's Pizza, Inc.,* 269 Ill.App.3d 714, 646 N.E.2d 1252, 1260 – 1261, 207 Ill.Dec. 165 (1st Dist. 1995).

In federal practice, Fed.R.Civ.P. 8(b) allows a defendant to claim lack of knowledge in its response to specific allegations in a complaint. Unlike state practice, the federal rules have no requirement that the defendant attach an affidavit attesting to the truth of his or her lack of knowledge. However, as stated in §2.30 above, practitioners should take extra caution to ensure that they comply with an individual district court judge's interpretation of Fed.R.Civ.P. 8(b) regarding the specificity of the defendant's claims of lack of knowledge. *See, e.g., Vulcan Materials Co. v. Casualty Insurance Co.,* No. 88 C 7572, 1988 WL 130054 (N.D.Ill. Nov. 30,

1988) (striking answer for failing to comply with Fed.R.Civ.P. 8(b)'s specific requirements regarding lack of knowledge).

c. [2.32] Affirmative Defenses

Section 2-613(d) of the Code of Civil Procedure governs the pleading of affirmative defenses:

> **The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, counterclaim, or third-party complaint, in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.** 735 ILCS 5/2-613(d).

The test of whether a defense is an affirmative defense and must be pleaded is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. The admission of the apparent right is inferable from the affirmative defense. *Vanlandingham v. Ivanow*, 246 Ill.App.3d 348, 615 N.E.2d 1361, 1367, 186 Ill.Dec. 304 (4th Dist. 1993).

Parties may plead as many affirmative defenses as they may have to the action. Each defense should be separately pleaded, designated, and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation. 735 ILCS 5/2-603(b).

In federal practice, affirmative defenses are governed by Fed.R.Civ.P. 8. As with practice in Illinois courts, an affirmative defense is a fact asserted by the respondent in its answer or response pleading that vitiates the opposing party's claim. Fed.R.Civ.P. 8(c) provides for the pleading of affirmative defenses and provides that mis-designated counterclaims will be deemed affirmative defenses. Practitioners should note that in 2010, the federal rules were amended to delete reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading. Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, p. 10, www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/st_report_sept_2009.pdf. The Report notes that while the self-executing statutory provision in the United States Bankruptcy Code controls and "vitiates the affirmative-defense pleading requirement, the continued reference to 'discharge' in Rule 8's list of affirmative defenses generates confusion, has led to incorrect decisions, and causes unnecessary litigation." *Id.*

Although technically speaking an affirmative defense that is not raised may be deemed waived, waiver will not be found when the defense is later pleaded — without undue delay or prejudice to the opponent — or when a timely assertion is prevented because the predicates for the defense had not yet arisen by the time the answer was filed. *See Williams v. Lampe*, 399 F.3d 867, 870 – 871 (7th Cir. 2005) (finding that fact that case has progressed significantly will not bar later-raised affirmative defense when prejudice to plaintiff is not proven). However, in certain instances, the failure to formally raise an affirmative defense will waive the defendant's right to later plead that defense. *See, e.g., Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc.*, 929 F.2d 343, 345 (7th Cir. 1991) (holding that affirmative defense of lack of capacity to sue based on failure to register under Illinois Business Corporation Act, 805 ILCS 5/1.01, *et seq.*, is jurisdictional defense that must be raised or will be considered waived). *See also APC Filtration, Inc. v. Becker*, 646 F.Supp.2d 1000, 1005 – 1006 (N.D.Ill. 2009) (holding that defendants' failure to raise argument concerning lack of capacity to sue in "specific negative averment" or timely amended pleading under Fed.R.Civ.P. 9(a) results in waiver of jurisdictional defense); *Amerco Field Office v. Onoforio*, 22 Ill.App.3d 989, 317 N.E.2d 596, 600 (2d Dist. 1974).

d. [2.33] Verification

In state court, if the complaint is verified, the defendant's answer also must be verified, unless verification is excused by the court. 735 ILCS 5/2-605(a). An unverified answer will be disregarded by the court, and the effect is as if the defendant had filed no answer at all.

e. [2.34] Jury Demand

A defendant in state court who wishes to have a trial by jury must file a jury demand at the time he or she files the answer. 735 ILCS 5/2-1105(a). As with the plaintiff, the failure to timely file a jury demand waives the right to a trial by jury. If a plaintiff is seeking equitable relief and the court thereafter determines that one or more of the parties is entitled to a trial by jury, the plaintiff has three days and the defendant six days from the entry of the order by the court to file a demand for trial by jury with the clerk of the court. *Id.*

A defendant in federal court has 14 days after the last pleading directed to the issue is served to demand a jury trial. Fed.R.Civ.P. 38(b).

E. [2.35] Counterclaims and Cross-Claims

In both state and federal practice, counterclaims and cross-claims must be asserted as independent causes of action. 735 ILCS 5/2-608; Fed.R.Civ.P. 13. The primary difference between state and federal practice with respect to counterclaims and cross-claims is that Fed.R.Civ.P. 13 distinguishes between compulsory and permissive counterclaims, whereas Illinois law makes no such distinction.

1. [2.36] State Practice

Both counterclaims and cross-claims are governed by 735 ILCS 5/2-608. A defendant may plead in his or her answer any and all counterclaims or cross-claims. 735 ILCS 5/2-608(a),

5/2-608(b), 5/2-614(a). A counterclaim must be included as a part of the defendant's answer and must be designated as a counterclaim. 735 ILCS 5/2-608(b); *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 176 Ill.2d 385, 680 N.E.2d 283, 288, 223 Ill.Dec. 550 (1997). However, a counterclaim does not require additional service of process on parties already before the court. 735 ILCS 5/2-608(b). Every counterclaim is required to be pleaded in the same manner and with the same particularity as a complaint, but allegations set forth in other parts of the answer may be incorporated by specific reference instead of being repeated. 735 ILCS 5/2-608(c). However, §2-608 does not require a defendant to assert his or her rights by way of a counterclaim if it would be inconvenient or strategically inadvisable to do so, or when the full extent of the damages was not known earlier. *Scentura Creations, Inc. v. Long*, 325 Ill.App.3d 62, 756 N.E.2d 451, 459, 258 Ill.Dec. 469 (2d Dist. 2001). If a defendant does not file a counterclaim with his or her answer, he or she may seek leave from the trial court to do so. *Id.* When determining whether to grant leave, a trial court will consider the timeliness of the amendment and whether other parties have been prejudiced or surprised by the proposed amendment. *Hobart v. Shin*, 185 Ill.2d 283, 705 N.E.2d 907, 911, 235 Ill.Dec. 724 (1998). See also 735 ILCS 5/2-616 (allowing for liberal amendment of pleadings, including counterclaims and cross-claims).

With respect to the technical aspects of pleading a counterclaim, practitioners should keep in mind that a counterclaim is an independent cause of action and must be complete in itself. As with a complaint, a pleading stating a counterclaim must contain a plain and concise statement of the pleader's counterclaim, and each separate cause of action on which a separate recovery might be had must be stated in a separate counterclaim. 735 ILCS 5/2-603(b). Further, every count of every counterclaim must contain specific prayers for relief to which the pleader deems himself or herself entitled. 735 ILCS 5/2-604. The prayer for relief in a counterclaim is governed by the same rules that govern the prayer for relief in a complaint. *Id.*

An answer to a counterclaim and pleadings subsequent thereto shall be filed as in the case of a complaint and with like designation and effect. 735 ILCS 5/2-608(d). The court may, in its discretion, order the separate trial of any cause of action, counterclaim, or third-party claim if it cannot be conveniently disposed of with the other issues in the case.

2. [2.37] Federal Practice

As stated in §2.35 above, Fed.R.Civ.P. 13 governs the filing of counterclaims and cross-claims in federal court. Importantly, federal practice is distinguishable from state practice in that Fed.R.Civ.P. 13(a) requires a party defending against any claim to bring as a compulsory counterclaim a claim that — "at the time of its service — the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." This requirement, under res judicata, will serve to bar a party from bringing a claim it should have brought as a compulsory counterclaim in a pending action. *Inforizons, Inc. v. VED Software Services, Inc.*, 204 F.R.D. 116, 118 (N.D.Ill. 2001). In the Seventh Circuit, the test of whether a claim is a compulsory counterclaim is whether the defendant's claim is "logically related" to the claim asserted by the plaintiff. *See generally Colonial Penn Life Insurance Co. v. Hallmark Insurance Administrators, Inc.*, 31 F.3d 445, 448 (7th Cir. 1994). In contrast, a permissive claim under Fed.R.Civ.P. 13(b) is a counterclaim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the

opposing party's claim. *Schwinn Plan Committee v. TI Reynolds 531 Ltd. (In re Schwinn Bicycle Co.)*, 182 B.R. 526, 531 (Bankr. N.D.Ill. 1995) (discussing distinction between compulsory and permissive counterclaims under Fed.R.Civ.P. 13). A cross-claim, governed by Fed.R.Civ.P. 13(g), is any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. *See Options Center for Independent Living v. G & V Development Co.*, 229 F.R.D. 149, 150 n.1 (C.D.Ill. 2005).

Because counterclaims and cross-claims seek affirmative relief, the burden of pleading them is on the party attempting to file the counterclaim or cross-claim. The pleading of counterclaims and cross-claims is subject to the same standards that apply to the statement of any claim for relief under Fed.R.Civ.P. 8. This is true whether the counterclaim or cross-claim is set forth in the defendant's answer or is contained in a reply to a previously asserted counterclaim. Thus, a Fed.R.Civ.P. 13 claim should be presented in a simple, concise, and direct manner, as required by Fed.R.Civ.P. 8(a) and 8(d). Similarly, the reply to a counterclaim and the answer to a cross-claim must meet the same requirements that apply to other responsive pleadings.

The service of a pleading containing a counterclaim or cross-claim must satisfy Fed.R.Civ.P. 5(a), which provides that "a pleading filed after the original complaint" "must be served on every party." However, unlike service of the original complaint, it is not necessary to have the pleading containing the counterclaim or cross-claim served on the party against whom the claim is asserted since he or she already is a party to the action and within the court's jurisdiction. It is sufficient under Fed.R.Civ.P. 5(b) if the pleading is delivered to the attorney of any party who has appeared in the action.

F. The Reply

1. [2.38] State Practice

In state practice, if new matter by way of defense is pleaded in the answer, the plaintiff must file a reply. 735 ILCS 5/2-602. However, a reply will not be considered to be an admission of the legal sufficiency of the new matter. *Id.*

A reply is purely a defensive pleading. Its purpose is to respond to new matter set up in the answer by counteracting the facts and conclusions set forth in the answer. The standard for pleading a reply is much the same as with complaints and other pleadings. That is, a reply must be plainly and concisely stated. Further, the reply shall be separately pleaded, designated, and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation. A reply should be specific, and a failure to reply specifically to a portion of an answer ordinarily constitutes an admission of the truth thereof. However, mere legal conclusions in an answer are not admitted by a failure to reply specifically thereto.

Generally, a reply must not depart from the complaint. A reply may not supply omissions in a complaint, add new grounds of action, or permit the taking of a position inconsistent with that alleged in the complaint.

