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Pleadings

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I. INTRODUCTION

A. [7.1] Scope of Chapter

This chapter is designed to aid the practitioner in the efficient advancement of litigation by careful drafting of pleadings. In specific cases, form pleadings are provided to illustrate considerations suggested. In addition to form pleadings, this chapter provides fundamental guidelines for the practitioner that, if followed, assist in the preparation of pleadings for use in types of cases not specifically illustrated here.

B. [7.2] Designation of Pleadings

“Pleadings” are written statements of facts that constitute a plaintiff’s cause of action and a defendant’s grounds for defense. Well-drafted pleadings narrow the issues on which the underlying litigation proceeds. In Illinois, all pleadings must conform to the requirements of Article II, Part 6, of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, and the applicable Illinois Supreme Court Rules. Because there is no substitute for a thorough and frequent reading of the Code and the rules, the reader is well advised to become familiar with them.

1. [7.3] Initiating the Lawsuit — The Complaint

The first pleading by the plaintiff is designated the “complaint.” 735 ILCS 5/2-602. The purpose of the complaint is to advise the court and the opposing parties of the plaintiff’s cause of action. A well-drafted complaint succinctly sets forth a legally recognized cause of action and states facts that bring the claim within it. For a more complete discussion of the complaint, see §§7.8 – 7.45 below.

2. [7.4] Responding to the Complaint — The Answer

The first pleading by the defendant is designated as the “answer.” 735 ILCS 5/2-602. The answer responds to the plaintiff’s allegations; also, the answer accompanies allegations of affirmative defense and allegations of any cause of action the defendant may have against the plaintiff or other parties. A well-drafted answer should admit allegations of fact that the defendant knows to be true and should expressly deny all other allegations and any conclusions of law not previously stricken by motion. See §§7.21 – 7.24 below for a discussion of fact pleading, including a distinction between factual allegations and conclusions of law. See also §7.55 below for a more complete discussion of motions filed in lieu of pleadings. Responding to the complaint is addressed in detail in §§7.46 – 7.74 below.

3. [7.5] Asserting a Cause of Action by the Defendant — The Counterclaim and Third-Party Complaint

If a defendant has a claim against the plaintiff or a codefendant, he or she may file that claim as part of the same proceeding in which the plaintiff seeks relief. Such a claim is called a “counterclaim.” 735 ILCS 5/2-608(a). If the defendant wishes to proceed with a counterclaim, the defendant should state the counterclaim in the answer or else seek leave of court later. 735 ILCS 5/2-608(b). For a more complete discussion of counterclaims, see §7.69 below.

If a defendant has a claim against a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim, the defendant may file a third-party complaint. See §7.73 below for a more complete discussion of third-party complaints.

4. [7.6] Responding to New Matter Raised in the Answer — The Reply

If the answer raises new matter not addressed in the complaint, the plaintiff must file a pleading designated as the "reply." 735 ILCS 5/2-602. See §7.75 below for a more complete discussion of the reply.

5. [7.7] Changing the Pleadings — Amendments and Supplemental Pleadings

Circumstances often arise that necessitate changing the pleadings after they are filed. Pleadings may be amended or supplemented with leave of court. 735 ILCS 5/2-609, 5/2-616. For a more complete discussion of amendments and supplemental pleadings, see §§7.76 – 7.78 below.

II. INITIATING THE LAWSUIT — THE COMPLAINT

A. [7.8] Pre-Drafting Considerations

A practitioner should think carefully about the case before drafting the complaint. All aspects of the case should be thought through, including the possibility of appeal. Drafting a complaint can be a fine art requiring the anticipation of every potential procedural and substantive defense. The following represents a sample of important pre-drafting considerations a plaintiff's lawyer must mentally review in every case:

Forum/Venue/Jurisdiction. The forum chosen must be consistent with any special needs of the case. For example, the plaintiff's attorney should consider whether the defendant is subject to personal jurisdiction in the desired forum, as well as potential discovery issues, the relative conditions of trial dockets, and the possibility of intrastate venue transfer. In comparing federal and state venues, procedural differences that appear to be unimportant often may be significant. See, *e.g.*, Federal Rule of Civil Procedure 4(f).

Parties. The plaintiff's attorney should carefully consider the possibility of joining, as defendants, parties other than those minimally necessary. Of course, in every case the facts should warrant the naming of any defendant. When a partnership or other organization is involved, careful attempts must be made to ascertain all potential interests. Agency relationships should be examined carefully. In addition, the plaintiff's attorney should consider whether the case may be maintained as a class action.

Causes of Action. Illinois law provides an array of actions to achieve a given remedy. The careful pleader should research unfamiliar law before drafting the complaint to avoid being required to do so in response to a motion to dismiss. Certain statutory actions that now exist permit recovery of attorneys' fees. Statutes of limitation can affect certain actions differently. For

example, a complaint may draw the filing of a counterclaim otherwise time-barred. See 735 ILCS 5/13-207. Adding claims based on federal law may lead to an undesired removal effort by the defendants. The possibility of punitive damages should not be overlooked, though pleading rules regarding punitive damages should be consulted. See §7.17 below. Before pleading, the plaintiff's attorney should think through the case from start to finish and weigh those interests suggested by experience.

B. Drafting the Complaint

1. [7.9] Overview/Contents

The complaint should contain the following: (a) the caption (which designates venue), the names of the parties and, if applicable, the appropriate division in which the lawsuit is filed; (b) the introductory paragraph; (c) the body (which contains factual allegations bringing the plaintiff's claims within a legally recognized cause of action); (d) a prayer for relief; (e) the signature and address of the attorney (or of the plaintiff if proceeding pro se); (f) verification in certain circumstances; and (g) any exhibits to which reference is made in the factual allegations.

a. [7.10] Caption

The caption identifies the court and parties and is used as a title of the case. According to General Order 6.1(a) of the Circuit Court of Cook County, every caption must contain the words "IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS" and must designate the department and division or district in which the action is filed. The use of a similar caption is recommended in circuits in which local court rules are silent. In any case, S.Ct. Rule 131(b) states that the name of the court is part of the case's title. Rule 131(b) also requires that the plaintiff's name appear first. If the case has more than one plaintiff, it is sufficient to name only one plaintiff in the caption. Better practice, of course, dictates listing all parties — plaintiff and defendant. The defendant's name follows; naming only one defendant in the caption is also sufficient. (Note, however, that the summons must name all parties. The summons is addressed in §7.45 below.) When a party's name is deleted in the caption, this omission should be indicated by the use of "et al." Finally, S.Ct. Rule 132 requires that the caption contain a designation conforming to the divisional organization of the circuit court, such as "at law," "in chancery," "in probate," or "small claim."

b. [7.11] Introductory Paragraph

The first paragraph of the complaint should name each plaintiff, identify the attorneys, and state the capacity in which the plaintiff comes forward.

c. [7.12] *Suggested Caption and Introductory Paragraph in Case with Individual Plaintiff Suing Individual Defendant*

**IN THE CIRCUIT COURT OF
THE _____ JUDICIAL CIRCUIT,
_____ COUNTY, ILLINOIS**

_____)
)
Plaintiff,)
)
v.)
)
_____)
)
Defendant.)

COMPLAINT [AT LAW] [IN CHANCERY] [ETC.]

NOW COMES plaintiff, _____, by [his] [her] attorney, _____, and complaining of defendant, _____, states:

For examples of captions and introductory paragraphs of complaints for use when a party is not an individual or when a plaintiff is unsure as to which defendant is liable, see §§7.30 – 7.38 below.

d. [7.13] *Body — Factual Allegations*

After identifying the court and the parties, the complaint should set forth “a plain and concise statement of [the plaintiff’s] cause of action.” 735 ILCS 5/2-603(a). This statement must contain allegations of fact that are sufficient to bring the plaintiff’s claims within the scope of a legally recognized cause of action. *Forest Preserve District of DuPage County v. Miller*, 339 Ill.App.3d 244, 789 N.E.2d 916, 273 Ill.Dec. 742 (2d Dist. 2003); *Smith v. Heissinger*, 319 Ill.App.3d 150, 745 N.E.2d 666, 253 Ill.Dec. 543 (4th Dist. 2001); *Vernon v. Schuster*, 179 Ill.2d 338, 688 N.E.2d 1172, 228 Ill.Dec. 195 (1997); *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 430 N.E.2d 1005, 58 Ill.Dec. 754 (1981). In Illinois practice, “fact pleading” is required. *Teter v. Clemens*, 112 Ill.2d 252, 492 N.E.2d 1340, 97 Ill.Dec. 467 (1986); *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 667 N.E.2d 1296, 217 Ill.Dec. 720 (1996). See §§7.21 – 7.24 below for a more complete discussion of the distinction between “fact pleading” and “notice pleading,” which is prescribed in federal practice.

Pleading “upon information and belief” is permissible under §2-605 of the Illinois Civil Practice Law, 735 ILCS 5/2-101, *et seq.* (Article II of the Code of Civil Procedure). Section 2-605 provides that even verified pleadings (see §7.19 below) “shall be stated positively or upon information and belief.” 735 ILCS 5/2-605. *See Cohen v. Smith*, 269 Ill.App.3d 1087, 648 N.E.2d 329, 207 Ill.Dec. 873 (5th Dist. 1995) (plaintiffs adequately alleged some necessary elements of

each of three causes of action against hospital and male nurse alleging battery, intentional infliction of emotional distress, and violation of Right of Conscience Act (now Health Care Right of Conscious Act, 745 ILCS 70/1, *et seq.*) due to their failure to honor her religious beliefs against being seen unclothed by male “on information and belief”). The body of the complaint is the most important portion of the pleading. The drafter should endeavor to tell the plaintiff’s side of the story in such a manner as to narrow the issues by eliciting as many admissions as possible from the defendant. Therefore, the use of short, single-allegation paragraphs is advised. The Code of Civil Procedure requires that separate factual allegations be arranged in separate and consecutively numbered paragraphs. See 735 ILCS 5/2-603(b). In any case, the use of concise, chronologically ordered and numbered paragraphs is the most effective way to inform the court and adverse parties of the plaintiff’s cause of action. Furthermore, the use of numbered paragraphs facilitates the examination of responsive pleadings, which are likely to admit or deny allegations with corresponding numbered paragraphs. For a more complete discussion of responsive pleadings, see §§7.46 – 7.74 below.

General considerations for the drafter to follow in composing the body of the complaint are discussed in §§7.21 – 7.28 below. In addition, examples of body portions of complaints setting forth allegations of negligence, intentional tort, willful and wanton misconduct, breach of a statutory duty, violation of a statute, healing art malpractice, and breach of contract may be found in §§7.39 – 7.44 below.

e. [7.14] Prayer for Relief

Each complaint must contain a prayer, which is a request for relief. 735 ILCS 5/2-604. The purpose of the prayer is to inform the court and opposing parties of the nature and the extent of the remedy sought. *See, e.g., Wong v. Stevens*, 216 Ill.App.3d 299, 576 N.E.2d 1069, 160 Ill.Dec. 115 (1st Dist. 1991) (purpose of provision is to give notice to court and to parties of claims being presented and relief being sought). *See also Cook v. Burnette*, 341 Ill.App.3d 652, 793 N.E.2d 160, 275 Ill.Dec. 680 (1st Dist. 2003) (default judgment against bank void when complaint failed to request money or judgment against bank in ad damnum clause); *Hendrix v. Board of Education of City of Chicago*, 199 Ill.App.3d 1, 556 N.E.2d 578, 144 Ill.Dec. 900 (1st Dist. 1990) (plaintiff failed to state cause of action; pro se plaintiff filed four sets of handwritten pleadings containing no specific prayer for relief, different theories of liability, and varying defendants). Prayers for general relief must be supported by factual allegations that warrant the relief. *Goodwine State Bank v. Mullins*, 253 Ill.App.3d 980, 625 N.E.2d 1056, 192 Ill.Dec. 901 (4th Dist. 1993); *Galapeaux v. Orviller*, 4 Ill.2d 442, 123 N.E.2d 321 (1954).