The law in Illinois provides for pleadings beyond the reply when necessary; under the Code of Civil Procedure, further pleadings may be permitted as required by the court. New matter contained in the reply filed by the plaintiff to the defendant's answer has been held admitted when it is not met by an additional pleading by the defendant. *Interstate Printing Co. v. Callahan*, 18 Ill.App.3d 930, 310 N.E.2d 786, 788 (1st Dist. 1974). It is unnecessary for a party to answer to a reply pleading when no new issue is raised in the reply. *In re Estate of Dukes*, 81 Ill.App.2d 428, 226 N.E.2d 424 (1st Dist. 1967) (abst.).

2. [2.39] Federal Practice

In federal practice, a reply is essentially the answer to a counterclaim. Fed.R.Civ.P. 7(a) contains an exhaustive list of the six types of pleadings that may be filed in federal court: (a) the complaint; (b) the answer to the complaint; (c) a reply to a counterclaim; (d) an answer to a cross-claim; (e) a third-party complaint; and (f) a third-party answer. Fed.R.Civ.P. 7(a). Additionally, a reply to an answer, a third-party answer, or a counterclaim answer is allowed "if the court orders one." Fed.R.Civ.P. 7(a)(7). To be granted leave to file a reply, the moving party must make a clear and convincing showing that substantial reason or extraordinary circumstances require a reply. *See, e.g., Moviecolor Ltd. v. Eastman Kodak Co.*, 24 F.R.D. 325 (S.D.N.Y. 1959) (noting that while reply will be permitted if there is clear and convincing factual showing of necessity or other extraordinary circumstances, reply should not be used as substitute for discovery and inspection).

Although Fed.R.Civ.P. 7 distinguishes between a "reply" to a counterclaim and an "answer" to a complaint, cross-claim, or third-party complaint, an answer and a reply to a counterclaim serve essentially the same purpose. However, Fed.R.Civ.P. 8(c)(2) gives the district court discretion to allow a reply by treating a counterclaim that is designated improperly as a defense as though it were properly designated and to impose any terms it deems appropriate on permitting correction of the mistake. *See, e.g., AAR International, Inc. v. Vacances Heliades S.A.*, 202 F.Supp.2d 788, 794 (N.D.Ill. 2002) (noting that mis-designation of claim as affirmative defense rather than counterclaim is of little significance provided that plaintiff had notice of claim and allowing defendant to correct mistake). The court also may resolve any confusion caused by improper designation by ordering the responding pleader to clarify an answer to indicate whether certain allegations are intended as defenses or counterclaims. As a general matter, practitioners should reply to all pleadings labeled "counterclaims," regardless of whether they are facially proper or not, to avoid any risk that any averments in a mis-designated counterclaim might be deemed admitted.

G. [2.40] Third-Party Practice

A third-party action, or an action for impleader, is a procedural device by which a defendant may assert a cause of action against a party that was not joined in the original action. *Guzman v. C.R. Epperson Construction, Inc.*, 196 Ill.2d 391, 752 N.E.2d 1069, 1075, 256 Ill.Dec. 827 (2001). An action for impleader differs from a counterclaim or cross-claim in that the party to be impleaded is not already a party to the case. *See, e.g., Rodd v. Region Construction Co.*, 783 F.2d 89, 92 (7th Cir. 1986). Third-party actions require that the claims against the third-party defendants relate to claims pending against the third-party plaintiff and must depend in some degree on the outcome of the original action. The party seeking relief from the third-party

defendant will therefore assert a claim of derivative liability against the third-party defendant. Thus, the majority of third-party complaints are based on claims for indemnification, contribution, subrogation, or a similar such theory. *See Securities & Exchange Commission v. Nappy,* No. 93 C 3446, 1993 WL 433780 at *1 (N.D.Ill. Oct. 25, 1993).

The institution of third-party proceedings is governed by §2-406 of the Code of Civil Procedure (735 ILCS 5/2-406) in state practice and Fed.R.Civ.P. 14 in federal practice. Section 2-406(b) provides, "Within the time for filing his or her answer or thereafter by leave of court, a defendant may by third-party complaint bring in as a defendant a person not a party to the action who is or may be liable to him or her for all or part of the plaintiff's claim against him or her." Fed.R.Civ.P. 14(a)(1) allows a defendant, acting as a third-party plaintiff, to implead a third-party defendant "who is or may be liable to it for all or part of the claim against it." Practitioners should note that although Fed.R.Civ.P. 14 was significantly reworded during the 2007 Style Project, the revisions are only stylistic and effect no substantive change. *See, e.g., American Zurich Insurance Co. v. Cooper Tire & Rubber Co.,* 512 F.3d 800, 805 n.3 (6th Cir. 2008) (citing Advisory Committee Notes to 2007 Amendments noting that amendments to Fed.R.Civ.P. 14 are intended to be stylistic only and do not change substance of Fed.R.Civ.P. 14).

The purpose of impleader actions in both state and federal practice is to avoid unnecessary, multiple actions and to expedite the resolution of secondary actions arising out of or in consequence of the action originally instituted. *See, e.g., Security Insurance Company of Hartford v. Mato,* 13 Ill.App.3d 11, 298 N.E.2d 725, 731 (2d Dist. 1973); *United States v. All Meat & Poultry Products Stored at LaGrou Cold Storage,* No. 02 C 5145, 2003 WL 21780963 (N.D.Ill. July 30, 2003). In state practice, a defendant can initiate a third-party proceeding by filing a third-party complaint within the time for filing his or her answer, or after that time by leave of court. 735 ILCS 5/2-406(b). In federal practice, a third party need not obtain leave of court to file a third-party action if the party files it more than 14 days after serving its original answer. Fed.R.Civ.P. 14(a). In both state and federal practice, all general rules of pleading as applied to original complaints apply with equal force to third-party complaints.

In state practice, to survive a motion to dismiss, a third-party complaint need show only a possibility of recovery against the third-party defendant. *See Badorski v. Commonwealth Edison Co.,* 89 Ill.App.3d 494, 411 N.E.2d 924, 926, 44 Ill.Dec. 558 (1st Dist. 1980). However, if a defendant seeks to file a third-party complaint for indemnification, the pleader must allege specific facts, not mere conclusions, to demonstrate the existence of a duty to indemnify. *See Vassolo v. Comet Industries, Inc.,* 35 Ill.App.3d 41, 341 N.E.2d 54, 57 (1st Dist. 1975). Further, if a party seeks to file an indemnification action against a third-party defendant, the party must take special caution to adhere to all applicable statutes of limitation. Specifically, the Illinois Supreme Court has held that the statute of limitations in these cases begins to run on the date the third-party plaintiff is served in the underlying action. *See Guzman, supra,* 752 N.E.2d at 1076.

Any subsequent pleadings in a third-party proceeding must be filed in the same manner as a complaint and with the same designation and effect. 735 ILCS 5/2-406(b). As with the answer in a primary proceeding, an answer to a third-party complaint must plainly set forth a defense that seeks to avoid the legal effect of, or to defeat in whole or in part, the cause of action set forth in the third-party complaint. 735 ILCS 5/2-613(d). The third-party defendant may assert any

defenses that he or she has to the third-party complaint or that the third-party plaintiff has to the plaintiff's claim and has the same right to file a counterclaim or third-party complaint as any other defendant. 735 ILCS 5/2-406(b).

The procedure for third-party proceedings in federal court is similar to that in state practice. In federal practice, a party seeking to initiate third-party proceedings must seek leave of court if it attempts to do so after 14 days following the party's service of an answer to the primary complaint. Fed.R.Civ.P. 14(a). Rule 14(a) allows a party to implead any party who is not already a party to the action. Rule 14(a)(5) provides that if a plaintiff is the subject of a counterclaim, the plaintiff may join third parties who may be liable for part or all of this claim.

H. Pleading Schedule

1. [2.41] State Practice

The complaint may be filed at any time, keeping in mind any applicable statutes of limitation. The answer is due within 30 days after, or at a set time between 21 and 40 days after, service of the summons and the complaint, unless the defendant files a motion attacking the complaint. In all other cases, the summons requires each defendant to file an appearance within 30 days after service. S.Ct. Rules 101(b), 181(a). Answers to and motions directed at counterclaims are due within 21 days after the last day allowed for filing the counterclaim. S.Ct. Rule 182(b). A reply to an answer is also due within 21 days after the last day allowed for the filing of an answer. S.Ct. Rule 182(a).

Motions attacking answers or replies must be filed within 21 days after the last day allowed for the filing of the pleading to which the motion is directed. S.Ct. Rule 182(c). It is common for parties to request, and courts to grant, extensions of time to answer or otherwise plead. Any subsequent pleadings allowed or ordered should be filed at such time as the court may order.

2. [2.42] Federal Practice

In 2009, the Federal Rules of Civil Procedures underwent numerous amendments, most of which standardized the way in which time periods are calculated. The amendments were designed "to make the method of computing time consistent, simpler, and clearer." Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States: Time-Computation Project, p. 1, at www.uscourts.gov/uscourts/rulesandpolicies/rules/supreme%20court%202008/excerpt_st_bk.pdf. Under the prior rules, time periods were calculated differently for periods under 10 days than for longer periods of time. Shorter periods ignored weekends and holidays, whereas longer periods included those days. Under the 2009 amendments, most time periods were standardized into multiples of 7 days, and the old, less-than-11-days computation rule was deleted; therefore, every day is counted, regardless of how long the time period is. Time periods also include additional time depending on the manner in which a document is filed and served on counsel of record (*i.e.*, 3 additional days are added if a document is mailed or e-mailed, by consent). Practitioners should familiarize themselves with the new rules governing calculation of time periods.

With regard to other aspects of time computation, in federal practice, the complaint may be filed at any time, keeping in mind applicable statutes of limitation and any deadlines governing petitions for removal and remand, if the case originated in state court. If no motion is made attacking the complaint, the responsive pleading is due within 21 days after being served with the summons and complaint. Fed.R.Civ.P. 12(a)(1)(A)(i). If service of summons has been waived pursuant to Fed.R.Civ.P. 4(d), the answer is due within 60 days of the date the waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States. Fed.R.Civ.P. 4(d)(3).

A counterclaim or cross-claim is to be filed with the answer and a third-party complaint within 14 days after service of the original answer. Fed.R.Civ.P. 14(a). Answers to counterclaims and cross-claims are due within 21 days after service of the claim. Fed.R.Civ.P. 12(a)(1)(B). The United States and its agencies, however, are granted 60 days to respond to any claim. Fed.R.Civ.P. 12(a)(2).

If a defendant files a motion attacking a pleading and the motion is denied, the responsive pleading is due within 14 days of notice of the court's denial. Fed.R.Civ.P. 12(a)(4)(A). If a motion to dismiss or strike is granted, the defendant will have 21 days after service of an amended complaint within which to answer, unless the court sets a different time. If the defendant files a motion for a more definite statement and that motion is granted, the responsive pleading is due within 14 days after the service of the more definite statement. Fed.R.Civ.P. 12(a)(4)(B). Similarly, if a court orders a more definite statement, the party so ordered must comply within 14 days after notice of the order, unless the court sets a different time. Fed.R.Civ.P. 12(e).

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✓ Practitioners who are considering removal should be cautious and note that a defendant who did not answer a complaint before removal must answer or present other defenses or objections within 7 days after the notice of removal is filed, or within 21 days after being served with or receiving a copy of the initial pleading, whichever is longest. Fed.R.Civ.P. 81(c)(2). The 7-day period is typically the longest period, and can accrue quickly if the practitioner does not plan ahead.