(1) [7.15] Drafting the prayer — generally

When a plaintiff seeks money damages in a non-personal injury lawsuit, the amount sought should be stated. If the plaintiff seeks equitable relief, the prayer should describe the specific relief sought and include a request for any other relief that the court may deem proper. A plaintiff may seek alternative relief when he or she is uncertain as to what relief the court may see fit to grant. 735 ILCS 5/2-604. A prayer for costs should always be included.

Any civil action seeking money damages must have attached to the initial pleading the party's affidavit which states that the total of money damages sought does or does not exceed \$50,000. S.Ct. Rule 222(b). Any judgment exceeding \$50,000 when the affidavit states otherwise is reduced posttrial to an amount not in excess of \$50,000. *Id.*

When a statute provides for the recovery of attorneys' fees, the prayer should request fees, and the applicable statute should be cited there unless identified in the body above. A similar approach should be followed if fees are permitted by a contract.

When appropriate, language similar to the following is suggested at the conclusion of the plaintiff's complaint:

WHEREFORE, plaintiff, _____, prays for judgment against defendant, _____, for \$ _____, together with the costs of this action.

[or]

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. **awarding compensatory damages in the amount of \$ _____; [but see §7.16 below]**
2. **awarding punitive damages in the amount of \$ _____; [when appropriate; see §7.17 below]**
3. **enjoining defendant from [describe acts to be enjoined];**
4. **awarding costs to plaintiff; and**
5. **awarding such other and further relief as the court may consider proper [including reasonable attorneys' fees pursuant to the applicable statute].**

(2) [7.16] Prayer for relief in a personal injury case

A plaintiff in a personal injury lawsuit is not allowed to specify the amount of damages sought, except to the extent necessary to comply with circuit court rules of assignment. 735 ILCS 5/2-604. See, *e.g.*, General Order 1.2 of the Circuit Court of Cook County (refers to various departments and amount of damages that must be pleaded to bring action in each department).

Suggested form:

WHEREFORE, plaintiff, _____, prays for judgment in excess of the minimum jurisdictional requirements for assignment of his case to the Law Division, plus costs.

(3) [7.17] Prayer for punitive damages

735 ILCS 5/2-604.1 prohibits a plaintiff from praying for punitive damages in a bodily injury or property damage case based on negligence or based on strict tort liability. *McCann v. Presswood*, 308 Ill.App.3d 1068, 721 N.E.2d 811, 242 Ill.Dec. 532 (4th Dist. 1999) (statute precludes plaintiff seeking recovery for bodily injury or physical damage to property from requesting punitive damages on face of complaint based even in part on negligence). In order to seek punitive damages in such a case, the plaintiff must seek to amend the original complaint pursuant to a pretrial motion and after a hearing before the court. The motion must be made not later than 30 days after the close of discovery and should be granted only if the plaintiff establishes at the hearing the reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. *See Gray v. National Restoration Systems, Inc.*, 354 Ill.App.3d 345, 820 N.E.2d 943, 289 Ill.Dec. 868 (1st Dist. 2004) (widow failed to sustain burden of proof necessary to plead punitive damages against manufacturer); *Cirrincone v. Johnson*, 184 Ill.2d 109, 703 N.E.2d 67, 234 Ill.Dec. 455 (1998) (whether punitive damages may be awarded in action is matter of law; whether defendant's conduct warrants imposition of punitive damages is factual issue for jury); *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397, 150 Ill.Dec. 510 (1990) (initial decision whether punitive damages may be imposed is matter normally reserved to trial judge). *See also LaSalle National Bank v. Willis*, 378 Ill.App.3d 307, 880 N.E.2d 1075, 317 Ill.Dec. 83 (1st Dist. 2007) (neighbor required to seek leave of court to plead punitive damages against contractor); *Spires v. Mooney Motors, Inc.*, 229 Ill.App.3d 917, 595 N.E.2d 225, 172 Ill.Dec. 162 (4th Dist. 1992) (earlier order permitting filing of punitive damages count did not prevent later entry of summary judgment); *Halle v. Robertson*, 219 Ill.App.3d 564, 579 N.E.2d 1243, 162 Ill.Dec. 429 (2d Dist. 1991) (trial court did not err in striking punitive damage claim from complaint that had been filed without prior leave of court); *Stojkovich v. Monadnock Building*, 281 Ill.App.3d 733, 666 N.E.2d 704, 217 Ill.Dec. 35 (1st Dist.), *appeal denied*, 168 Ill.2d 626 (1996) ("negligence" as used in 735 ILCS 5/2-604.1 is used in generic sense as term covering all types of non-intentional, non-strict liability torts, including willful and wanton misconduct).

In other cases, a plaintiff is not precluded by pleading rules from seeking punitive damages. If such damages are appropriate, they should be specifically requested in the prayer. See §7.15 above for an example of a prayer requesting punitive damages.

f. [7.18] Signature

Supreme Court Rule 137 provides for the signing of all pleadings, motions, and other papers. *McCloughry v. Village of Antioch*, 296 Ill.App.3d 636, 695 N.E.2d 492, 230 Ill.Dec. 1002 (2d Dist. 1998). Every pleading, motion, and other paper must be signed by an attorney or by a party proceeding pro se as a certification that the signer

has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose. S.Ct. Rule 137.

Rule 137 closely parallels Fed.R.Civ.P. 11. Supreme Court Rule 137 dictates that an attorney or litigant has an affirmative duty to conduct an inquiry into the facts and law before filing a pleading. *Medical Alliances, L.L.C. v. Health Care Service Corp.*, 371 Ill.App.3d 755, 863 N.E.2d 1169, 309 Ill.Dec. 272 (2d Dist. 2007) (sanctions applied to attorney who signed pleading and/or client, not law firm). The standard for evaluating conduct is one of reasonableness under the circumstances existing at the time of filing, and the decision whether to award fees and expenses rests within the sound discretion of the trial judge. *Barrett v. Fonorow*, 343 Ill.App.3d 1184, 799 N.E.2d 916, 279 Ill.Dec. 113 (2d Dist. 2003) (trial court's decision to sanction party or counsel for filing motion or pleading not well supported by fact or law is reviewed under abuse of discretion standard). See also *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill.App.3d 841, 864 N.E.2d 288, 309 Ill.Dec. 422 (5th Dist. 2007) (sanctions warranted against hospital based on response to interrogatory and privilege log responses); *Jurgensen v. Haslinger*, 295 Ill.App.3d 139, 692 N.E.2d 347, 229 Ill.Dec. 574 (3d Dist.) (finding that trial court properly imposed sanctions against plaintiffs' counsel for filing complaint based on absolutely privileged testimony), *appeal denied*, 179 Ill.2d 585 (1998); *Couri v. Korn*, 202 Ill.App.3d 848, 560 N.E.2d 379, 148 Ill.Dec. 77 (3d Dist. 1990). See also *Kennedy v. Miller*, 221 Ill.App.3d 513, 582 N.E.2d 200, 163 Ill.Dec. 934 (2d Dist. 1991) (trial court not limited to imposition of reasonable attorneys' fees only); *In re Marriage of Irvine*, 215 Ill.App.3d 629, 577 N.E.2d 462, 160 Ill.Dec. 332 (4th Dist. 1991) (trial court's decision is not to be reversed absent abuse of discretion; trial court abused discretion in denying sanction as no reasonable inquiry made by respondent as to validity of claim); *Shea, Rogal & Associates, Ltd. v. Leslie Volkswagen, Inc.*, 250 Ill.App.3d 149, 621 N.E.2d 77, 190 Ill.Dec. 208 (1st Dist. 1993) (pleader need present only objectively reasonable argument for views, not necessarily correct view of law). Motions for sanctions must be filed within 30 days of the entry of final judgment or, if a timely postjudgment motion is filed, within 30 days of the ruling on that motion. S.Ct. Rule 137; *Rosen v. Ingersoll-Rand Co.*, 372 Ill.App.3d 440, 865 N.E.2d 451, 310 Ill.Dec. 127 (1st Dist. 2007) (motion for sanctions tolled time to appeal).

Supreme Court Rule 137 allows but does not require that sanctions be imposed. If a trial judge imposes sanctions, he or she must set forth with specificity the reasons and basis for any sanction in a separate written order. See Committee Comment, S.Ct. Rule 137 (Aug. 1, 1989); *Cirrincone v. Westminster Gardens Limited Partnership*, 352 Ill.App.3d 755, 816 N.E.2d 730, 287 Ill.Dec. 763 (1st Dist. 2004) (sanction order should specify rule pursuant to which order was entered, at minimum, as well as specific reasons for entry of order); *Mandziara v. Canulli*, 299 Ill.App.3d 593, 701 N.E.2d 127, 233 Ill.Dec. 484 (1st Dist. 1998) (S.Ct. Rule 137 requires court to enunciate its reasons only for granting sanctions, not for denying them), *appeal denied*, 182 Ill.2d 547 (1999). See also *Toland v. Davis*, 295 Ill.App.3d 652, 693 N.E.2d 1196, 230 Ill.Dec. 445 (3d Dist.) (court should not impose sanctions based on subjective, after-the-fact analysis or hindsight), *appeal denied*, 179 Ill.2d 621 (1998); *Berg v. Mid-America Industrial, Inc.*, 293 Ill.App.3d 731, 688 N.E.2d 699, 228 Ill.Dec. 1 (1st Dist. 1997) (before imposing S.Ct. Rule 137 sanctions, court must conduct hearing to allow parties to present evidence to support or rebut claim).

g. [7.19] *Verification*

While pleadings must be signed (see §7.18 above), they generally need not be verified or sworn. Statutory causes of action may, however, require verification. The statute granting the

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true. 735 ILCS 5/1-109.

h. [7.20] Incorporation of Documents by Reference; Exhibits

When a cause of action is based on a written instrument, the Code of Civil Procedure requires that a copy of the instrument or document be attached to the complaint as an exhibit. 735 ILCS 5/2-606. Relevant portions of the document may be attached when the document itself is cumbersome. Some plaintiffs confronted with extremely voluminous contracts or exhibits identify the instrument carefully and then simply allege that all the parties already are in possession of a copy. Such a practice is consistent with the spirit of §2-606, but those portions pleaded should be alleged verbatim.

In addition, §2-606 allows for the attachment of exhibits in order to plead documents when the claim is not based on the document. While attaching a document as an exhibit may be more convenient than realleging the relevant portions of the document, the careful pleader should note that when facts disclosed in exhibits are in conflict with facts alleged in the complaint, the exhibit controls. However, the rule that the exhibit controls over conflicting allegations in the complaint does not apply when the exhibit is not an instrument on which the claim or defense is founded. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill.2d 414, 804 N.E.2d 519, 281 Ill.Dec. 554 (2004) (party not prohibited from attaching written documents to complaint; when exhibit not instrument on which claim or defense based; rule that exhibit controls over conflicting averments in pleading inapplicable); *Garrison v. Choh*, 308 Ill.App.3d 48, 719 N.E.2d 237, 241 Ill.Dec. 376 (1st Dist. 1999). Exhibits become part of the pleadings; facts stated in exhibits are considered as though alleged in the complaint. *See Garrison, supra*; *Patterson v. Carbondale Community High School District No. 165*, 144 Ill.App.3d 254, 494 N.E.2d 240, 98 Ill.Dec. 313 (5th Dist. 1986). *See also People ex rel. Hartigan v. E&E Hauling, Inc.*, 218 Ill.App.3d 28, 577 N.E.2d 1262, 160 Ill.Dec. 691 (1st Dist. 1991), *aff'd in relevant part, rev'd on other grounds*, 153 Ill.2d 473 (1992); *Groenings v. City of St. Charles*, 215 Ill.App.3d 295, 574 N.E.2d 1316, 158 Ill.Dec. 923 (2d Dist. 1991); *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127, 708 N.E.2d 1122, 237 Ill.Dec. 82 (1999) (copies of written instruments attached to pleading as exhibit considered part of pleading). *But see Jones v. Lazerson*, 203 Ill.App.3d 829, 561 N.E.2d 151, 148 Ill.Dec. 845 (5th Dist. 1990) (facts contained in exhibits that consist of examples of evidence supporting plaintiff's allegations are not controlling and court should not assume these facts to be true).

If an exhibit is attached as evidence at the request of the court, facts in the exhibit do not negate contrary facts alleged in the complaint. *McCormick v. McCormick*, 118 Ill.App.3d 455, 455 N.E.2d 103, 74 Ill.Dec. 73 (1st Dist. 1983). However, evidentiary exhibits should be attached only at the court's request and even then should be clearly marked as "EVIDENCE NOT TO BE CONSIDERED PART OF THE PLEADINGS."

2. General Considerations

a. [7.21] Fact Pleading Required

The Code of Civil Procedure requires that a complaint contain a plain and concise statement of the plaintiff's cause of action. 735 ILCS 5/2-603(a). In order to state a cause of action, "substantial allegations of fact" are necessary. 735 ILCS 5/2-601. Thus, "fact pleading," as opposed to "notice pleading," is required in Illinois practice. *Vernon v. Schuster*, 179 Ill.2d 338, 688 N.E.2d 1172, 228 Ill.Dec. 195 (1997); *Teter v. Clemens*, 112 Ill.2d 252, 492 N.E.2d 1340, 97 Ill.Dec. 467 (1986).

(1) [7.22] Distinguished from "notice pleading"

Notice pleading, prescribed in federal practice, requires merely that a complaint contain a statement sufficient to give the defendant fair notice of what the plaintiff's claim is and the ground on which it rests. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 167 L.Ed.2d 929, 127 S.Ct. 1955 (2007). See also *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 821 N.E.2d 1099, 290 Ill.Dec. 525 (2004). Fact pleading, however, requires the plaintiff to "allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." *Jordan v. Knafel*, 355 Ill.App.3d 534, 823 N.E.2d 1113, 1122, 291 Ill.Dec. 527 (1st Dist. 2005); *Weiss v. Waterhouse Securities, Inc.*, 208 Ill.2d 439, 804 N.E.2d 536, 281 Ill.Dec. 571 (2004); *Vernon v. Schuster*, 179 Ill.2d 338, 688 N.E.2d 1172, 228 Ill.Dec. 195 (1997); *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 430 N.E.2d 1005, 1009, 58 Ill.Dec. 754 (1981). Often, a plaintiff lacking knowledge of facts sufficient to state a cause of action defends a motion to strike by citing to the Code of Civil Procedure, which provides:

No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet. 735 ILCS 5/2-612(b).

However, §2-612(b) must be construed with other sections of the Code of Civil Procedure, (e.g., §§2-601 and 2-603, which clearly require allegations of fact). The purpose of §2-612(b) is to permit formal defects to be ignored and to make unnecessary the recitation of every material fact when the parties are already on notice of the litigation.

(2) [7.23] Ultimate facts distinguished from conclusions of law — examples

Fact pleading requires the pleading of ultimate facts rather than conclusions of law. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662 (allegation of "knew or should have known" of dangers of secondhand asbestos insufficient but case remanded to allow plaintiff to replead facts); *Iseberg v. Gross*, 227 Ill.2d 78, 879 N.E.2d 278, 316 Ill.Dec. 211 (2007); *Lempa v. Finkel*, 278 Ill.App.3d 417, 663 N.E.2d 158, 215 Ill.Dec. 408 (2d Dist. 1996); *Harris v. Johnson*, 218 Ill.App.3d 588, 578 N.E.2d 1326, 161 Ill.Dec. 680 (2d Dist. 1991) (complaint must contain facts and not mere conclusions; action will be dismissed if complaint contains conclusions unsupported by facts). To the extent that the distinction between an ultimate fact and a conclusion of law is often not easily drawn, examples may be helpful.

Negligence. An allegation that the defendant acted “negligently” is a conclusion of law. *McLean v. Rockford Country Club*, 352 Ill.App.3d 229, 816 N.E.2d 403, 287 Ill.Dec. 641 (2d Dist. 2004); *Doyle v. Shlensky*, 120 Ill.App.3d 807, 458 N.E.2d 1120, 76 Ill.Dec. 466 (1st Dist. 1983). An allegation of negligence should instead contain a statement of facts showing a breach of duty, such as “the defendant failed to keep a proper lookout,” or “the defendant was traveling at a rate of speed in excess of posted limits,” etc.

Breach of Contract. An allegation that a contract exists without stating supporting facts demonstrating offer, acceptance, and consideration is conclusory and insufficient. *Martin-Trigona v. Bloomington Federal Savings & Loan Ass’n*, 101 Ill.App.3d 943, 428 N.E.2d 1028, 57 Ill.Dec. 348 (1st Dist. 1981). See also *Wait v. First Midwest Bank/Danville*, 142 Ill.App.3d 703, 491 N.E.2d 795, 96 Ill.Dec. 516 (4th Dist. 1986) (to state contract is “entered into” or “accepted” is to state mere conclusory allegation insufficient to support breach of contract claim).

(3) [7.24] Ultimate facts distinguished from evidence

While the pleader must set forth factual allegations, he or she is not required to set forth evidence. The distinction between an ultimate fact and an “evidentiary fact” is often not easily drawn. See, e.g., *J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 213 Ill.App.3d 510, 572 N.E.2d 1090, 157 Ill.Dec. 626 (1st Dist. 1991) (party may plead ultimate facts only rather than evidence; pleading must give sufficient information concerning character of evidence to be introduced or of issues to be tried or allegation may be deemed legal conclusion). In general, an ultimate fact is a fact that the pleader sets out to prove; an evidentiary fact is a fact that tends to show that an ultimate fact is more likely true than not. *Oravek v. Community School District 146*, 264 Ill.App.3d 895, 637 N.E.2d 554, 202 Ill.Dec. 15 (1st Dist. 1994); *Ward v. Community Unit School District No. 220*, 243 Ill.App.3d 968, 614 N.E.2d 102, 184 Ill.Dec. 901 (1st Dist. 1993) (statement of defendant’s knowledge of certain proposition is allegation of ultimate fact; plaintiff need not plead evidentiary facts that will be used to prove that knowledge). In any event, what is an ultimate fact often depends simply on the nature of the action. Keeping in mind the examples set forth in §7.23 above, the following examples may also be helpful.

Negligence. Ultimate Fact: “The defendant was driving in excess of posted speed limits.” Evidence: “The defendant was driving at 45 miles per hour in excess of the posted limit of 35 miles per hour.”

Breach of Contract. Ultimate Fact: “The plaintiff executed a written contract with the defendant, a copy of which is attached as Exhibit A, and the plaintiff and the defendant exchanged valuable consideration.” Evidence: “The plaintiff executed a written contract with the defendant, a copy of which is attached as Exhibit A (the signature of the defendant therein demonstrating acceptance on his part), in consideration of which the plaintiff paid the defendant a sum of \$100,000, and the defendant promised to convey to the plaintiff the residence referred to therein.”

b. [7.25] Complaint as a Judicial Admission

When a fact has been admitted in a complaint, it is a judicial admission, which makes it unnecessary for an opposing party to introduce evidence of the fact. *Roti v. Roti*, 364 Ill.App.3d

191, 845 N.E.2d 892, 301 Ill.Dec. 27 (1st Dist. 2006); *Baker v. Daniel S. Berger, Ltd.*, 323 Ill.App.3d 956, 753 N.E.2d 463, 257 Ill.Dec. 268 (1st Dist. 2001); *DiBenedetto v. County of DuPage*, 141 Ill.App.3d 675, 491 N.E.2d 13, 96 Ill.Dec. 199 (2d Dist. 1986). Therefore, when a plaintiff seeks to disprove a fact previously admitted, the complaint should be amended. See §§7.76 – 7.78 below for a discussion of amendments. If a complaint is verified, the facts admitted within it is admissible as evidence at trial even if the complaint is subsequently amended. See §7.19 above regarding verification.

c. [7.26] Use of Separate Counts

735 ILCS 5/2-613(a) provides: “Parties may plead as many causes of action . . . as they may have, and each shall be separately designated and numbered.”

A complaint that sets forth more than one legally recognized theory of recovery should be divided into counts. In *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 430 N.E.2d 976, 58 Ill.Dec. 725 (1981), the Illinois Supreme Court insisted on the use of separate counts when more than one statute of limitations is implicated. Arguably, separate counts should be employed whenever there might be any reason or prejudice to follow for commingled counts.

Some pleaders of multi-count complaints incorporate by reference all the preceding allegations from the first count into the second count. For the third count, all allegations of the first two counts are incorporated into that count, and so forth. Thus, counts in negligence might be commingled with contract. This practice knows no justification — certainly there is none under §2-613(a).

An exception to the rule is that separate counts should not be used in equitable causes of action. See S.Ct. Rule 135(a). *See also Nance v. Donk Brothers Coal & Coke Co.*, 13 Ill.2d 399, 151 N.E.2d 97 (1958); *Board of Education of City of Peoria, School District. No. 150 v. Sanders*, 150 Ill.App.3d 755, 502 N.E.2d 730, 104 Ill.Dec. 233 (3d Dist. 1986). If a legal cause is joined with an equitable cause, the causes should be pleaded separately and marked “separate action at law” and “separate action in chancery.” S.Ct. Rule 135(b).