I. Amendments of Pleadings

1. [2.43] General Considerations

Amendments to pleadings in both state and federal court are liberally allowed; however, a party's right to amend a pleading is not absolute and unlimited. *Bidani v. Lewis*, 285 Ill.App.3d 545, 675 N.E.2d 647, 653, 221 Ill.Dec. 452 (1st Dist. 1996); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir. 1977). A pleading may be amended at any time, before or after judgment, provided that the amendment is in the interests of justice. 735 ILCS 5/2-616(a); Fed.R.Civ.P. 15. *See also Moran v. Gust K. Newberg/Dugan & Meyers*, 268 Ill.App.3d 999, 645 N.E.2d 489, 494, 206 Ill.Dec. 484 (1st Dist. 1994); *Connell v. KLN Steel Products Co.*, No. 04 C 0194, 2006 WL 1120514 (N.D.Ill. Apr. 25, 2006). Whether an amendment will be allowed rests within the sound discretion of the trial court. Generally, a court will deny amendment only if it

would surprise the opposite party so as to constitute a ground for mistrial. *See A.J. Maggio Co. v. Willis*, 316 Ill.App.3d 1043, 738 N.E.2d 592, 599, 250 Ill.Dec. 376 (1st Dist. 2000). A plaintiff may amend his or her complaint to add a claim against the defendant if the defendant will not sustain prejudice or surprise and when the evidence supporting either claim is essentially the same, little additional discovery will be required, and the plaintiff offers sufficient justification for not pursuing the subsequently asserted theory earlier. There are important distinctions between amendments to pleadings under Illinois law and federal law. These distinctions are set forth more fully in §§2.44 – 2.47 below.

2. State vs. Federal

a. [2.44] Illinois Law

Provisions regarding amendments to the pleadings are set forth in §2-616 of the Code of Civil Procedure. Section 2-616(a) provides as follows:

> **At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.** 735 ILCS 5/2-616(a).

In considering whether to allow an amendment to the pleadings, the trial court should consider, among any other relevant factors, whether the amendment would cure the defect in the pleadings; whether the amendment would surprise, and thereby unfairly prejudice, the opposing party; whether the motion to amend is timely; and whether the party had previous opportunities to amend the pleadings. *Kern v. DaimlerChrysler Corp.*, 364 Ill.App.3d 708, 848 N.E.2d 125, 127 – 128, 302 Ill.Dec. 125 (5th Dist. 2006), citing *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 586 N.E.2d 1211, 1215 – 1216, 166 Ill.Dec. 882 (1992). Once a trial has begun or a substantive hearing has been held, a court will ordinarily not permit an amendment to add a matter of which the pleader had full knowledge at the time of filing the original pleading, if there is no valid excuse for omitting its substance at that time. *See Andersen v. Resource Economics Corp.*, 133 Ill.2d 342, 549 N.E.2d 1262, 1265, 140 Ill.Dec. 390 (1990).

Under Illinois law, an amendment that is complete in itself and does not refer to or adopt the prior pleading ordinarily supersedes the prior pleading, resulting in that pleading being, in effect, abandoned or withdrawn. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 127, 70 Ill.Dec. 251 (1983); *Cwikla v. Sheir*, 345 Ill.App.3d 23, 801 N.E.2d 1103, 1108, 280 Ill.Dec. 158 (1st Dist. 2003); *Kennedy v. First National Bank of Mattoon*, 194 Ill.App.3d 1004, 551 N.E.2d 1002, 1006, 141 Ill.Dec. 659 (4th Dist. 1990). In these cases, the subsequent proceedings will be regarded as based on the amended pleading, and the prior pleading will ordinarily be ignored. *Foxcroft Townhome, supra*.

However, practitioners must keep in mind that for some purposes, the original pleading may still remain part of the record even after the filing of an amendment thereto. *See Alton Community*

Unit School District No. 11 v. Illinois Educational Labor Relations Board, 362 Ill.App.3d 663, 839 N.E.2d 1131, 1133, 298 Ill.Dec. 484 (4th Dist. 2005). Thus, admissions in a verified pleading will still bind the pleader after the filing of an amended pleading that supersedes the original pleading, unless the amended pleading discloses that the admissions were made through mistake or inadvertence. *See Heider v. Leewards Creative Crafts, Inc.*, 245 Ill.App.3d 258, 613 N.E.2d 805, 815, 184 Ill.Dec. 488 (2d Dist. 1993) (noting rule that when original pleading is verified, it remains as part of record upon filing of amended pleading and that these admissions in original verified pleading are judicial admissions that bind pleader).

b. [2.45] Federal Law

Amendments to pleadings in federal court are governed by Fed.R.Civ.P. 15. Rule 15 was amended in 2007 as part of the Style Project, and again in 2009 as part of the Time-Computation Project. While the 2007 amendment significantly reworded Fed.R.Civ.P. 15, it did not change the substance of the amendment. The 2009 amendment enlarged both the time to amend (from 20 days to 21) and the time to respond to an amended pleading ordered under Rule 15(a)(3) (from 10 to 14 days).

Thus, Fed.R.Civ.P. 15(a) still provides a plaintiff with an automatic right to amend pleadings a single time before a response is filed or, if no response is required, within 21 days after the original pleading to be amended was served, provided that the case has not been placed on the court's trial calendar. Otherwise, a party must seek leave of court or permission from the opposing party to amend pleadings.

(1) [2.46] Fed.R.Civ.P. 15(a) — amendments as of right or by leave of court

A party may amend a pleading without leave of court or consent of opposing parties one time only, under either of two circumstances. A pleading may be amended of right (a) if the amendment is filed within 21 days after serving it (Fed.R.Civ.P. 15(a)); (b) if the pleading to be amended is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b)(e) or 12(b)(f), whichever is earlier. *Id.*

Even if a party has already exercised his or her right to amend once, or if neither circumstance allowing for amendment as of right exists, a party may still amend his or her complaint "with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Id. See Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 204 (7th Cir. 1985). The trial court's refusal to grant permission to file a second amended complaint is reviewable only for an abuse of discretion. *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1244 (7th Cir. 1983); *Textor v. Board of Regents of Northern Illinois University*, 711 F.2d 1387, 1391 (7th Cir. 1983). This refusal is proper "where the proposed amendment fails to allege facts which would support a valid theory of liability . . . or where the party moving to amend has not shown that the proposed amendment has substantial merit." [Citation omitted.] *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979) (per curiam). District courts have broad discretion to deny leave to amend when there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, or undue prejudice to the defendant or when the amendment would be futile. *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008).

Practitioners seeking leave to amend a pleading in any district court within the Seventh Circuit are well advised to attach a copy of the proposed pleading to the motion to allow the court to determine whether to grant leave. *See, e.g., Broga v. Northeast Utilities*, No. 96-CV-2114, 1999 WL 33483581 at *6 (D.Conn. Aug. 19, 1999) (denying motion for leave to amend based on party's failure to attach proposed pleading, noting that neither court nor opposing party can properly ascertain whether motion for leave has merit); *Clonlara, Inc. v. Runkel*, 722 F.Supp. 1442, 1449 (E.D.Mich. 1989) ("Without the proposed amendment, it is impossible to determine whether justice requires that the amendment be granted.").

As with Illinois law, a pleading that has been amended under Fed.R.Civ.P. 15(a) supersedes the previous pleading it modifies and remains in effect through the action, unless it is subsequently modified. 6 Charles Alan Wright et al., 6 FEDERAL PRACTICE AND PROCEDURE §1476 (3d ed. 2010, Supp. 2011). Once an amended pleading is filed, the original pleading essentially ceases to exist, and any subsequent motion made by an opposing party should be directed at the amended pleading. *Id.*

(2) [2.47] Fed.R.Civ.P. 15(b) — amendments to conform to the evidence

Unlike motions for leave to amend under Fed.R.Civ.P. 15(a), motions for amendment under Fed.R.Civ.P. 15(b) are generally made in the later stages of litigation, more likely at trial or immediately after trial. Practitioners should generally try to move under Fed.R.Civ.P. 15(a) to amend pleadings before trial. However, there are instances in which the need to do so does not become apparent until trial has commenced, or even after the close of trial. Further, on occasion, the actual trial strays from the controversy revealed during the discovery process and pretrial stages of litigation so that the pleadings must be adjusted to reflect the actual case unveiled in the courtroom. 6A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE §1491 (3d ed. 2010, Supp. 2011). Fed.R.Civ.P. 15(b) permits amendments to pleadings in two such circumstances: (a) when an issue not raised in the original pleadings is tried by consent of the parties; and (b) when an issue not raised in the pleadings is objected to, but the proposed amendment will either not create unfair prejudice, or such prejudice as may result can be cured by other judicial action. The two procedures provided for in Fed.R.Civ.P. 15(b) are intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action and later proves to be erroneous. Wright §1491. Consequently, courts will generally interpret Fed.R.Civ.P. 15(b) liberally and permit an amendment whenever doing so will affect the underlying purpose of the rule. *See Brandon v. Holt*, 469 U.S. 464, 83 L.Ed.2d 878, 105 S.Ct. 873, 877 n.19 (1985); *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982).

3. [2.48] Relation Back

Both Illinois and federal law contain relation-back provisions that allow amendments to pleadings that would otherwise be untimely, provided that they relate back to the claims contained in the original pleading. This determination is highly relevant to the applicability of statutes of limitation to claims raised or parties joined in amended pleadings. In state practice, relation back is governed by §§2-616(b) and 2-616(d) of the Code of Civil Procedure, 735 ILCS 5/2-616(b), 5/2-616(d). In federal practice, relation back is governed by Fed.R.Civ.P. 15(c).

The relation-back doctrine under §2-616(b) applies if (a) the original complaint was timely filed, and (b) the cause of action in the amended complaint grew out of the same transaction or occurrence as that alleged in the original complaint. *Marek v. O.B. Gyne Specialists II, S.C.*, 319 Ill.App.3d 690, 746 N.E.2d 1, 6, 253 Ill.Dec. 759 (1st Dist. 2001). The defendant must be on notice of the claim prior to the expiration of the statute of limitations and the true facts on which the amended claim against the defendant is based. *McArthur v. St. Mary's Hospital of Decatur*, 307 Ill.App.3d 329, 717 N.E.2d 501, 505 – 506, 240 Ill.Dec. 408 (4th Dist. 1999).

Section 2-616(d) provides relief to the plaintiff who, after the limitations period has expired, realizes he or she has named the wrong defendant. *Morton v. Madison County Nursing Home Auxiliary*, 198 Ill.2d 183, 761 N.E.2d 145, 149, 260 Ill.Dec. 301 (2001). In essence, the relation-back provision of §2-616(d) is an exception to the requirement that plaintiffs comply with applicable statutes of limitation. *See Morton, supra*, 761 N.E.2d at 149. In order to protect the rights of the defendant, however, §2-616(d) also provides that at the time he or she seeks to amend the complaint, the plaintiff must demonstrate that (a) he or she filed the original complaint within the limitations period, (b) his or her failure to name the proper defendant was inadvertent, (c) the defendant had knowledge of the suit within the limitations period, (d) the amendment is based on the same transaction or occurrence as the original complaint, and (e) service of summons was in fact had on the proper defendant albeit in the wrong capacity. *See Morton, supra*, 761 N.E.2d at 149. In determining whether the subsequent pleading relates back to the filing of the original pleading, the focus is not on the nature of the causes of action, but on the identity of the transaction or occurrence. *Weininger v. Siomopoulos*, 366 Ill.App.3d 428, 851 N.E.2d 1249, 303 Ill.Dec. 824 (1st Dist. 2006); *Castro v. Bellucci*, 338 Ill.App.3d 386, 789 N.E.2d 784, 788, 273 Ill.Dec. 610 (1st Dist. 2003).