When separate counts are pleaded, the plaintiff need not repeat in each count every fact alleged. Supreme Court Rule 134 allows for incorporation by reference of facts adequately stated in one part of a pleading. In addition, one prayer for relief is sufficient in a multi-count complaint. A prayer at the conclusion of the complaint is sufficient for all counts pleaded.

d. [7.27] Example of Complaint Setting Forth Separate Causes of Action in Separate Counts

[Caption]

COMPLAINT AT LAW

NOW COMES plaintiff _____, by [his] [her] attorney, _____, and complaining of defendant, _____, states:

COUNT I

NEGLIGENCE

_____ [Identify plaintiff, defendant; state facts indicating relevant dates, times, and places.]

_____ [Identify duty of care.]

_____ [Allege facts showing a breach.]

_____ [Allege proximate cause and damages.]

COUNT II

PUBLIC UTILITIES ACT

_____ **Plaintiff realleges paragraphs 1 – __ of Count I of [his] [her] Complaint at Law.**

_____ [Plead the statute; see §7.41 below.]

_____ [Allege proximate cause and damages.]

_____ [Prayer for relief; see §§7.14 – 7.17 above.]

[Signature; see §7.18 above.]

e. [7.28] Use of Alternative Counts

The Code of Civil Procedure allows a plaintiff in doubt as to which of two or more allegations are true to plead the allegations alternatively, regardless of consistency. See 735 ILCS 5/2-613(b); *Mueller v. Community Consolidated School District 54*, 287 Ill.App.3d 337, 678 N.E.2d 660, 222 Ill.Dec. 788 (1st Dist. 1997). See also *Bureau Service Co. v. King*, 308 Ill.App.3d 835, 721 N.E.2d 159, 242 Ill.Dec. 191 (3d Dist. 1999); *Cleveringa v. J.I. Case Co.*, 230 Ill.App.3d 831, 595 N.E.2d 1193, 172 Ill.Dec. 523 (1st Dist. 1992) (allegations in unverified pleading and third-party action inadmissible as admissions when allegations were pleaded

alternatively or claims were contingent); *Fitchie v. Yurko*, 212 Ill.App.3d 216, 570 N.E.2d 892, 156 Ill.Dec. 416 (2d Dist. 1991) (permissible to argue in alternative if inconsistent facts and no individual argument affected by other); *Wegman v. Pratt*, 219 Ill.App.3d 883, 579 N.E.2d 1035, 162 Ill.Dec. 221 (5th Dist. 1991) (alternative pleading does not mean plaintiff must submit evidence and attempt to prove two inconsistent alternatives; plaintiff may choose which to prosecute or abandon). When this is done, an admission in one alternative does not affect the other. Unverified alternative pleadings are not admissible at trial either as admissions or for impeachment purposes. *Tuttle v. Fruehauf Division of Fruehauf Corp.*, 122 Ill.App.3d 835, 462 N.E.2d 645, 78 Ill.Dec. 526 (1st Dist. 1984); *King v. Corsini*, 32 Ill.App.3d 461, 335 N.E.2d 561 (3d Dist. 1975). The complaint should clearly state that a count is pleaded as an alternative. However, Illinois courts have held that “alternative pleading is not permitted when in the nature of things the pleader must know which of the inconsistent averments is true and which is false.” *McCormick v. Kopmann*, 23 Ill.App.2d 189, 161 N.E.2d 720, 728 (3d Dist. 1959), quoting *Church v. Adler*, 350 Ill.App. 471, 113 N.E.2d 327, 332 (3d Dist. 1953). *But see Eidson v. Audrey’s CTL, Inc.*, 251 Ill.App.3d 193, 621 N.E.2d 921, 190 Ill.Dec. 468 (5th Dist. 1993) (defendant’s counterclaim may plead that plaintiff was driver of vehicle who negligently caused collision and, alternatively, that defendant was driver of vehicle and plaintiff was negligent in allowing him to drive).

3. Specific Considerations

a. [7.29] Forum Allegations

Unlike federal practice, Illinois practice does not require the complaint to contain a jurisdictional statement. The complaint should, however, adequately fix venue. A separate, numbered venue allegation is not necessary. It is sufficient merely to state the county of residence of the defendant (if venue is affixed on the basis of a defendant’s residence) or the county where the incident giving rise to the lawsuit occurred. See 735 ILCS 5/2-101 through 5/2-108.

b. When a Party Is Not an Individual

(1) [7.30] When a party is a corporation

There is no requirement that a corporation’s existence be pleaded, although it is customary to do so. When the plaintiff is a foreign corporation transacting business in Illinois, the complaint should state that the plaintiff has obtained a certificate of authority from the Secretary of State because a foreign corporation transacting business in Illinois is barred from maintaining an action in an Illinois court unless it first obtains such a certificate. See 805 ILCS 5/13.70.

Suggested form:

_____ [a corporation],)
)
Plaintiff,)
)
 v.)
 _____ [a corporation],)
)
Defendant.)

NOW COMES plaintiff, _____, a corporation, by its attorney, _____, and complaining of defendant, _____, states:

1. At all times herein mentioned, plaintiff, _____, was and is a corporation duly organized [under the laws of the State of Illinois] [under the laws of the State of _____] and was the holder of a certificate of authority to transact business in Illinois].

(2) [7.31] When a party does business under an assumed name

A suit brought by or against an individual doing business under an assumed name proceeds by the plaintiff or against the defendant in his or her individual capacity. Nonetheless, it is suggested that the name of the business be pleaded in order to clearly identify the parties.

Suggested form:

_____ d/b/a _____,)
)
Plaintiff,)
 v.)
 _____ d/b/a _____,)
)
Defendant.)

NOW COMES plaintiff, _____, doing business as _____, by [his] [her] attorney, _____, and complaining of defendant, _____, doing business as _____, states:

1. At all times defendant was acting in an individual capacity, d/b/a _____.

(3) [7.32] When a party is a partnership

735 ILCS 5/2-411(a) states in pertinent part that a “partnership may sue or be sued in the names of the partners as individuals doing business as the partnership, or in the firm name, or both.” Therefore, a partnership may sue either in the name of the partners or in the name of the

firm itself. When suit is filed against a partnership, the pleader should consider naming the individual partners as defendants. This is because a judgment against the partnership in the firm name supports execution against partnership property only. See 735 ILCS 5/12-102.

Suggested form:

_____ and)
 _____, partners,)
 d/b/a _____,)
Plaintiffs,)
 v.)
 _____, a partnership, and)
 _____ and)
 _____ as individuals,)
 d/b/a _____,)
Defendants.)

NOW COME plaintiffs, _____ and _____, partners, doing business as [name of partnership], by their attorneys, _____, and complaining of defendants, [name of partnership], a partnership, and _____ and _____ as individuals doing business as [name of partnership], state:

1. At all times herein mentioned, defendants _____ and _____ were partners doing business as [name of partnership].

(4) [7.33] When a party is an unincorporated association

Any unincorporated organization of two or more individuals formed for a common purpose, but not a partnership, may sue in its own name. 735 ILCS 5/2-209.1. Section 2-209.1 was adopted as an apparent response to criticism of the common-law rule that unincorporated associations could not sue or be sued. *See generally Brucato v. Edgar*, 128 Ill.App.3d 260, 470 N.E.2d 615, 83 Ill.Dec. 489 (1st Dist. 1984). *See also Rivard v. Chicago Fire Fighters Union, Local No. 2*, 122 Ill.2d 303, 522 N.E.2d 1195, 119 Ill.Dec. 336 (1988) (substantive statute allowing voluntary, unincorporated associations to sue and be sued in their own names could not be applied retroactively).

Suggested form:

_____ [a voluntary unincorporated association],)
)
Plaintiff,)
)
v.)
)
 _____ [a voluntary unincorporated association],)
)
Defendant.)

NOW COMES plaintiff, _____ [a voluntary unincorporated association], **by its attorney,** _____, **and complaining of defendant,** _____ [a voluntary unincorporated association], **states:**

1. At all times herein mentioned, [plaintiff] [defendant], _____, **was a voluntary unincorporated association.**

(5) [7.34] When a party is a government entity

When filing suit against a government entity, the entity should be identified as a municipal corporation or by another proper identifying organizational distinction. If an attorney is in doubt as to precisely the kind of governmental entity being sued, the attorney should consult the statute that created the entity. The pleader should also be aware that suits against government entities often require notice to the defendant before the filing of a complaint and that notice may be required well in advance of the running of the applicable statute of limitations. See, *e.g.*, Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, *et seq.* Further, bear in mind special venue provisions for such actions. The Code of Civil Procedure provides that “[a]ctions must be brought against a public, municipal, governmental or quasi-municipal corporation in the county in which its principal office is located or in the county in which the transaction or some part thereof occurred out of which the cause of action arose.” 735 ILCS 5/2-103.

(6) When plaintiff brings suit through a representative

(a) [7.35] Suing through a guardian

The appointment of guardians is provided for by statute. See 755 ILCS 5/11-5. A guardian is authorized to represent the ward in all legal proceedings.

Suggested form:

[name of ward],)
)
 [a minor] [an incompetent person],)
)
by [name of guardian],)
)
 [his] [her] **Guardian,**)
)
Plaintiff,)
)
v.)
 _____,)
)
Defendant.)

NOW COMES plaintiff, by [his] [her] guardian, _____, by [his] [her] attorney, _____, and complaining of defendant, _____, states:

1. [Plaintiff, _____, is a minor of the age of _____ years.] [On _____, 20__, plaintiff, _____, was duly adjudged by [identify the court] to be incompetent.]

Alternative form:

_____, **Guardian of**)
)
 _____,)
)
Plaintiff,)
)
v.)
 _____,)
)
Defendant.)

NOW COMES plaintiff, by [his] [her] guardian, _____, by [his] [her] attorney, _____, and complaining of defendant, _____, states:

1. On _____, 20__, _____ was, by order duly made by [identify the court], appointed the guardian of the [person/estate/person and estate] of _____, and [he] [she] thereupon entered upon the discharge of [his] [her] duties as such guardian and has since been and now is such guardian.

An attorney filing a personal injury lawsuit on behalf of a minor should also note 735 ILCS 5/13-203 which provides that “[a]ctions for damages for loss of consortium or other actions,

including actions for the medical expenses of minors or persons under legal disability, deriving from injury to the person of another. . . shall be commenced within the same period of time as actions for damages for injury to such other person.” Section 13-203 further provides that if the statute of limitations for the injured person is tolled, the time for the filing of the loss of consortium or other action, including an action for medical expenses, is also tolled. *See also Dewey v. Zack*, 272 Ill.App.3d 742, 651 N.E.2d 643, 209 Ill.Dec. 465 (2d Dist. 1995).

(b) [7.36] Suing through an executor or administrator

While letters testamentary need not be attached to the complaint as an exhibit, attaching them is likely to draw an admission of the plaintiff’s capacity to sue and avoids the necessity to respond to a motion to dismiss predicated on 735 ILCS 5/2-619(a)(2).

Suggested form:

_____,)
)
 as [Executor] [Administrator])
)
 of the Estate of _____, deceased,)
)
 Plaintiff,)
)
 v.)
)
 _____,)
)
 Defendant.)

NOW COMES plaintiff, _____, as [executor] [administrator] of the Estate of _____, by [his] [her] attorney, _____, and complaining of defendant, _____, states:

1. Plaintiff is the duly appointed and qualified [executor] [administrator] [administrator with the will annexed] of the Estate of _____, deceased. A copy of letters testamentary is attached hereto as Exhibit 1.

(c) [7.37] Suing in a class action

In order to maintain a cause of action as a class action, the named representatives must comply with the provisions of 735 ILCS 5/2-801. While §2-801 does not expressly require the representative to plead any special allegations, it is suggested that the representative allege facts that demonstrate compliance with §2-801. For example, stating the number of plaintiffs represented and facts showing that the named plaintiff is an adequate representative would be appropriate.

Suggested form:

_____,)
)
on behalf of [himself] [herself])
)
and all others [describe class],)
)
Plaintiff,)
)
v.)
 _____,)
)
Defendant.)