Under Fed.R.Civ.P. 15(c), an amended complaint relates back to the date of the original pleading when (a) the law that provides the applicable statute of limitations allows relation back; (b) "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading"; or (c) "the amendment changes the party or the naming of the party," provided that certain enumerated requirements are fulfilled. Fed.R.Civ.P. 15(c)(1). In general, relation back is permitted under Fed.R.Civ.P. 15(c) when an amended complaint asserts a new claim on the basis of the same core of facts, but involving a different substantive legal theory than that advanced in the original pleading. *Bularz v. Prudential Insurance Company of America*, 93 F.3d 372, 379 (7th Cir. 1996); *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 410 (7th Cir. 1989). *See also Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir. 1993), citing *Wood v. Worachek*, 618 F.2d 1225, 1229 – 1230 (7th Cir. 1980). Thus, a new substantive claim that would otherwise be time-barred relates back to the date of the original pleading, provided the new claim stems from the same "conduct, transaction, or occurrence" as was alleged in the original complaint; for relation back to apply, there is no additional requirement that the claim be based on an identical theory of recovery. *Bularz, supra*, 93 F.3d at 379, citing *Donnelly, supra*, 874 F.2d at 410; *Federal Deposit Insurance Corp. v. Bennett*, 898 F.2d 477, 479 (5th Cir. 1990).

J. [2.49] False Pleadings

In both state and federal practice, pleadings, motions, and other papers must conform to the governing rules and must be signed by at least one attorney of record in his or her individual

name, whose address must also be included. S.Ct. Rule 137; Fed.R.Civ.P. 11. Practitioners should always keep S.Ct. Rule 137 and Fed.R.Civ.P. 11 firmly in mind when drafting any pleading, motion, or paper to be filed with any court. Both rules authorize the trial court or district court to impose sanctions for violating these rules.

The purpose of S.Ct. Rule 137 "is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions based upon unsupported allegations of fact or law." *Fremarek v. John Hancock Mutual Life Insurance Co.*, 272 Ill.App.3d 1067, 651 N.E.2d 601, 606, 209 Ill.Dec. 423 (1st Dist. 1995). The purpose of the rule is not to penalize litigants for a lack of success but to restrict litigants who plead frivolous or false matters with no basis in law. *Sadler v. Creekmur,* 354 Ill.App.3d 1029, 821 N.E.2d 340, 353, 290 Ill.Dec. 289 (3d Dist. 2004) (reciting general standard for awards for sanctions under Rule 137 and stating that purpose of such sanctions is to prevent filing of false and frivolous pleadings, not to penalize parties and their attorneys for zealous but unsuccessful pursuit of claims); *Gershak v. Feign*, 317 Ill.App.3d 14, 738 N.E.2d 600, 250 Ill.Dec. 384 (1st Dist. 2000) (noting that purpose of Rule 137 is to discourage false and frivolous pleadings and that Rule 137 governs imposition of sanctions only for filing of pleadings, motions, and other papers in violation of Rule 137 itself). Therefore, it makes no difference if the party seeking sanctions did not incur any damages at all. *Heckinger v. Welsh,* 339 Ill.App.3d 189, 790 N.E.2d 904, 906, 274 Ill.Dec. 131 (2d Dist. 2003). The standard used by a court when evaluating a motion for sanctions is the objective reasonableness of the attorney's conduct at the time, not in hindsight. *Fremarek, supra,* 651 N.E.2d at 607. It is not sufficient that an attorney "honestly believed" his or her case was well-grounded in fact and law. *Id.,* quoting *Shea, Rogal & Associates, Ltd. v. Leslie Volkswagen, Inc.,* 250 Ill.App.3d 149, 621 N.E.2d 77, 80, 190 Ill.Dec. 208 (1st Dist. 1993).

S.Ct. Rule 137 only authorizes sanctions for acts of misconduct involving the filing of pleadings, motions, and other papers, not the general misconduct of an attorney or for discovery violations. Appropriate sanctions include an order to pay the other party's reasonable expenses, including reasonable attorneys' fees, incurred as a consequence of the offending pleading or motion. *In re Marriage of Adler*, 271 Ill.App.3d 469, 648 N.E.2d 953, 957, 208 Ill.Dec. 31 (1st Dist. 1995). Any motion for sanctions must specifically identify (a) the offending pleading, motion, or other paper; (b) which statements in the documents were false; and (c) the fees and costs that directly resulted from the false allegations. *Id.* A court may impose sanctions on its own initiative. S.Ct. Rule 137. A court that imposes sanctions must set forth with specificity the basis for sanctions in a separate order. *Id. See Gershak, supra,* 738 N.E.2d at 608 – 609. Orders entering sanctions are reviewed under the abuse of discretion standard. *Adler, supra,* 648 N.E.2d at 958.

Fed.R.Civ.P. 11, which is similar to S.Ct. Rule 137, establishes the standards attorneys and parties must meet when filing pleadings, motions, or other documents in federal court. It also regulates the circumstances in which sanctions may be imposed if the standards of Fed.R.Civ.P. 11 are not met. As with S.Ct. Rule 137, Fed.R.Civ.P. 11(a) requires that at least one attorney sign the pleading, motion, or other document and provide the attorney's address and telephone number. Fed.R.Civ.P. 11 was significantly reworded during the 2007 Style Project, however, the revisions were mostly stylistic and, as noted by the Committee on Rules of Practice and Procedure, effect no substantive change. See Report of the Judicial Conference Committee on

Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/st_report_sept_2009.pdf.

Fed.R.Civ.P. 11(b) prohibits the filing of pleadings that are not reasonably based in fact or law and that are interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increased cost in litigation. *CUNA Mutual Insurance Society v. Office & Professional Employees International Union, Local 39,* 443 F.3d 556, 560 – 561 (7th Cir. 2006). As with S.Ct. Rule 137, the purpose of Fed.R.Civ.P. 11 is not to judge the merits of a cause of action, but to discourage unnecessary complaints and other filings that impose substantial costs on the judicial system as well as on the parties. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L.Ed.2d 359, 110 S.Ct. 2447, 2454 (1990); *Corley v. Rosewood Care Center, Incorporated of Peoria*, 388 F.3d 990, 1013 (7th Cir. 2004) (noting that purpose of Fed.R.Civ.P. 11 is to deter abusive litigation practices). As with state practice, the trial court is given broad discretion to determine whether an award of sanctions under Fed.R.Civ.P. 11 is proper. *Id.*

In federal practice, Fed.R.Civ.P. 11 requires the court to inquire into whether the attorney's conduct was reasonable under the circumstances. *Corley, supra.* Thus, a potential violation of Fed.R.Civ.P. 11 is analyzed under a negligence standard and turns on whether the conduct was objectively reasonable. *Brotherhood Mutual Insurance Co. v. Ervin Cable Construction, LLC,* No. 05 C 3408, 2006 WL 3431915 at *5 (N.D.Ill. Nov. 27, 2006) (noting that court must not look back in hindsight but rather look to what attorney knew at time when complaint was filed, not after what was subsequently discovered during discovery); *Papa John's International, Inc. v. Rezko,* No. 04 C 3131, 2006 WL 566468 at *2 (N.D.Ill. Mar. 3, 2006) (noting that attorney's good faith is immaterial in imposition of sanctions).

As with state practice, sanctions may be imposed either by motion of the opposing party or by the court's own initiative through a show-cause order. Fed.R.Civ.P. 11(c). However, federal practice differs from state practice in that Fed.R.Civ.P. 11 contains a "safe harbor" provision that is designed to give the author of the allegedly offending pleading a full and fair opportunity to respond and show cause before sanctions are imposed. Fed.R.Civ.P. 11(c)(1); *Divane v. Krull Electric Co.*, 200 F.3d 1020, 1025 – 1026 (7th Cir. 1999). Under this safe-harbor provision, a motion for sanctions may not be filed with the court until 21 days after service of the motion, or within any other time frame the court provides. Fed.R.Civ.P. 11(c)(2); *Harris v. Franklin-Williamson Human Services, Inc.*, 97 F.Supp.2d 892, 910 (S.D.Ill. 2000) (refusing to consider motion for sanctions under Fed.R.Civ.P. 11 when motion was not served on opposing counsel 21 days prior to filing with court). If an attorney is served with a motion for sanctions, he or she has 21 days to withdraw or amend the subject pleading. A court that imposes sanctions by motion without adhering to this 21-day safe harbor abuses its discretion. *Divane, supra.*

III. MOTIONS

A. Motions To Dismiss in State Court

1. [2.50] 735 ILCS 5/2-615

A motion to dismiss brought pursuant to §2-615 of the Code of Civil Procedure (735 ILCS 5/2-615) addresses defects in a pleading. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 607 N.E.2d 201, 205, 180 Ill.Dec. 307 (1992). Under §2-615, Illinois courts accept as true all well-pleaded allegations, liberally construe those allegations, and draw all reasonable inferences in the plaintiff's favor. *Colonial Funding, L.L.C. v. American Empire Surplus Lines Insurance Co.*, 308 Ill.App.3d 376, 719 N.E.2d 1098, 1099, 241 Ill.Dec. 695 (1st Dist. 1999); *Zeitz v. Village of Glenview*, 227 Ill.App.3d 891, 592 N.E.2d 384, 387, 169 Ill.Dec. 897 (1st Dist. 1992) (reversing grant of §2-615 motion). After applying these principles, the court should not dismiss any claim unless it is clear that the plaintiff cannot prove any set of facts, under any circumstances, that would entitle him or her to relief. *Schons v. Monarch Insurance Company of Ohio*, 214 Ill.App.3d 601, 574 N.E.2d 83, 158 Ill.Dec. 289 (1st Dist. 1991) (reversing grant of §2-615 motion to dismiss reformation claims); *Ballard v. Granby*, 90 Ill.App.3d 13, 412 N.E.2d 1067, 1070, 45 Ill.Dec. 485 (3d Dist. 1980) ("[t]he question of the sufficiency of the evidence on the question of mistake or fraud is one to be decided at trial, not at the motion to dismiss stage").

Illinois is a fact-pleading state in which plaintiffs are required to set out facts giving rise to causes of action. Plaintiffs must allege facts supporting all of the elements of the claims made. *See Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill.App.3d 562, 732 N.E.2d 1082, 1092, 247 Ill.Dec. 750 (1st Dist. 1999). To state a cause of action, a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action being asserted. *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 667 N.E.2d 1296, 1300, 217 Ill.Dec. 720 (1996). Although well-pleaded facts are taken as true for the purposes of a motion to dismiss, pleadings are to be strictly construed against the pleader. *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 430 N.E.2d 976, 983, 58 Ill.Dec. 725 (1981). Notice pleading, conclusions of law, and conclusions of fact are insufficient and will be disregarded by the court. 430 N.E.2d at 984 – 985. *See also Monroe Dearborn Limited Partnership v. Board of Education of City of Chicago*, 271 Ill.App.3d 457, 648 N.E.2d 1055, 1057 – 1058, 208 Ill.Dec. 133 (1st Dist. 1995). In *Knox College*, the Illinois Supreme Court stated that "if after deleting the conclusions that are pleaded there are not sufficient allegations of fact which state a cause of action against the defendant, the motion [to dismiss] must be granted . . . regardless of whether or not they inform the defendant in a general way of the nature of the claim against him." 430 N.E.2d at 985.