NOW COMES plaintiff, _____ **by** [his] [her] **attorney,** _____, **on behalf of** [himself] [herself] **and all others** [describe class], **and complaining of defendant,** _____, **states:**

(7) [7.38] When plaintiff is in doubt as to which defendant is liable

A plaintiff who is in doubt as to which person against whom he or she is entitled to recover may join two or more defendants and state claims against them in the alternative. 735 ILCS 5/2-405(c).

4. Examples of Pleadings for Specific Causes of Action

a. [7.39] Negligence

In a negligence case, the plaintiff must state (1) facts demonstrating that the defendant owed the plaintiff a duty of care, (2) facts demonstrating that the defendant breached that duty, (3) an allegation of proximate cause (facts are not nearly as important here), and (4) a simple statement alleging, when appropriate, general bodily injury, property damage, and special damages. Illinois practice has supported the notion that proximate causation may be pleaded in a conclusory style in the form of “notice pleading.” While notice pleading might be accepted in most negligence cases, those involving more complex transactions or those involving professional negligence might well require some supporting allegations more than just the usual.

Suggested form:

COUNT I

1. On _____, 20__, defendant had possession and control of an automobile that [he] [she] was driving westward on a public highway known as _____ Street, at or near its intersection with another public highway known as _____ Road, in the City of _____, County of _____, State of Illinois. [Date, place, and time should be pleaded with as much specificity as possible.]

2. On _____, 20__, plaintiff was the owner of a certain automobile that [he] [she] was driving southward on _____ Road approaching the same intersection.

3. Defendant, notwithstanding [his] [her] duty to plaintiff and others, negligently drove [his] [her] automobile westward on _____ Street at or near that intersection with the direct and proximate result that [his] [her] automobile collided with the automobile that plaintiff was driving.

4. At the time and place alleged above, defendant did one or more of the following acts and/or omissions and thereby caused the injuries and damages in this complaint:

- a. Defendant drove [his] [her] automobile at a speed exceeding _____ miles per hour contrary to section ____ of the Illinois Vehicle Code, 625 ILCS 5/_____.
- b. There is an electrically operated traffic signal at the intersection, which appeared red for the traffic approaching the intersection on _____ Street from the east at the time defendant approached and entered the intersection from that direction. Nevertheless, defendant failed to stop [his] [her] automobile and drove past the traffic signal and into the intersection in violation of section ____ of the Illinois Vehicle Code, 625 ILCS 5/_____.
- c. [Allege additional acts of negligence, if any.]

5. Plaintiff suffered bodily injuries proximately caused by defendant's foregoing acts.

6. By reason of the foregoing acts, plaintiff has been prevented from attending to [his] [her] occupation and has suffered a resulting loss of income, [his] [her] earning capacity has been permanently impaired, and [he] [she] has incurred medical expenses.

7. In addition, plaintiff's automobile was damaged, the damage having been proximately caused by defendant's foregoing acts, and plaintiff was required to expend a sum of money having it repaired.

[Prayer as in §§7.14 – 7.17 above; omit if more counts follow.]

b. [7.40] *Willful and Wanton Misconduct; Intentional Torts*

Alleging willful and wanton misconduct and intentional torts can lead to punitive damages. However, the plaintiff must allege facts that support an allegation of intent or willful and wanton misconduct. *See, e.g., Williams v. City of Evanston*, 378 Ill.App.3d 590, 883 N.E.2d 85, 318 Ill.Dec. 251 (1st Dist. 2007) (ambulance driver's failure to stop at intersection did not constitute willful or wanton conduct required by Tort Immunity Act, 745 ILCS 10/1-101, *et seq.*); *Jones v. O'Brien Tire & Battery Service Center, Inc.*, 374 Ill.App.3d 918, 871 N.E.2d 98, 312 Ill.Dec. 698 (5th Dist. 2007) (trial court did not abuse discretion by denying motion to amend complaint to add willful and wanton spoliation count). The plaintiff must allege facts demonstrating a reckless disregard of the plaintiff's safety on the part of the defendant. *Floyd v. Rockford Park District*,

355 Ill.App.3d 695, 823 N.E.2d 1004, 291 Ill.Dec. 418 (2d Dist. 2005); *Lynch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill.2d 415, 412 N.E.2d 447, 45 Ill.Dec. 96 (1980). See also *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill.2d 429, 593 N.E.2d 522, 170 Ill.Dec. 633 (1992). The mere addition of the words “willful and wanton” and “intentionally” in a count otherwise indistinguishable from a negligence count may be insufficient. Compare *Pendowski v. Patent Scaffolding Co.*, 89 Ill.App.3d 484, 411 N.E.2d 910, 44 Ill.Dec. 544 (1st Dist. 1980), with *Morrow v. L.A. Goldschmidt Associates, Inc.*, 126 Ill.App.3d 1089, 468 N.E.2d 414, 82 Ill.Dec. 152 (1st Dist. 1984), *rev'd*, 112 Ill.2d 87 (1986).

While willful and wanton misconduct allegations should preferably be set forth and labeled in a separate count (*Walker v. Dominick's Finer Foods, Inc.*, 92 Ill.App.3d 645, 415 N.E.2d 1213, 47 Ill.Dec. 900 (1st Dist. 1980)), the failure to do so is not fatal when the facts alleged in the negligence count are sufficient to show a reckless disregard for the plaintiff's safety. *O'Brien v. Township High School District 214*, 83 Ill.2d 462, 415 N.E.2d 1015, 47 Ill.Dec. 702 (1980). But see *Werderman v. Liberty Ventures, LLC*, 368 Ill.App.3d 78, 857 N.E.2d 320, 306 Ill.Dec. 227 (2d Dist. 2006) (when defendant files answer to complaint, it constitutes waiver; when defendant allows action to go to verdict, it cures both formal defects in complaint and defects in failing to allege essential elements of cause of action).

Suggested form:

COUNT II WILLFUL AND WANTON MISCONDUCT

8 – 10. Plaintiff repeats and realleges the facts contained in paragraphs 1 through 3 of Count 1 as paragraphs 8 through 10 of this Count II as if fully set forth herein. [See §7.26 above.]

11. At the time and place alleged above, defendant showed reckless disregard for plaintiff's safety by committing one or more of the following acts:

- a. Defendant drove [his] [her] automobile at a rate of speed of _____, was at all times aware of [his] [her] rate of speed, and was aware that the speed was in excess of the limit prescribed in section _____ of the Illinois Vehicle Code, 625 ILCS 5/_____.
- b. Defendant saw that the traffic signal at the intersection appeared red for traffic approaching the intersection on _____ Street from the east at the time [he] [she] approached and entered the intersection.

12 – 14. Plaintiff repeats and realleges the facts contained in paragraphs 5 through 7 of Count 1 as paragraphs 12 through 14 of this Count II as if fully set forth herein.

[Prayer as in §§7.14 – 7.17 above; omit if more counts follow.]

c. [7.41] Pleading a Statute; Statutory Duty Distinguished from a Statutory Cause of Action

In a negligence case, the plaintiff should allege that the defendant owed the plaintiff a duty of care. If a statute prescribes conduct in a given situation (*e.g.*, the operation of a motor vehicle) that statute may be cited as the applicable duty of care. Supreme Court Rule 133(a) provides that in such a case the statute should be cited.

In other cases, a statute creates liability or establishes a cause of action. In such cases of statutory liability, the complaint should cite the statute, address its requirements, and allege facts showing that (1) the statute applies and (2) the plaintiff is entitled to a recovery under the statute.

In either case, the exact words of the statute need not be used, but concise quotations of material portions of the statute are recommended. *See Cordts v. Chicago Tribune Co.*, 369 Ill.App.3d 601, 860 N.E.2d 444, 307 Ill.Dec. 790 (1st Dist. 2006) (statute need not be quoted, only cited — purpose being to give notice to court and opposing parties that pleader is basing case, at least in part, on particular statute).

Suggested form:

**COUNT III
PUBLIC UTILITIES ACT**

10 – 14. Plaintiff repeats and realleges the facts contained in paragraphs 1 through 5 of Count I as paragraphs 10 through 14 of this Count III as if fully set forth herein.

15. That on [the date of this injury] there was in full force and effect a statute known as the Public Utilities Act, 220 ILCS 5/1-101, *et seq.*, which provided:

[Set forth material portions verbatim.]

16 – __ [Allege facts showing that the statute applies and that it affords relief.]

[Prayer for relief as in §§7.14 – 7.17 above.]

d. [7.42] Healing Art Malpractice

735 ILCS 5/2-622 applies

[i]n any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice.

Section 2-622(a) provides that an affidavit and a copy of a medical professional's report must be attached to the complaint. The affidavit should state that (1) the plaintiff's attorney (or the plaintiff if he or she appears pro se) has consulted with a healthcare professional and include the

identity of that person's profession; (2) the affiant reasonably believes that the healthcare professional is knowledgeable in the relevant issues involved; (3) that the healthcare professional practices or has practiced within the last five years in the same area of healthcare or medicine that is at issue in the action; (4) the healthcare professional has determined in a written report after a review of the medical records and other relevant material that there is a reasonable and meritorious cause for filing the action; and (5) the affiant has concluded on the basis of the healthcare professional's review and consultation that there is a reasonable and meritorious cause for filing the action. The report must clearly identify the plaintiff and the reasons for the healthcare professional's determination.

The medical professional's report is required in all cases in which the plaintiff seeks damages for injury or death by reason of medical, hospital, or other "healing art malpractice." *See, e.g., Jackson v. Chicago Classic Janitorial & Cleaning Service, Inc.*, 355 Ill.App.3d 906, 823 N.E.2d 1055, 291 Ill.Dec. 469 (1st Dist. 2005) (claim against occupational therapist for injuries during functional capacity evaluation was claim for healing art malpractice that required certificate). The written healthcare professional report specified by §2-622(a)(1) is a pleading requirement and establishes only that the plaintiff has a meritorious claim and reasonable grounds for filing suit. *DeLuna v. St. Elizabeth's Hospital*, 147 Ill.2d 57, 588 N.E.2d 1139, 167 Ill.Dec. 1009 (1992). The statute has no bearing on the type of evidence relied on at trial. *See, e.g., Sullivan v. Edward Hospital*, 209 Ill.2d 100, 806 N.E.2d 645, 282 Ill.Dec. 348 (2004) (physician not qualified to testify regarding nursing standard of care at trial).

If the plaintiff's attorney is unable to obtain a certificate of merit before the statute of limitations would expire, an affidavit can be filed pursuant to §2-622(a)(2). If an affidavit is executed pursuant to this section, the affidavit and written report as required by §2-622(a)(1) must be filed within 90 days after the filing of the complaint. *See also O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill.2d 421, 892 N.E.2d 994, 323 Ill.Dec. 2 (2008) (plaintiff who voluntarily dismisses and refiles case has 90 days to obtain certificate of merit).

e. [7.43] Fraud

Common-law fraud is an example of a cause of action that requires particularized pleading. To state a cause of action for common-law fraud, a plaintiff must allege (1) a false statement of material fact by the defendant, (2) that the defendant knew the statement to be false, (3) that the defendant intended the plaintiff to rely on his or her false statement, (4) that the plaintiff did in fact rely on the defendant's statement, and (5) injuries arising from reliance on the statement. *Addison v. Distinctive Homes, Ltd.*, 359 Ill.App.3d 997, 836 N.E.2d 88, 296 Ill.Dec. 673 (1st Dist. 2005). The plaintiff alleging common-law fraud must additionally allege, "with specificity and particularity, facts from which fraud is the necessary or probable inference, including what representations were made, who made them, and to whom." 836 N.E.2d at 92.

f. [7.44] Breach of Contract

A breach-of-contract complaint must allege facts demonstrating offer, acceptance, consideration, breach, and damages. When the contract is written, a copy of the contract may be attached as an exhibit. See §7.20 above. Incorporating a written contract by reference should

satisfy the offer, acceptance, and consideration requirements. According to S.Ct. Rule 133(c), it is sufficient to allege generally that the plaintiff performed all conditions precedent. Bear in mind that Illinois applies rather strict scrutiny to allegations of third-party beneficiary status. A careful pleader should do far more to allege facts than mere conclusions of a purported intent to confer a benefit.

Suggested form:

1. On or about _____, 20__, in the City of _____, _____ County, Illinois, plaintiff and defendant entered into a written contract, a copy of which is attached hereto as Exhibit A. [Time, date, and place of execution are customarily included.]

2. By the terms of that contract, defendant agreed to construct a building on certain premises owned by plaintiff at [address] in the City of _____, _____ County, Illinois.

3. Plaintiff has performed all the conditions on [his] [her] part under the terms of the contract.

4. Defendant failed to fulfill the contract on [his] [her] part, in that [he] [she] failed to complete the building that [he] [she] was obligated to construct on or before _____, 20__, the date for completion specified in the contract.

5. Plaintiff has been damaged in the sum of \$_____ by reason of the breach.

[Prayer as in §§7.14 – 7.17 above.]

C. [7.45] Filing the Complaint and Service of Process

The lawsuit is initiated with the filing of the complaint with the clerk of the circuit court. The plaintiff's attorney should take special care when mailing the complaint to the clerk of the circuit court to be filed, especially when the statute of limitations is running, as the plaintiff acts at his or her own peril.

The plaintiff's attorney should also prepare and file a summons for each defendant in accordance with S.Ct. Rule 101(a). In causes of action for money damages not in excess of \$50,000 or in any action subject to mandatory arbitration when a local rule prescribes a specific date for appearance, the summons should specify the date on which the defendant must appear. That day should be not less than 21 days or more than 40 days after the issuance of the summons. S.Ct. Rule 101(b). In other cases, the summons requires each defendant to file an answer or otherwise file his or her appearance within 30 days after service. S.Ct. Rule 101(d). S.Ct. Rule 101 provides a form of summons that should be consulted before drafting.

The plaintiff's attorney should arrange for each defendant to be served. While the local sheriff's office does attempt to serve defendants residing within the county, the plaintiff may have to make arrangements with the sheriff's office of non-forum counties when the defendant does

not reside in the county where the lawsuit is filed. If expedited service is needed, the plaintiff's attorney may use a private person of 18 years of age or older and not a party to the lawsuit to make service, though leave of court is necessary in such a case. See 735 ILCS 5/2-202(a). If a defendant resides out of state, a private party may serve him or her without leave of court. 735 ILCS 5/2-208(b).

III. RESPONDING TO THE COMPLAINT

A. Pre-Answer Considerations

1. [7.46] Objecting to Jurisdiction

Special appearances are no longer required to make a personal jurisdiction objection. The four subsections of Code of Civil Procedure §2-301, as amended by P.A. 91-145 (eff. Jan. 1, 2000), now provide a more flexible approach for objecting to the circuit court's exercise of jurisdiction over the person of the defendant. Although the act eliminates the distinction between special and general appearances, a defendant objecting to personal jurisdiction must still file an appearance.

The Code of Civil Procedure provides that a defendant may make a personal jurisdiction objection prior to the filing of any other pleading or motion "other than a motion for an extension of time to answer or otherwise appear." 735 ILCS 5/2-301(a). A personal jurisdiction objection can be made either because "the party is not amenable to process of a court of this State" or "on the ground of insufficiency of process or insufficiency of service of process." *Id.*

A motion to dismiss is appropriate if the objection is raised because the party is not amenable to process by Illinois courts, whereas a motion to quash service of process is appropriate if the objection is based on insufficiency of process or service of process. A motion to dismiss or motion to quash may be made either singly or in a combined motion pursuant to Code of Civil Procedure §2-619.1. The combined motion option allows the defendant to put other matters before the court and reduces the possibility of inadvertent waiver.

The Code of Civil Procedure contains a waiver rule which provides that when "the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a-5). A defendant who needs additional time to prepare and file a motion objecting to personal jurisdiction should file a motion entitled "Motion for Extension of Time To Answer or Otherwise Appear." While attorneys are accustomed to asking for an extension of time to answer or otherwise plead, defendants are well advised to use the exact language in §2-301 to defeat any waiver claim.

2. Forum Considerations

a. [7.47] Removal

When considering the removal of a case to federal court, a practitioner should review 28 U.S.C. §1441 carefully. The removal procedure is very technical, and §1441 has traditionally been the subject of frequent revisions by Congress. In addition, there is generally no appeal from a decision of a federal district court remanding the matter back to the state court, so one must be sure to comply with the statute's requirements.

In general, an action filed in a circuit court that falls under the jurisdiction of a United States district court may be removed to the district court pursuant to 28 U.S.C. §1441.

Recent amendments arising from the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub.L. No. 112-63, 125 Stat 758, include two important changes that apply to all actions “commenced” in state court on or after January 6, 2012.

The first change resolved split opinions among the circuits over the time for removal in cases involving multiple defendants when each defendant is not served at the same time. 28 U.S.C. §1446(b)(2)(B) was amended to state that when multiple defendants are sued in state court, *each* defendant now has 30 days to file a notice of removal to federal district court, starting from the date that the defendant *itself* was served, not from the date the first defendant was served. Before the change, there were contradictory holdings among the circuits, some adopting this “later-served” rule and others adopting a “first-served” rule, which required any defendant seeking removal to file the notice of removal within 30 days of the date the *first* defendant was served.

The second change removed the discretion federal district courts previously possessed over removal jurisdiction on state law claims not within the court's original or supplemental jurisdiction. 28 U.S.C. §1441(c) now provides:

(c) Joinder of Federal Law Claims and State Law Claims. — (1) If a civil action includes —

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

As a result of the amendment, a federal district court no longer has discretion to hear state law claims in a removed action if they are not otherwise within the original or supplemental jurisdiction of the court. Previously the court had discretion in claims combining sections (A) and (B), authority that was criticized as it permitted federal district courts to decide state law claims over which they lacked jurisdiction. Now, however, when a removable claim or cause of action is joined with one or more otherwise nonremovable claims or causes of action, the federal district court must sever the nonremovable claims from the action and remand them to the state court. While unrelated state law claims must now be severed and remanded to state court, the supplemental jurisdiction provided for under 28 U.S.C. §1367 continues to allow federal district courts to assert jurisdiction over state law claims when those claims are “so related to” claims that raise a federal question “that they form part of the same case or controversy.”

Consequently, under the new §1441(c), whenever a separate and independent claim or cause of action within the jurisdiction conferred by §1331 (federal question) of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed, but litigants must consider the possibility that if they remove, the state law claims will be remanded and they will face litigation in both state and federal court. The practitioner should review this statute very carefully.

Section 1441 was also amended in 2002 to add subsection (e), providing specific instruction for removal and remand of multiparty and multi-forum actions that could have been brought in federal court under 28 U.S.C. §1369. Both §§1441(e) and 1369 should be reviewed carefully by those practitioners handling removal of §1369 claims. The former subsection (e) was redesignated as subsection (f).

To remove a case to the district court, the defendant should file a notice of removal in the district and division of the district court that embraces the county in which the plaintiff has filed the complaint. 28 U.S.C. §1446(a). The notice of removal should be filed within 30 days of service of the complaint and should contain “a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon [the] defendant.” 28 U.S.C. §§1446(a), 1446(b). Section 1446(a) requires that the notice of removal must be signed pursuant to Fed.R.Civ.P. 11.

In addition to the changes noted above, the recent amendments to §1446 codify the judicially created “rule of unanimity” in requiring “all defendants who have been properly joined and served must join in or consent to the removal of the action.” 28 U.S.C. §1446(b)(2)(A). Furthermore, considering that later-served defendants may seek to remove even if an earlier-served defendant has chosen not to, §1446 now allows that if “defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.” 28 U.S.C. §1446(b)(2)(C).

A “bad faith” exception has also been incorporated into the §1446 to provide relief from the one-year absolute deadline for removal based on diversity of citizenship. Before the 2012 amendments, diversity cases prohibited removal more than one year after commencement of the action. As an example, a defendant previously would not be permitted to remove an action following the dismissal of a party who had been the only impediment to complete diversity of citizenship. The revised statute now allows removal after expiration of the one-year limitation period if the court finds that the plaintiff acted in bad faith to prevent it.

A defendant should carefully consult the provisions of the Code and any recent revisions thereto applicable to filing a removal petition (28 U.S.C. §§1441 – 1453) as well as those concerning jurisdiction (28 U.S.C. §§1331 – 1332). Once a removal petition is filed, the defendant must promptly give notice of the petition to all adverse parties and file a copy of the petition with the circuit court. 28 U.S.C. §1446(d).

Note that a case of exclusively federal jurisdiction cannot be removed. Rather, the defendant’s remedy is to seek dismissal of the state proceeding for lack of subject-matter jurisdiction. See FEDERAL CIVIL PRACTICE, Ch. 1 (IICLE®, 2010).

While diversity jurisdiction might not exist when all of the original defendants appear, if the plaintiff’s voluntary dismissal of a non-diverse party creates diversity, removal is allowed. However, if the dismissal of the non-diverse defendant is the result of a state court acting contrary to the desire of the plaintiff, the case cannot be removed because the court order might be reversed on appeal. See 14B Wright, Miller, FEDERAL PRACTICE AND PROCEDURE (4th ed. 2009 & Supp. 2010, Supp. 2011 forthcoming).

b. [7.48] Sample Form of Removal Petition

UNITED STATES DISTRICT COURT

_____ District of _____
 _____,
)
)
Petitioner,)
)
 v.)
)
) **No.**
 _____,
)
)
Respondent.)

PETITION FOR REMOVAL

To the Judges of the United States District Court for the _____ District of _____:

The petition of _____ respectfully shows:

1. On the _____ day of _____, 20__, an action was commenced against petitioner in the Circuit Court of _____ County, the State of Illinois, entitled _____, plaintiff, against _____, defendant, docket no. _____, by the service on petitioner of a summons and complaint, copies of which are attached hereto. No further proceedings have been had therein.

2. The above-described action is a civil action of which this court has original jurisdiction under the provisions of Title 28, United States Code, Section [e.g., 1331] and is one that may be removed to this court by petitioner, defendant therein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that [set out short and plain statement of the grounds that entitle defendant or defendants to removal].

WHEREFORE, petitioner prays that the above action now pending against [him] [her] in the Circuit Court of _____ County, State of Illinois, be removed therefrom to this court.