In considering a motion under §2-615, the court may consider all facts apparent from the face of the pleadings in addition to matters of which the court can take judicial notice and admissions in the record. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995). Only those well-pleaded factual allegations and the reasonable inferences to be drawn from them need be taken as true. *First National Bank of Decatur v. Mutual Trust Life Insurance Co.*, 122 Ill.2d 116, 522 N.E.2d 70, 118 Ill.Dec. 615 (1988). The court should ignore conclusions of law that are unsupported by allegations of specific facts on which these conclusions rest. *Mlade v. Finley*, 112 Ill.App.3d 914, 445 N.E.2d 1240, 68 Ill.Dec. 387 (1st Dist. 1983).

It is well established in Illinois that to survive a motion to dismiss, a complaint must set out sufficiently every essential fact to be proved. *Lykowski v. Bergman*, 299 Ill.App.3d 157, 700 N.E.2d 1064, 1069, 233 Ill.Dec. 356 (1st Dist. 1998). It is also elementary that in a §2-615 motion to dismiss, the only facts to be considered are those contained in the complaint. *Pioneer Bank & Trust Co. v. Austin Bank of Chicago*, 279 Ill.App.3d 9, 664 N.E.2d 182, 185, 215 Ill.Dec. 785 (1st Dist. 1996).

Unless the defendant can show that the plaintiff has pleaded himself or herself out of court, a court will usually afford the plaintiff at least one opportunity to file an amended pleading and correct any defects. Therefore, it is important for a movant to be mindful of both the costs and the benefits of filing a §2-615 motion to dismiss and whether such a motion may merely lead to a stronger pleading.

2. [2.51] 735 ILCS 5/2-619

Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619) allows a party to seek involuntary dismissal based on certain defects or defenses. This is different from 735 ILCS 5/2-615 in that a motion brought under §2-619 may go beyond allegations in the complaint and present other affirmative matters that may defeat the claims made in the complaint. A party can utilize a §2-619 motion to raise a defense that completely defeats a cause of action. Such defenses include

(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

(4) That the cause of action is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

When ruling on a §2-619 motion to dismiss, the court interprets all well-pleaded facts and reasonable inferences therefrom as true and interprets all pleadings and supporting documents in the light most favorable to the nonmoving party. *White v. City of Chicago,* 369 Ill.App.3d 765, 861 N.E.2d 1083, 308 Ill.Dec. 518 (1st Dist. 2006); *Hermitage Corp. v. Contractors Adjustment Co.,* 166 Ill.2d 72, 651 N.E.2d 1132, 1139, 209 Ill.Dec. 684 (1995); *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago,* 213 Ill.2d 1, 820 N.E.2d 401, 404, 289 Ill.Dec. 625 (2004); *Van Meter v. Darien Park District,* 207 Ill.2d 359, 799 N.E.2d 273, 278, 278 Ill.Dec. 555 (2003). A §2-619 motion to dismiss "admits the legal sufficiency of the complaint but asserts affirmative matter to avoid or defeat the claim." *Lamar Whiteco Outdoor Corp. v. City of West Chicago,* 355 Ill.App.3d 352, 823 N.E.2d 610, 616, 291 Ill.Dec. 318 (2d Dist. 2005).

When a party moving for dismissal under §2-619 supplies facts that, if not contradicted, would entitle the party to a judgment as a matter of law, the opposing party cannot rely on bare allegations alone to raise issues of material fact. *Atkinson v. Affronti,* 369 Ill.App.3d 828, 861 N.E.2d 251, 308 Ill.Dec. 186 (1st Dist. 2006); *Barber-Colman Co. v. A & K Midwest Insulation Co.,* 236 Ill.App.3d 1065, 603 N.E.2d 1215, 1220, 177 Ill.Dec. 841 (5th Dist. 1992). Facts contained in an affidavit in support of a motion to dismiss that are not contradicted by counteraffidavit must be taken as true for purposes of the motion. *Id.*

Motions under §2-619 should be filed "within the time for pleading." Section 2-619 motions to dismiss may be filed after an answer if leave is granted by the court. The court may deny leave to file a late §2-619 motion if the responding party can show that the late filing has caused undue prejudice. *In re Marriage of Brownfield,* 283 Ill.App.3d 728, 670 N.E.2d 1198, 219 Ill.Dec. 310 (4th Dist. 1996).

3. [2.52] Combined Motions Pursuant to 735 ILCS 5/2-619.1

Section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1) provides that a party may file a motion under any combination of §§2-615, 2-619, and 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-615, 5/2-619, and 5/2-1005) as a single motion. For example, a party may wish to dismiss a count both for failure to state a claim and because it is barred by the applicable statute of limitations. Section 2-619.1 provides, "A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based."

Motions that are not properly identified may be denied. The First District Appellate Court has admonished movants to file motions that clearly identify which section supports each argument:

> **Section 2-619.1 specifically provides that a combined motion shall be divided into parts and each part shall be limited to and specify a single section of the Code under which relief is sought. . . . Meticulous practice dictates that the movants clearly state the section of the Code under which a motion to dismiss is brought. [**Citation omitted.**]** *Storm & Associates, Ltd. v. Cuculich,* 298 Ill.App.3d 1040, 700 N.E.2d 202, 206, 233 Ill.Dec. 101 (1st Dist. 1998).

B. Motions Pursuant to Fed.R.Civ.P. 12

1. [2.53] Fed.R.Civ.P. 12(b)(6) — Failure To State a Claim

Fed.R.Civ.P. 12(b)(6) is the parallel provision in federal practice to §2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615. Fed.R.Civ.P. 12(b)(6) affords a defendant the opportunity to seek dismissal if the complaint fails to state a claim on which relief can be granted. A motion to dismiss under Fed.R.Civ.P. 12(b)(6) will be granted when the plaintiff can prove no set of facts, consistent with the allegations as set forth in the pleadings, that will entitle him or her to relief. *See Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000); *Ntron International Sales Co. v. Carroll*, 714 F.Supp. 335, 336 (N.D.Ill. 1989). When deciding such a motion, the court must accept the plaintiff's allegations as true and view those allegations in the light most favorable to the plaintiff. *Id.*

In 2007, the United States Supreme Court clarified the federal notice-pleading standard in a case involving complex antitrust violations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955, 1974 (2007). Two years later, the United States Supreme Court affirmed that the clarified standard set in *Twombly* applied to all civil cases filed in federal courts and was not limited to complex cases. *See Ashcroft v. Iqbal*, 556 U.S. 662, 173 L.Ed.2d 868, 129 S.Ct. 1937, 1949 (2009).

To survive a motion to dismiss after the decisions in *Twombly* and *Iqbal*, a pleading must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* Pleading " 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Id.*, quoting *Twombly, supra*, 127 S.Ct. at 1965. Fed.R.Civ.P. 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 129 S.Ct. at 1949. Factual allegations must be enough to raise a right to relief above the speculative level. *Twombly, supra*, 127 S.Ct. at 1964 – 1965. This is because "a plaintiff with a 'largely groundless claim' " should not be "allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.' " 127 S.Ct. at 1966, quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 161 L.Ed.2d 577, 125 S.Ct. 1627, 1634 (2005). Plaintiffs and defendants alike should be familiar with these two decisions when preparing and assessing a complaint, respectively.

A motion under Fed.R.Civ.P. 12(b)(6) can also be used to argue that a plaintiff has pleaded himself or herself out of court by attaching documents to a complaint. Documents attached to a pleading control over any inconsistent allegations in the pleading. *See Berbas v. Board of Education of City of Chicago*, No. 00-C-2734, 2000 WL 875728 at *4 (N.D.Ill. June 28, 2000) ("When . . . an exhibit contradicts an assertion in the complaint and reveals information which prohibits recovery as a matter of law, the information provided in the exhibit trumps the assertion in the complaint."). A court is permitted to look at documents attached to a complaint to determine whether a plaintiff is entitled to judgment. *See Reger Development, LLC v. National City Bank*, 592 F.3d 759, 764 (7th Cir. 2010) (granting motion to dismiss based on documents attached to complaint which showed that plaintiff was not entitled to judgment).

Last, when pleading a claim for fraud, Fed.R.Civ.P. 9(b) requires a plaintiff to allege the circumstances constituting fraud with particularity. This means the "who, what, when, where, and

how." *Arazie v. Mullane*, 2 F.3d 1456, 1465 (7th Cir. 1993), quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990). Failing to satisfy the heightened pleading standards set forth in Fed.R.Civ.P. 9 when asserting fraud also constitutes grounds for dismissal under Fed.R.Civ.P. 12(b)(6). *See Reger Development, supra*, 592 F.3d at 763 – 767.

2. [2.54] Fed.R.Civ.P. 12(c) — Motions for Judgment on the Pleadings

Fed.R.Civ.P. 12(c) permits motions for judgment on the pleadings. Rule 12(c) provides: "After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings."

Under Fed.R.Civ.P. 12(c), a party may move for judgment on the pleadings after the pleadings are closed. *Scherr v. Marriot International, Inc.*, No. 10 C 7384, 2011 WL 6097854 at *2 (N.D.Ill. Dec. 1, 2011); *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). The applicable standard for a Fed.R.Civ.P. 12(c) motion on the pleadings is the same standard as that applicable for a motion to dismiss for failure to state a claim on which relief can be granted under Rule 12(b)(6). Fed.R.Civ.P. 12(d); *Scherr, supra; Buchanan-Moore, supra.*

Thus, the court will grant a Rule 12(c) motion when "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998), quoting *Craigs, Inc. v. General Electric Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993). In evaluating the motion, the court accepts all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in favor of the plaintiff. *Buchanan-Moore, supra*. However, the court need not ignore facts set forth in the complaint that undermine the plaintiff's claim or give weight to unsupported conclusions of law. *Id.*

When considering a motion under Fed.R.Civ.P. 12(c), the court is confined to matters that appear in the pleadings and matters of which the court can take judicial notice. *Scherr, supra*. Consideration of other extraneous matters can result in the motion being converted to one for summary judgment under Fed.R.Civ.P. 56. *See General Insurance Company of America v. Clark Mall Corp.*, 644 F.3d 375, 378 (7th Cir. 2011).