Attorney for Petitioner

c. [7.49] Transfer of Venue

Generally, in Illinois, venue is proper in the county of residence of any defendant joined in good faith or in the county in which the transaction or some part thereof giving rise to the plaintiff's cause of action occurred. See 735 ILCS 5/2-101. All objections to improper venue are waived unless a motion to transfer is made by the defendant on or before the date on which the defendant is required to appear or within the time the defendant is granted to respond to the complaint after filing his or her appearance. 735 ILCS 5/2-104(b); *Chochorowski v. Home Depot U.S.A., Inc.*, 376 Ill.App.3d 167, 875 N.E.2d 682, 314 Ill.Dec. 709 (5th Dist. 2007); *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 839 N.E.2d 524, 298 Ill.Dec. 201 (2005). It is the defendant's burden to set forth specific facts showing that the plaintiff's venue selection was improper. *Corral, supra*. The dismissal of a certain defendant upon motion of the plaintiff may remove the basis for venue in a given county. An immediate venue motion should be made if thought desirable.

d. [7.50] Forum Non Conveniens

A defendant may elect to change the forum of the litigation even when venue is proper (*i.e.*, in compliance with the provision of 735 ILCS 5/2-101). Supreme Court Rule 187 provides for the intrastate transfer of litigation or the dismissal (in contemplation of refiling in another state) of litigation pursuant to the doctrine of forum non conveniens. A forum non conveniens motion must be made within 90 days after the last day a defendant is allowed to answer. A forum non conveniens motion should state facts suggesting that a different forum is more appropriate (*i.e.*, that the alternative forum is available, has better access to the proof, has a less crowded docket, and is more convenient for the parties). See *Ellis v. AAR Parts Trading Inc.*, 357 Ill.App.3d 723, 828 N.E.2d 726, 293 Ill.Dec. 416 (1st Dist. 2005); *Berry v. Electrolux Home Products, Inc.*, 352 Ill.App.3d 731, 817 N.E.2d 936, 288 Ill.Dec. 286 (1st Dist. 2004); *Dawdy v. Union Pacific R.R.*, 207 Ill.2d 167, 797 N.E.2d 687, 278 Ill.Dec. 92 (2003); *First American Bank v. Guerine*, 198 Ill.2d 511, 764 N.E.2d 54, 261 Ill.Dec. 763 (2002); *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill.2d 101, 554 N.E.2d 209, 143 Ill.Dec. 274 (1990); *Bland v. Norfolk & Western Ry.*, 116 Ill.2d 217, 506 N.E.2d 1291, 107 Ill.Dec. 236 (1987); *Torres v. Walsh*, 98 Ill.2d 338, 456 N.E.2d 601, 74 Ill.Dec. 880 (1983).

3. Vacation of Defaults

a. [7.51] *Within 30 Days of a Default Judgment or Before Default Judgment Is Entered*

In general, a defendant is in a condition of default if he or she fails to appear within the time specified on the summons. In that event, a motion to vacate the default is required before a responsive pleading may be filed. Such a motion may be made at any time. However, if the plaintiff obtains a default judgment, the defendant must move to vacate this judgment within 30 days of its entry. 735 ILCS 5/2-1301(e).

b. [7.52] *More Than 30 Days After a Default Judgment*

If more than 30 days lapse after the entry of a default judgment, a defendant may not answer without first filing a petition in accordance with Code of Civil Procedure §2-1401. In the petition, the defendant must demonstrate the existence of a meritorious defense and due diligence. *See Robinson v. Ryan*, 372 Ill.App.3d 167, 865 N.E.2d 400, 310 Ill.Dec. 76 (1st Dist. 2007) (legal malpractice insurer that failed to approve settlement agreement and dismissal had meritorious defense and exercised due diligence by intervening and petitioning for relief less than two months after learning of dismissal orders); *Johnson v. Wal-Mart Stores, Inc.*, 324 Ill.App.3d 543, 755 N.E.2d 507, 258 Ill.Dec. 124 (5th Dist. 2001) (defendant not entitled to vacate default judgment when defendant failed to offer reason for six-month delay in responding to complaint); *Kaput v. Hoey*, 124 Ill.2d 370, 530 N.E.2d 230, 125 Ill.Dec. 202 (1988) (no meritorious defenses based on defendant's failure to provide basis on which defense could be premised); *Smith v. Airoom, Inc.*, 114 Ill.2d 209, 499 N.E.2d 1381, 102 Ill.Dec. 368 (1986) (defendant not entitled to vacate default judgment because defendant failed to establish any acceptable excuse for failure to appear after summons was duly served on agent); *Lazzara v. Dreyer Medical Clinic*, 120 Ill.App.3d 721, 458 N.E.2d 958, 76 Ill.Dec. 304 (1st Dist. 1983). *But see Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 99 L.Ed.2d 75, 108 S.Ct. 896 (1988) (employer entitled to set aside judgment when he did not receive proper service of process despite absence of meritorious defense).

With certain exceptions, the petition must be filed not later than two years after entry of the order or judgment. 735 ILCS 5/2-1401(c). *See Bank of Ravenswood v. Domino's Pizza, Inc.*, 269 Ill.App.3d 714, 646 N.E.2d 1252, 207 Ill.Dec. 165 (1st Dist. 1995) (defendant's petition to vacate default barred because filed more than two years after entry of judgment).

4. [7.53] **Obtaining Leave To Appear and an Extension of Time To Answer**

In seeking to vacate a default judgment, a defendant should simultaneously file a motion for leave to appear. If more time is needed to answer, the motion seeking leave to appear should include a request for more time to answer. Supreme Court Rule 183 allows for extensions of time for "good cause shown on motion after notice to the opposite party." In most cases, leave to appear is granted *instanter* (*i.e.*, the defendant may attach to the motion an appearance form and an appearance may be entered immediately upon the granting of leave).

5. [7.54] Suggested Form: Leave To Appear, Extension of Time To Answer

[Caption]

**MOTION TO VACATE DEFAULTS AND FOR LEAVE
TO FILE OR FOR TIME IN WHICH TO RESPOND**

NOW COMES defendant, _____, by [his] [her] attorneys, _____, and moves this court for the entry of an Order vacating any and all defaults heretofore entered against this defendant, and further for leave to file **instanter** [his or her Appearance, Jury Demand, and Answer to plaintiff's Complaint at Law] [for an extension of time up to and including (specify date) to file an Answer to plaintiff's Complaint at Law], and as grounds states: [state grounds]

6. [7.55] Motions in Lieu of Pleadings

Pursuant to the Code of Civil Procedure, if a complaint is insufficient as a matter of law or if it is so unspecific that it cannot be answered, a defendant may object to the complaint. 735 ILCS 5/2-615. Furthermore, if a defendant wishes to assert affirmative matter that is grounds for dismissal (*e.g.*, that the plaintiff's cause of action is time-barred), he or she may do so by filing a motion for involuntary dismissal pursuant to 735 ILCS 5/2-619. In either case, a §2-615 or §2-619 motion should be filed within the time allowed for a defendant to answer. Code of Civil Procedure §2-619.1 provides that motions under §§2-615, 2-619, and 2-1005 may be filed together as a single motion in any combination. The combined motion must be in parts; each part must show the points or grounds relied on under the section on which it is based.

7. [7.56] Demand for Bill of Particulars

A defendant may ask for a bill of particulars from the plaintiff if the allegations of the complaint are so wanting in detail that the defendant is unable to answer. See 735 ILCS 5/2-607. The notice must point out specifically the defects complained of or the details desired. The plaintiff has 28 days to file and serve the bill of particulars; the defendant has 28 days to plead after being served with the bill. 735 ILCS 5/2-607(a). If the pleader does not file and serve a bill of particulars within 28 days of the demand or if it is insufficient, the court may strike the pleading, allow further time to furnish the bill of particulars, or require a more particular bill to be filed and served. 735 ILCS 5/2-607(b). A bill, however, need not state more than what the plaintiff expects to prove. *Porter v. Urbana-Champaign Sanitary Dist.*, 237 Ill.App.3d 296, 604 N.E.2d 393, 178 Ill.Dec. 137 (4th Dist. 1992); *Bejda v. SGL Industries, Inc.*, 82 Ill.2d 322, 412 N.E.2d 464, 45 Ill.Dec. 113 (1980). Thus, requesting a bill of particulars from the plaintiff tends to be duplicative of discovery efforts and is often not helpful. See also *Kling v. Landry*, 292 Ill.App.3d 329, 686 N.E.2d 33, 226 Ill.Dec. 684 (2d Dist. 1997) (dismissal of complaint with prejudice for failure to provide bill of particulars not permitted under 735 ILCS 5/2-607 although case may be dismissed based on court's inherent authority to control its business), *appeal denied*, 176 Ill.2d 575 (1998).

B. Drafting the Answer

1. [7.57] Overview/Contents

When a defense attorney is satisfied that (a) the circuit court has subject-matter and personal jurisdiction over his or her client (or is willing to waive this objection on personal jurisdiction); (b) the forum of the litigation is the most appropriate available; and (c) the complaint or counterclaim is sufficient in both form and substance, then a pleading designated as the answer should be filed.

The answer should contain essentially the same component parts as the complaint: (a) introductory portions designating the court and parties; (b) the body, which should address the plaintiff's allegations; (c) a denial that the plaintiff is entitled to the relief sought; (d) a prayer for defendant's costs; (e) assertions of affirmative defenses; (f) assertions of counterclaims when appropriate; (g) signature; (h) verification when appropriate; (i) any exhibits; and (j) jury demand, if desired.

A well-drafted answer should admit to allegations of facts that the defendant knows to be true and should expressly deny all other facts and any conclusions of law that have not previously been stricken. See §7.55 above for a discussion of a motion to strike pursuant to 735 ILCS 5/2-615.

The defense attorney should be especially careful when drafting the answer because any admissions set forth in the answer can be used at trial. See *Underwood v. Baker*, 168 Ill.App.3d 223, 522 N.E.2d 677, 119 Ill.Dec. 15 (1st Dist. 1988) (admissions in answer resulted in reversal of directed verdict and new trial even though defendant did not answer interrogatories and failed to appear for deposition and trial). The Illinois Supreme Court has held that a defendant's admission of a specific fact alleged in a complaint is sufficient to prove that fact. *Regan v. Berent*, 392 Ill. 376, 64 N.E.2d 483 (1945).

2. Addressing Allegations of the Complaint

a. Denials

(1) [7.58] General denials

According to 735 ILCS 5/2-610(a), “[e]very answer . . . shall contain an explicit admission or denial of each allegation of the pleading to which it relates.” In general, every allegation other than those not expressly denied is admitted. However, the failure to specifically deny the conclusion alleged in a complaint is not an admission of its truth. *Knauerhaze v. Nelson*, 361 Ill.App.3d 538, 836 N.E.2d 640, 296 Ill.Dec. 889 (1st Dist. 2005) (defendant's refusal to answer allegation of agency relationship because it called for legal conclusion was proper and put plaintiff on notice that agency was at issue); *Cole Taylor Bank v. Cole Taylor Bank*, 224 Ill.App.3d 696, 586 N.E.2d 775, 166 Ill.Dec. 817 (1st Dist. 1992). See 735 ILCS 5/2-610(b). Supreme Court Rule 136(a) allows a defendant to deny all allegations contained in a paragraph of

SUBSCRIBED AND SWORN to
before me this _____ day
of _____, 20__

Notary Public

(4) [7.63] Allegations directed to a codefendant in multi-defendant litigation

Often in multi-defendant litigation, a count or a paragraph of the plaintiff's complaint contains allegations directed to codefendants that do not concern the defendant seeking to respond. In such a case, the following response may be appropriate:

Defendant states that the allegations contained in [paragraph ____ of plaintiff's Complaint at Law] [Count ____ of plaintiff's Complaint at Law] are not directed to [him] [her] and, therefore, makes no answer thereto. To the extent an answer is required, defendant denies the allegations and each of them.

b. [7.64] Admissions

If a defendant can admit to all the allegations of a paragraph of the plaintiff's complaint, the following may be stated:

Defendant admits the allegations of paragraph ____ of Count ____ of plaintiff's complaint.