3. [2.55] Fed.R.Civ.P. 12(e) — Motions for More Definite Statement

Fed.R.Civ.P. 12(e) provides, in pertinent part, as follows:

> **A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired.**

Motions for a more definite statement are generally disfavored and apply "to a small class of pleadings." *Land O'Lakes Purina Feed, LLC v. WelkCo, LLC*, No. 10-981-GPM, 2011 WL 1465632 at *2 (S.D.Ill. Apr. 18, 2011). A motion for a more definite statement under Fed.R.Civ.P. 12(e) is intended only to clear up confusion in a pleading and not as a substitute for the normal discovery process. *Id.*

Rule 12(e) motions should rarely be granted and only in those instances in which the pleading is "so unintelligible that the movant cannot draft a responsive pleading." *Golden v. Nadler Pritikin & Mirabelli*, No. 05 C 0283, 2010 WL 5373876 at *1 (N.D.Ill. Dec. 21, 2010). Thus, if a complaint is sufficiently definite to enable a defendant to know what is charged, then it is sufficient to withstand a motion under Rule 12(e). *WelkCo, supra*.

The Code of Civil Procedure also allows a party to move for a more definite statement through a motion for a bill of particulars if a pleading is so lacking in detail that it fails to advise a party of the claim to be defended. 735 ILCS 5/2-607. Motions for a more definite statement or for a bill of particulars are not common in the context of business and commercial litigation. Parties will more typically utilize a motion to dismiss under 735 ILCS 5/2-615 or Fed.R.Civ.P. 12(b)(6) when a complaint fails to adequately advise a defendant of the claims being made.

4. [2.56] Fed.R.Civ.P. 12(f) — Motions To Strike

Under Fed.R.Civ.P. 12(f), the court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Delta Consulting Group, Inc. v. R. Randle Construction, Inc.*, 554 F.3d 1133, 1141 (7th Cir. 2009), quoting Rule 12(f). A party may move to strike or the court can issue an order striking all or part of a pleading on its own. 554 F.3d at 1141. The decision to strike all or part of a pleading is within the court's discretion. *Id.*

While motions to strike are generally disfavored because they can result in delay, a motion to strike which seeks to remove "unnecessary clutter" from a case can serve to expedite a case and will be granted. *Isringhausen Imports, Inc. v. Nissan North America, Inc.*, No. 10-CV-3253, 2011 WL 6029733 at *1 (C.D.Ill. Dec. 5, 2011) (striking affirmative defenses); *Delta Consulting Group, supra*, 554 F.3d at 1141 – 1142 (affirming district court's decision to strike certain allegations of defendant's counterclaim).

C. Forum Non Conveniens

1. [2.57] Pursuant to Illinois S.Ct. Rule 187

Illinois S.Ct. Rule 187 allows a party to file a motion on the grounds of forum non conveniens. Rule 187(a) states, "A motion to dismiss or transfer the action under the doctrine of *forum non conveniens* must be filed by a party not later than 90 days after the last day allowed for the filing of that party's answer."

Rule 187(b) specifically allows for discovery to be conducted as called for in a motion to dismiss or transfer on grounds of forum non conveniens and states that these motions may be supported and opposed by affidavit.

The doctrine of forum non conveniens is "founded in considerations of fundamental fairness and sensible and effective judicial administration." *First American Bank v. Guerine*, 198 Ill.2d 511, 764 N.E.2d 54, 57, 261 Ill.Dec. 763 (2002), quoting *Adkins v. Chicago, Rock Island & Pacific R.R.*, 54 Ill.2d 511, 301 N.E.2d 729, 730 (1973). When more than one potential forum exists, the equitable doctrine of forum non conveniens may be invoked to determine the most appropriate forum. *Dawdy v. Union Pacific R.R.*, 207 Ill.2d 167, 797 N.E.2d 687, 693, 278

Ill.Dec. 92 (2003). Under this doctrine, "the court in which the action was filed [may] decline jurisdiction and direct the lawsuit to an alternative forum that the court determines can better serve the convenience of the parties and the ends of justice." *Id.*

In ruling on a forum non conveniens motion, the court must apply a balancing test of private and public interest factors to determine the appropriate forum. 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.*

The 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 county with no connection to the litigation; and the interest in having local controversies decided locally." *Id.*

"A defendant seeking transfer is not required to show that the plaintiff's choice of forum is inconvenient; rather, transfer is allowed where defendant's choice is the substantially more appropriate forum." *Czarnecki v. Uno-Ven Co.*, 339 Ill.App.3d 504, 791 N.E.2d 164, 168, 274 Ill.Dec. 368 (1st Dist. 2003).

In addition to the above factors, the trial court must "consider the plaintiff's substantial right to choose the forum in which to bring an action." *Botello v. Illinois Central R.R.*, 348 Ill.App.3d 445, 809 N.E.2d 197, 207, 284 Ill.Dec. 75 (1st Dist. 2004). However, a plaintiff's choice of forum is not entitled to the same weight or consideration in every case. "When the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Dawdy, supra*, 797 N.E.2d at 694, quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 70 L.Ed.2d 419, 102 S.Ct. 252, 266 (1981).

2. [2.58] Forum Non Conveniens in Federal Court

Under the doctrine of forum non conveniens, the federal court can "dismiss a suit over which it would normally have jurisdiction if it best serves the convenience of the parties and the ends of justice." *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 703 (7th Cir. 2005), quoting *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 802 (7th Cir. 1997). To dismiss under the doctrine, however, the plaintiff's choice of forum must be "oppressive and vexatious to the defendant, out of all proportion to the plaintiff's convenience." *Id.*, quoting *In re Ford Motor Co.*, 344 F.3d 648, 651 (7th Cir. 2003).

Further, the court should dismiss the suit as inconvenient only if an alternative forum is both available and adequate. *Kamel, supra*, 108 F.3d at 802. A forum is "available" if "all parties are amenable to process and are within the forum's jurisdiction." 108 F.3d at 803, citing *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), *vacated in part on other grounds sub nom. Pan American World Airways, Inc.*

v. Lopez, 109 S.Ct. 1928 (1989). An alternative forum is "adequate" if "the parties will not be deprived of all remedies or treated unfairly [in that venue]." 108 F.3d at 803, citing *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 70 L.Ed.2d 419, 102 S.Ct. 252, 265 – 266 (1981).

Once the existence of an adequate alternative forum has been established, "the court decides whether to keep or dismiss the case by weighing various private and public interest factors." *Bridgestone/Firestone, supra,* 420 F.3d at 704. "The private interest factors include 'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling . . . witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.' " *Id.,* quoting *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 91 L.Ed. 1055, 67 S.Ct. 839, 843 (1947). The public interest factors include the administrative difficulties in handling litigation in congested courts instead of at the origin of the controversy, the burden on a community of jury duty when the community has no relation to the litigation, and the benefit of deciding "localized controversies . . . at home," in a venue whose law will govern the case. 67 S.Ct. at 843. "The Court may reasonably assume that a plaintiff's home forum is convenient, and therefore this choice should rarely be disturbed." *Rotec Industries Inc. v. Aecon Group, Inc.,* 436 F.Supp.2d 931, 934 (N.D.Ill. 2006). *See also Kamel, supra,* 108 F.3d at 803, citing *Piper Aircraft, supra,* 102 S.Ct. at 258, and *Wilson v. Humphreys (Cayman) Ltd.,* 916 F.2d 1239, 1245 (7th Cir. 1990).

D. Removal and Remand

1. [2.59] Removal to Federal Court

Removal is the process by which a defendant moves a case from a state trial court to a federal district court. Removal is permissible only when at least one claim filed by the plaintiff falls within the original subject-matter jurisdiction of the federal court. *Jefferson County, Alabama v. Acker,* 527 U.S. 423, 144 L.Ed.2d 408, 119 S.Ct. 2069, 2074 (1999). The entire process is governed exclusively by federal law, specifically 28 U.S.C. §1441, which identifies the kinds of suits that are removable to federal court. Included are most diversity suits, most federal-question suits, nondiverse state claims that are joined with federal questions, and suits against foreign states. Finally, 28 U.S.C. §1441(f) contains a provision through which a case may be removed to federal court even when the original state court lacked jurisdiction.

Cases removed from state court are removed to the federal district court that includes the location where the state court sits. Thus, a case removed from the Circuit Court of Cook County would be sent to the Northern District of Illinois, Eastern Division. Though the removal statute does not specifically state so, caselaw has established that an action cannot be removed to federal district court unless all defendants join in the notice of removal. Some district courts, including the Northern, Central, and Southern Districts of Illinois, also require that the petition for removal must not only reflect the unanimous agreement of the defendants, but that each individual defendant must personally, or through the defendant's own counsel, confirm to the court that the individual defendant has consented to the removal petition. *Chicago, Rock Island & Pacific Ry. v. Martin,* 178 U.S. 245, 44 L.Ed. 1055, 20 S.Ct. 854, 855 (1900); *McMahon v. Bunn-O-Matic Corp.,* 150 F.3d 651 (7th Cir. 1998).

28 U.S.C. §1441(b) authorizes removal of cases when the parties meet the requirements of diversity jurisdiction, with one notable exception. If any defendant sued on a diversity count is a citizen of the state in which the claim was filed, this count is not eligible for removal to federal district court. *Geldermann, Inc. v. Commodity Futures Trading Commission,* 836 F.2d 310, 322 n.11 (7th Cir. 1987). Litigants should take note, however, that removal cannot be defeated by joining a defendant who is a citizen of the state if this defendant has no real interest in the claim. *See id.*

Defendants that intend to remove a case to federal court must file the notice of removal in the appropriate federal court within 30 days of receipt of the plaintiff's original pleading. 28 U.S.C. §1446. For purposes of the removal statute, "receipt" means actual service of the summons and complaint. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.,* 526 U.S. 344, 143 L.Ed.2d 448, 119 S.Ct. 1322 (1999).

Filing the notice of removal automatically removes the case from the jurisdiction of the state court. After removal, the federal court will then determine whether the case will remain in federal court or be remanded to state court.

2. [2.60] Remand to State Court

28 U.S.C. §1447(c) governs motions to remand a case to state court. Section 1447(c) provides two different time limits on motions to remand, depending on the grounds for seeking remand. If the ground is any basis other than the federal court's lack of subject-matter jurisdiction, a party seeking remand must file an appropriate motion within 30 days of the date of the filing of the removal petition. Examples of these bases are the failure to comply with the time limits for removal or lack of diversity of citizenship. If the basis for seeking remand is an allegation that the federal court lacks subject-matter jurisdiction, §1447(c) provides that the motion may be made at any time prior to final judgment. *See Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 141 L.Ed.2d 364, 118 S.Ct. 2047, 2054 (1998). Finally, a court may remand a case sua sponte if it notices its own lack of subject-matter jurisdiction, regardless of whether a motion to remand has been filed. 28 U.S.C. §1447(c).

E. Motions To Consolidate

1. [2.61] Consolidation Pursuant to 735 ILCS 5/2-1006

Section 2-1006 of the Code of Civil Procedure provides that "actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." 735 ILCS 5/2-1006. Under Illinois law, when separate causes are of the same nature, involve the same or like issues, and depend largely on the same evidence, consolidation is proper. *See Ad-Ex, Inc. v. City of Chicago,* 247 Ill.App.3d 97, 617 N.E.2d 333, 187 Ill.Dec. 125 (1st Dist. 1993). Illinois courts have broad discretion in considering a motion to consolidate. *Pickering v. Owens-Corning Fiberglas Corp.,* 265 Ill.App.3d 806, 638 N.E.2d 1127, 203 Ill.Dec. 1 (5th Dist. 1994). Further, Illinois courts favor consolidation of causes when it can be done as a matter of judicial economy. *See J.F. Inc. v. Vicik,* 99 Ill.App.3d 815, 426 N.E.2d

257, 55 Ill.Dec. 282 (5th Dist. 1981), *overruled on other grounds by Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.*, 183 Ill.2d 66, 697 N.E.2d 727, 231 Ill.Dec. 942 (1998).

Consolidation generally occurs in three situations: (a) when several actions are pending involving substantially the same subject matter, the court may stay proceedings in all but one and see whether the disposition of the one action may settle the others, thereby avoiding multiple trials on the same issue; (b) when several actions involve an inquiry into the same event in its general aspects, the actions may be tried together, but with separate docket entries, verdicts, and judgments, the consolidation being limited to a joint trial; and (c) when several actions are pending that might have been brought as a single action, the cases may be merged into one action, thereby losing their individual identity, to be disposed of in one suit. *Kassnel v. Village of Rosemont,* 135 Ill.App.3d 361, 481 N.E.2d 849, 851, 90 Ill.Dec. 49 (1st Dist. 1985); *Shannon v. Stookey*, 59 Ill.App.3d 573, 375 N.E.2d 881, 16 Ill.Dec. 774 (5th Dist. 1978); *Vitale v. Dorgan,* 25 Ill.App.3d 941, 323 N.E.2d 616 (2d Dist. 1975).

2. [2.62] Consolidation Pursuant to Fed.R.Civ.P. 42(a)

Fed.R.Civ.P. 42(a), regarding the consolidation of actions, provides as follows:

If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

In applying this rule, courts stress that the purpose of joining actions is to promote convenience and judicial economy. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 77 L.Ed. 1331, 53 S.Ct. 721, 727 – 728 (1933). Fed.R.Civ.P. 42 is designed to encourage consolidation when common questions of law or fact are present. 9A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE (3d ed. 2008, Supp. 2011).

F. [2.63] Motions To Intervene Pursuant to 735 ILCS 5/2-408

Section 2-408(a) of the Code of Civil Procedure provides for intervention of a party as of right:

> **Upon timely application anyone shall be permitted as of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer.** 735 ILCS 5/2-408(a).

Section 2-408(b) provides for permissive intervention:

> **Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.** 735 ILCS 5/2-408(b).

It is important that a party considering intervention be mindful of the clock. In the case of both permissive intervention and intervention as of right, the application to intervene must be made in a timely manner. *In re Estate of Mueller*, 275 Ill.App.3d 128, 655 N.E.2d 1040, 211 Ill.Dec. 657 (1st Dist. 1995); *People ex rel. Hartigan v. Illinois Commerce Commission*, 243 Ill.App.3d 544, 611 N.E.2d 1321, 1324, 183 Ill.Dec. 673 (1st Dist. 1993). The determination of whether a petition is timely is a matter left to the sound discretion of the trial court. *Brandt v. John S. Tilley Ladders Co.*, 145 Ill.App.3d 304, 495 N.E.2d 1269, 1272, 99 Ill.Dec. 534 (1st Dist. 1986); *Standard Bank & Trust Co. v. Village of Oak Lawn*, 61 Ill.App.3d 174, 377 N.E.2d 1152, 1154, 18 Ill.Dec. 516 (1st Dist. 1978).

G. [2.64] Multidistrict Litigation

Under the federal multidistrict litigation (MDL) statute, 28 U.S.C. §1407, Congress established a national MDL court, called the Judicial Panel on Multidistrict Litigation (JPML). The JPML is made up of seven district or circuit court judges, no two of whom can be from the same circuit. See 28 U.S.C. §1407(d). The JPML's purpose is to determine whether it is appropriate to transfer and consolidate actions for the purpose of pretrial MDL. One principal purpose of the statute governing MDL is to allow one judge to take control of complex proceedings, the better to avoid unnecessary duplication in discovery. *In re Orthopedic Bone Screw Products Liability Litigation*, 79 F.3d 46 (7th Cir. 1996). MDL status has been allowed in business and commercial litigation ranging from antitrust to patent, copyright, and trademark cases.

28 U.S.C. §1407(c) states that proceedings for the transfer of an action under the MDL statute may be initiated by either (1) the JPML's own initiative or (2) a motion filed with the JPML "by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending."

The JPML can "override a plaintiff's choice of forum when three factors are present: (1) 'one or more common questions of fact are pending in different districts,' (2) a transfer would serve 'the convenience of parties and witnesses,' and (3) a transfer would 'promote the just and efficient conduct of [the] actions.' " *Pinney v. Nokia, Inc.*, 402 F.3d 430, 451 – 452 (4th Cir. 2005), quoting 28 U.S.C. §1407(a). *See also In re Vernitron Securities Litigation*, 462 F.Supp. 391, 394 (J.P.M.L. 1978).

Once the JPML grants a motion to transfer a matter under the MDL statute, a single district and federal judge are selected by the JPML to preside over all consolidated cases. This judge will

then rule on all pretrial motions and coordinate discovery. If a case does not conclude prior to trial, it will then be transferred back to its original district for trial. *See Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002).

H. [2.65] Motions for Summary Judgment Pursuant to 735 ILCS 5/2-1005

Summary judgment motions in Illinois are governed by §2-1005 of the Code of Civil Procedure, which provides that summary judgment should be granted "without delay 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." 735 ILCS 5/2-1005(c). *See Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 758 N.E.2d 848, 259 Ill.Dec. 440 (2001). The purpose of a motion for summary judgment is to determine whether a question of fact exists. *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 662 N.E.2d 397, 402, 214 Ill.Dec. 831 (1996); *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 622 N.E.2d 788, 792, 190 Ill.Dec. 758 (1993). A court will strictly construe pleadings, depositions, admissions, and affidavits on file against the moving party when making the determination as to whether there is a genuine issue as to a material fact. *Id.* "A triable issue precluding summary judgment exists where the material facts are disputed . . . or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." [Citation omitted.] *Id.*

Illinois courts encourage the use of summary judgment to assist in the expeditious disposition of lawsuits. *Id.* "The purpose of the summary judgment procedure is to avoid the needless expense and time of a full trial where there is no showing that the plaintiff has even a *prima facie* case." *Holland v. Arthur Andersen & Co.*, 212 Ill.App.3d 645, 571 N.E.2d 777, 782, 156 Ill.Dec. 797 (1st Dist. 1991). Summary judgment "is an important tool in the administration of justice; its use in a proper case is to be encouraged and its benefits inure not only to the litigants . . . but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trial." *Kimbrough v. Jewel Cos.*, 92 Ill.App.3d 813, 416 N.E.2d 328, 333, 48 Ill.Dec. 297 (1st Dist. 1981). However, courts have cautioned that because summary judgment is a drastic means of disposing of litigation, it should be allowed only when the moving party's right is "clear and free from doubt." *Busch, supra*, 662 N.E.2d at 402, citing *Purtill v. Hess*, 111 Ill.2d 229, 489 N.E.2d 867, 871, 95 Ill.Dec. 305 (1986).

In support of a summary judgment motion, the moving party may file supporting affidavits, but these affidavits are not required. 735 ILCS 5/2-1005(a). The party defending against a motion for summary judgment "may prior to or at the time of the hearing on the motion file counteraffidavits." 735 ILCS 5/2-1005(c). The party defending against a summary judgment motion should carefully review all affidavits submitted in support of the motion and file any counteraffidavits necessary to contradict all factual assertions raised by the moving party that are not otherwise contradicted in the pleadings, depositions, and admissions on file. "If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opponent cannot rest on his pleadings to create a genuine issue of material fact." *Harrison, supra*, 758 N.E.2d at 851. *See also Purtill, supra*.

1. [2.66] Timing

A plaintiff may move for a summary judgment in his or her favor "[a]ny time after the opposite party has appeared or after the time within which he or she is required to appear has expired." 735 ILCS 5/2-1005(a). Defendants may file a motion for summary judgment at any time. 735 ILCS 5/2-1005(b).

2. [2.67] Partial Summary Judgment

A motion for partial summary judgment allows a party to seek a determination as to one or more, but less than all, of the issues presented in a case. Such a motion can be an effective way of streamlining the issues to be presented at trial.

The Code of Civil Procedure specifically allows plaintiffs and defendants to move for summary judgment for all or any part of the relief sought. 735 ILCS 5/2-1005(a), 5/2-1005(b). Partial summary judgment as to liability may also be granted even when there is a genuine issue of material fact as to the amount of damages. 735 ILCS 5/2-1005(c). Section 2-1005(d) of the Code of Civil Procedure provides as follows:

> **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.** 735 ILCS 5/2-1005(d).

3. [2.68] Affidavits

The form and content of affidavits submitted under §2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005) should comply with S.Ct. Rule 191. Rule 191(a) provides that motions under §2-1005 must be filed before the last date for dispositive motions set by the trial court. Rule 191(a) further provides that affidavits in support of or opposition to a summary judgment shall

a. be made on the personal knowledge of the affiant;

b. set forth with particularity the facts on which the claim, counterclaim, or defense is based;

c. have attached thereto sworn or certified copies of all papers on which the affiant relies;

d. not consist of conclusions but of facts admissible in evidence; and

e. affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.

More than one affidavit may be used if all of the facts to be shown are not within the personal knowledge of one person. *Id.* When a party cannot obtain a necessary affidavit, S.Ct. Rule 191(b) allows a party to submit an affidavit explaining why the affidavit could not be obtained and "the court may make any order that may be just."

If it appears an affidavit relating to summary judgment is submitted in bad faith or for the purpose of delay, the court shall order the party to pay the reasonable expenses incurred by the other party as a result of the filing of the affidavit. 735 ILCS 5/2-1005(f). Any offending party or attorney may also be found in contempt. *Id.*

I. [2.69] Summary Judgment Pursuant to Fed.R.Civ.P. 56

Fed.R.Civ.P. 56(a) governs motions for summary judgment filed in federal court proceedings:

> **A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.**

Effective December 2010, Fed.R.Civ.P. 56 was amended for the first time in over 40 years to "improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice." Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, p. 14, at www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/st_report_sept_2009.pdf. Although the amendments reorganized the rule and added substantial procedural provisions, the amendments were "not intended to change the summary-judgment standard or burdens." Report, p. 14. The Committee on Rules of Practice and Procedure noted that while Fed.R.Civ.P. 56 had not changed in over 40 years, a wide variation among local rules and individual-judge rules had developed throughout the country. *Id.* Thus, the proposed amendments drew from many summary judgment provisions in current local rules and made six major proposals:

1. requiring that a party asserting a fact that cannot be genuinely disputed provide a "pinpoint citation" to the record supporting its fact position;

2. recognizing that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. §1746 as a substitute for an affidavit to support or oppose a summary-judgment motion;

3. providing courts with options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion;

4. setting a time period, subject to variation by local rule or court order in a case, for the party to file a summary-judgment motion;

5. explicitly recognizing that "partial summary judgments" may be entered; and

6. clarifying the procedure for challenging the admissibility of summary-judgment evidence. Report, pp. 14 – 15.

See also the Letter from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Honorable John G. Roberts, Chief Justice of the United States, regarding the Summary of Proposed Amendments to the Federal Rules (Dec. 16, 2009), www.uscourts.gov/uscourts/rulesandpolicies/rules/supreme%20court%202009/rulessctsummary2009letterhead.pdf. The amendments to Fed.R.Civ.P. 56 were approved by the U.S. Supreme Court in April 2010, and, after Congress declined to take action objecting to the proposed amendments, they took effect in December 2010.

1. [2.70] Moving Party's Initial Burden

The party moving for summary judgment bears the initial burden of establishing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Becker v. Tenenbaum-Hill Associates, Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548, 2553 (1986) (stating that moving party bears initial responsibility of informing district court of basis for its motion and identifying those portions of pleadings, depositions, answers to interrogatories, admissions on file, and affidavits that it believes demonstrate absence of genuine issue of material fact). In determining whether there is a genuine issue for trial, any doubt is resolved against the moving party. *Becker, supra*.

A moving party under Fed.R.Civ.P. 56 may also meet its initial burden by showing that there is an absence of evidence to support the nonmoving party's case. *Id.* For example, when a defendant seeks summary judgment on the ground that the plaintiff cannot establish an essential element of its claim, the defendant is not required to submit affidavits or other materials that negate the plaintiff's claims but can demonstrate the absence of that element. *See Celotex, supra,* 106 S.Ct. at 2554 ("the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case"). The *Celotex* Court further stated: "In our view, the plain language of [former] Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 106 S.Ct. at 2552. Essentially, "where the nonmoving party will bear the burden of proof at trial on a dispositive issue," the moving party does not have to submit affidavits in support of summary judgment motion but may rely solely on the pleadings, depositions, answers to interrogatories, and admissions on file. 106 S.Ct. at 2553. *Cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970) (finding that defendants failed to meet their initial burden of establishing absence of essential element in plaintiff's claim; thus, plaintiff was not required to come forward with affidavits in opposition to motion for summary judgment).

Last, the substantive law identifies the facts that are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505, 2510 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law are material. *Id.* Parties moving for summary judgment should be mindful of the amendments to the rules governing procedure, including the specific material required to support such a motion.

2. [2.71] Shifting the Burden to the Nonmoving Party

Once the moving party meets its initial burden, the nonmoving party then has the burden of presenting specific facts to show that there is a genuine issue for trial. *Becker v. Tenenbaum-Hill Associates, Inc.,* 914 F.2d 107, 110 (7th Cir. 1990); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348, 1356 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." 106 S.Ct. at 1356. As set forth in the Advisory Committee Notes, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes, 1963 Amendment, Note to Subdivision (e), Fed.R.Civ.P. 56. Thus, once the moving party has met his or her burden, the burden shifts to the opposing party to either (a) point to specific facts in the record or submit affidavits or declarations that show that there is a genuine issue of material fact precluding summary judgment or (b) show that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact. Fed.R.Civ.P. 56(c)(1).

3. [2.72] When Facts Are Unavailable to the Nonmovant

A party in opposition to a summary judgment motion may also submit an affidavit under Fed.R.Civ.P. 56(d) explaining why the party at the time cannot present by affidavit facts essential to justify the party's opposition to summary judgment. This rule is helpful if the adverse party needs further discovery before it is able to submit an affidavit to contradict the materials submitted by the party moving for summary judgment. Relief under this rule is often and liberally granted, particularly when a motion for summary judgment is filed early in the litigation. However, it does not come automatically, and a request must be made by separate motion, *not* within a response to a motion for summary judgment. *See, e.g., Six Flags, Inc. v. Westchester Surplus Lines Insurance Co.,* 565 F.3d 948, 963 (5th Cir. 2009). Fed.R.Civ.P. 56(d) allows the court to "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." An affidavit under Fed.R.Civ.P. 56(d) should set forth the reasons why a party is unable to present an affidavit at the time.

4. [2.73] Timing

Under Fed.R.Civ.P. 56(b), as amended as part of the 2009 Time-Computation Project and again in 2010, any party may move for summary judgment at any time until 30 days after the close of all discovery, unless a different time is set by local rule or the court orders otherwise. Although the amendment to the rules has attempted to harmonize the "due date" for summary

judgment, the rules expressly give courts the discretion to "order otherwise," and parties should be mindful of local rules and the individual judge's standing order to ensure that any additional deadlines or rules governing timing of summary-judgment motions are met.

5. [2.74] Partial Summary Judgment

Fed.R.Civ.P. 56(a) (formerly (d)) contemplates the use of a motion for summary judgment on one or more but less than all the issues presented in a case. As before, partial summary judgment is not a final judgment and is not appealable, unless specifically allowed by caselaw or statute.

6. [2.75] Affidavits

Fed.R.Civ.P. 56(c)(4) addresses the form of affidavits or declarations submitted in support or opposition to a motion for summary judgment. Whether filed in support of or opposition to a motion for summary judgment, affidavits or declarations "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Id.* Sworn or certified copies of any documents referred to in the affidavit shall be attached or served with the affidavit.

A party submitting an affidavit in bad faith or solely for the purpose of delay shall be sanctioned by an order to pay the reasonable expenses incurred by the other party, including attorneys' fees. Fed.R.Civ.P. 56(h). An offending party may also be held in contempt.

7. [2.76] N.D.Ill. Local Rule 56.1

N.D.Ill. Local Rule 56.1 must be closely followed by lawyers seeking summary judgment in the Northern District of Illinois. The Central and Southern District Courts have adopted similar local rules governing materials that must accompany motions for summary judgment. See S.D.Ill. Local Rule 7.1(e); C.D.Ill. Local Civ. Rule 7.1(D). N.D.Ill. Local Rule 56.1(a) specifically requires that a party seeking summary judgment supplement the motion with any affidavits referred to in Fed.R.Civ.P. 56(e), a supporting memorandum of law, and a statement of material facts "as to which the moving party contends there is no genuine issue" that entitle the movant to summary judgment. *Id.* Leave of court is required to file more than 80 separately numbered statements for the movant or more than 40 for the respondent. Please refer directly to N.D.Ill. Local Rule 56.1 for further detail.

J. [2.77] Motions To Seal

Motions to seal are strongly disfavored in Illinois state and federal courts. Motions to seal all or portions of court files have come under close scrutiny in the Illinois appellate courts. *See A.P. v. M.E.E.,* 354 Ill.App.3d 989, 821 N.E.2d 1238, 290 Ill.Dec. 664 (1st Dist. 2004). The *A.P.* court noted that there is a long-standing presumption of public access to court-filed documents and to proceedings in courtrooms. 821 N.E.2d at 1245, citing *Press-Enterprise Co. v. Superior Court of California for County of Riverside,* 478 U.S. 1, 92 L.Ed.2d 1, 106 S.Ct. 2735, 2741 (1986), and *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 55 L.Ed.2d 570, 98 S.Ct. 1306, 1311 – 1313 (1978).

The Illinois legislature codified the public's right to review judicial records in §16 of the Clerks of Courts Act, 705 ILCS 105/0.01, *et seq.*, which provides, in relevant part, as follows:

> **All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto.** 705 ILCS 105/16.

The common-law right of access can be limited as every court has supervisory power over its own records and files, and access may be denied under limited circumstances. *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214, 730 N.E.2d 4, 16, 246 Ill.Dec. 324 (2000). "The presumption of access can be rebutted by demonstrating that suppression 'is essential to preserve higher values and is narrowly tailored to serve that interest.' " *A.P., supra,* 821 N.E.2d at 1245, quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 78 L.Ed.2d 629, 104 S.Ct. 819, 824 (1984). *See also Skolnick, supra,* 730 N.E.2d at 16 – 17.

Many judges are closely scrutinizing any requests that would limit public access to court-filed documents, and parties, therefore, should be careful to craft motions to seal any protective orders narrowly to comport with the appellate courts' holdings. In addition, if a motion to seal filed in federal court is successful, practitioners should comply with any applicable electronic filing procedures. For example, some federal district courts, including the Northern District of Illinois, have implemented special procedures to be followed when parties electronically file sealed or restricted documents in civil cases. See, *e.g.*, N.D.Ill. General Order No. 09-014, General Order on Electronic Case Filing, amended Apr. 30, 2009 (eff. June 5, 2009), www.ilnd.uscourts.gov/home/clerksoffice/rules/admin/pdf-orders/generalorder102607.pdf. See also a supplemental document to N.D.Ill. General Order No. 09-014, E-Filing Civil Sealed Documents, www.ilnd.uscourts.gov/home/_assets/_documents/e-filing sealed documents.pdf. Practitioners should check applicable local rules and procedures for filing documents under seal.

K. [2.78] Motions for Reconsideration

Motions for reconsideration are not to be used as an attempted second bite at the apple. Rather, motions for reconsideration in state court are only appropriate under three specific circumstances:

1. to bring to the court's attention newly discovered evidence that was not available at the time of the hearing;

2. to indicate changes in the law; or

3. to point out errors in the court's previous application of existing law.

See O'Connor v. County of Cook, 337 Ill.App.3d 902, 787 N.E.2d 185, 191, 272 Ill.Dec. 370 (1st Dist. 2003); *Kaiser v. MEPC American Properties, Inc.*, 164 Ill.App.3d 978, 518 N.E.2d 424, 429 – 430, 115 Ill.Dec. 899 (1st Dist. 1987). *See also Landeros v. Equity Property & Development*, 321 Ill.App.3d 57, 747 N.E.2d 391, 254 Ill.Dec. 351 (1st Dist. 2001).

A court should deny a motion for reconsideration when a party "merely reiterated its earlier arguments before the court [and] did not bring newly discovered evidence to the court's attention, indicate a change in the law or illustrate that the judge misapplied the law." *Farley Metals, Inc. v. Barber Colman Co.*, 269 Ill.App.3d 104, 645 N.E.2d 964, 972, 206 Ill.Dec. 712 (1st Dist. 1994).

Illinois law is clear that "[t]he allowance of new matter on a motion for reconsideration . . . should not be permitted without a reasonable explanation as to why it was not available at the time of the original hearing." *Taylor v. Peoples Gas Light & Coke Co.*, 275 Ill.App.3d 655, 656 N.E.2d 134, 141, 211 Ill.Dec. 942 (1st Dist. 1995).

"Newly discovered" evidence is evidence that was not available prior to the hearing on the motion for summary judgment. *Chelkova v. Southland Corp.*, 331 Ill.App.3d 716, 771 N.E.2d 1100, 1111 – 1112, 265 Ill.Dec. 141 (1st Dist. 2002); *Farley Metals, supra*.

Motions for reconsideration in federal court are held to a similar standard. Motions for reconsideration are "not for use by parties who simply want to 'rehash' the same arguments or are disgruntled with the result." *See Burns v. First American Bank*, No. 04 C 7682, 2007 WL 141175 at *1 (N.D.Ill. Jan. 12, 2007) (denying motion to reconsider that "basically treats the Court's opinion as if it were a brief to which [d]efendant is entitled to respond"). *See also Hu v. Huey*, No. 07 C 3822, 2008 WL 2797000 at *5 (N.D.Ill. July 18, 2008) (reconsideration requires showing of newly discovered evidence, change in law, or "manifest error"); *Willmott v. Federal Street Advisors, Inc.*, No. 05 C 1124, 2008 WL 2477507 at *4 n.6 (N.D.Ill. June 17, 2008); *Altana, Inc. v. Abbott Laboratories*, No. 04 C 4807, 2007 WL 2669024 at *3 (N.D.Ill. Sept. 7, 2007). Thus, a motion for reconsideration should not be filed unless the movant can establish the following:

> **[**T**]he Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.** *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990), quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983).