If the defendant seeks to admit to less than all of the allegations of a paragraph, the Committee Comment, Paragraph (a), to S.Ct. Rule 136 provides the following illustration:

5. Defendant admits [stating facts admitted] and denies the remaining allegations of paragraph 5 and each of them.

3. [7.65] Raising Defenses

The Code of Civil Procedure requires that a defendant who seeks to raise certain defenses must do so in the answer. The Code provides:

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).

While §2-613(d) does not include the defenses of waiver, unclean hands, res judicata, consent, justification, assumption of the risk, and the statute of limitations, those defenses would seem to be of an affirmative nature that might take the plaintiff by surprise and thus should be raised in the answer. *See, e.g., Hanley v. City of Chicago*, 343 Ill.App.3d 49, 795 N.E.2d 808, 277 Ill.Dec. 140 (1st Dist. 2003) (affirmative defense must be set out in answer to avoid surprise to opposing party, and failure to do so results in waiver of defense); *Avery v. Sabbia*, 301 Ill.App.3d 839, 704 N.E.2d 750, 235 Ill.Dec. 177 (1st Dist. 1998) (if defendant fails to plead affirmative defense, defendant waives such argument at trial or on review and it cannot be considered even if evidence suggests its existence); *Condon v. American Telephone & Telegraph Co.*, 210 Ill.App.3d 701, 569 N.E.2d 518, 155 Ill.Dec. 337 (2d Dist. 1991); *International Association of Firefighters Local No. 23 v. City of East St. Louis*, 213 Ill.App.3d 91, 571 N.E.2d 1198, 157 Ill.Dec. 179 (5th Dist. 1991).

On the other hand, a defendant need not plead as an affirmative defense lack of proximate cause because such defense “neither concedes the truthfulness of the plaintiff’s claim nor asserts a new matter to defeat the plaintiff’s claim; instead it attacks the sufficiency of that claim.” *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill.2d 335, 637 N.E.2d 1020, 1025, 202 Ill.Dec. 284 (1994). *Korando* points out an important point: not all “defenses” are affirmative defenses to be specially pleaded. Indeed, a practitioner might be guided by the scope of Code of Civil Procedure §§2-619(a)(1) through 2-619(a)(9) in deciding what should be pleaded affirmatively. To similar effect, *see Leonardi v. Loyola University of Chicago*, 168 Ill.2d 83, 658 N.E.2d 450, 212 Ill.Dec. 968 (1995).

Defenses should be clearly labeled and asserted at the end of the defendant’s answer after the portion that denies that the plaintiff is entitled to the relief sought. If the defendant has more than one defense, all of the defenses should be pleaded regardless of consistency. See §7.69 below.

a. [7.66] Drafting the Defense Portion of an Answer

The drafter should keep in mind that the rules of fact pleading apply to the drafting of defenses as well as to the drafting of complaints. A well-drafted answer setting forth a defense should thus allege facts that establish the defense, rather than state mere conclusions of law. See §§7.21 – 7.24 above for a discussion of fact pleading.

Suggested form:

AFFIRMATIVE DEFENSE [No. ____]

For defendant’s [first] affirmative defense to plaintiff’s Complaint [at Law], defendant states:

1-4. [Allege facts demonstrating that plaintiff’s cause of action can be avoided by a legally recognizable defense. Consider incorporating certain introductory paragraphs of plaintiff’s own complaint. Also set forth alternative grounds. For example, in contributory negligence allege how “plaintiff failed to keep a look out for her own safety” or “failed to heed warnings” etc.]

Accordingly, plaintiff cannot recover, by reason of [the provisions of ____ ILCS ____/____, which state . . .] [state name of common-law defense].

b. [7.67] Special Defenses in Contract Actions

The Code of Civil Procedure lists defenses to contract actions that must be pleaded. 735 ILCS 5/2-613(d). In addition, the defendant’s attorney should note that S.Ct. Rule 133(c) requires a defendant who denies performance of a condition precedent to allege facts showing “wherein there was a failure to perform.” In addition, if the plaintiff pleads a written contract allegedly executed by the defendant, the defendant must deny the allegation in a verified answer or the allegation is deemed admitted. 735 ILCS 5/2-605(b). See §7.72 below for a discussion of verification of answers.

c. [7.68] Asserting Inconsistent Defenses

735 ILCS 5/2-613(b) allows for the assertion of alternative inconsistent defenses when the defendant is in doubt as to which defense is applicable. However, the defendant must directly address each of the plaintiff’s allegations even when the defendant is unsure of the truth of the plaintiff’s allegation. In such a case, the defendant should answer that he or she has insufficient knowledge to form a belief as to the truth of the allegations. See §7.60 above.

4. Counterclaims

a. [7.69] In General

In Illinois, there is no distinction between claims made by a defendant against the plaintiff and claims made by one defendant against a codefendant. Both are called “counterclaims” in Illinois practice. 735 ILCS 5/2-608(a). In federal practice, the latter type of claim is called a “cross-claim.” See Fed.R.Civ.P. 13(g).

Another distinction is that Illinois practice does not recognize compulsory counterclaims. See Fed.R.Civ.P. 13(a). Thus, a defendant may elect to bring a cause of action in the plaintiff’s action or commence an independent action, but if the plaintiff files suit in a compulsory counterclaim jurisdiction, the defendant must raise his or her claim or else be barred from bringing it in Illinois

at a later date. *McDonald's Corp. v. Levine*, 108 Ill.App.3d 732, 439 N.E.2d 475, 64 Ill.Dec. 224 (2d Dist. 1982). A defendant seeking contribution under the Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*, must do so in the original action. *Harshman v. DePhillips*, 218 Ill.2d 482, 844 N.E.2d 941, 300 Ill.Dec. 498 (2006); *Laue v. Leifheit*, 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984). One who elects not to file a counterclaim should analyze the effect of res judicata. Moreover, that which might have been raised as a defense to the plaintiff's complaint, but which is withheld in favor of forming the basis of an independent later action might invoke res judicata principles. *See, e.g., Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982).

In general, the same considerations apply to drafting a counterclaim that would apply to drafting a complaint. However, the counterclaim must be part of the answer and should be designated as a counterclaim. The counterclaim need not repeat allegations stated in the answer but may incorporate them by reference. See S.Ct. Rule 134. The pleader should note that an otherwise time-barred claim may be filed as a counterclaim in response to a plaintiff's complaint. See 735 ILCS 5/13-207. The Supreme Court has also held that the "saving provision" of §13-207 also applies to counterclaims among codefendants. *Barragan v. Casco Design Corp.*, 216 Ill.2d 435, 837 N.E.2d 16, 297 Ill.Dec. 236 (2005) (when architect filed its contribution counterclaim against contractor, architect became "plaintiff" and contractor became "defendant" for purposes of "saving" provision).

Service of a counterclaim on parties already before the court is not necessary. See 735 ILCS 5/2-608(b). The time for responding to a counterclaim is 21 days. S.Ct. Rule 182(b).

b. [7.70] Suggested Form

COUNTERCLAIM

Defendant-counterplaintiff, _____, for [his] [her] counterclaim against plaintiff-counterdefendant, _____, states:

[Here allege all facts constituting defendant's counterclaim with the same particularity as in a complaint.]

WHEREFORE, [prayer for relief as in §§7.14 – 7.17 above].

5. [7.71] Signature

Supreme Court Rule 137 requires that all pleadings be signed. For a detailed discussion of the provisions of S.Ct. Rule 137, see §7.18 above.

6. [7.72] Verification

An answer filed in response to a verified complaint must be verified. 735 ILCS 5/2-605(a). If a plaintiff pleads a written contract allegedly executed by the defendant, the allegation must be denied in a verified answer (735 ILCS 5/2-605(b)) or an answer accompanied by an attorney's certification (see 735 ILCS 5/1-109). *In re Andrea D.*, 342 Ill.App.3d 233, 794 N.E.2d 1043, 276

Ill.Dec. 793 (2d Dist. 2003); *In re Application of County Collector*, 295 Ill.App.3d 711, 692 N.E.2d 1290, 230 Ill.Dec. 124 (1st Dist. 1998) (when pleading is verified, every subsequent pleading also must be verified unless verification is excused; filing unverified answer has same effect as if no answer has been filed at all).

Code of Civil Procedure §2-605 allows the court to excuse verification in responding to a verified pleading. *See Armstrong v. Freeman United Coal Mining Co.*, 112 Ill.App.3d 1020, 446 N.E.2d 296, 68 Ill.Dec. 562 (3d Dist. 1983) (court has considerable discretion in excusing verification of answer filed subsequent to verified complaint; unless substantial prejudice has resulted it will not be basis for reversible error). Strategically, the defendant may be well advised to seek an excusal rather than to file a verified pleading. Doing the latter leaves the plaintiff with a verified complaint that can be admissible at trial even if subsequently amended. See §7.19 above.

C. [7.73] Third-Party Complaints

If a defendant has a claim against a person not a party to the lawsuit but who may be liable to the defendant for all or part of the plaintiff's claim, the defendant may file a third-party complaint against that person pursuant to 735 ILCS 5/2-406(b). A third-party complaint must be filed within the time allowed for the defendant's answer or with leave of court. Counsel should also be aware of any applicable statutes of repose as the Illinois Supreme Court has held that such statutes are applicable to contribution actions. *See Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill.App.3d 349, 703 N.E.2d 473, 234 Ill.Dec. 612 (1st Dist. 1998) (statute of limitations for contribution and indemnity actions preempts all other statutes of limitation and repose except in medical malpractice cases); *Hayes v. Mercy Hospital & Medical Center*, 136 Ill.2d 450, 557 N.E.2d 873, 145 Ill.Dec. 894 (1990) (medical malpractice statute of repose bars third-party claims against physicians for contribution). The defendant third-party plaintiff should follow the rules regarding complaints (see §§7.8 – 7.45 above), including rules regarding service of process. In the third-party complaint, the defendant third-party plaintiff should take care to identify the parties accurately. *See People v. Fiorini*, 143 Ill.2d 318, 574 N.E.2d 612, 158 Ill.Dec. 499 (1991) (standards for analyzing third-party complaint differ from those applicable to counterclaim). While custom has often had third-party plaintiffs filing a different third-party complaint against each and every third-party defendant, there is no reason in the Code of Civil Procedure or Supreme Court Rules for doing so. Instead, the better practice would be for the third-party plaintiff (or all third-party plaintiffs represented by the same attorney) to file one third-party complaint against all third-party defendants sought to be added, asserting each cause of action against each third-party defendant in a different count. Plaintiffs do not file separate complaints against each defendant; third-party plaintiffs need not do so either.

Suggested form:

_____,)
)
Plaintiff,)
)
v.)
)
_____,)
)
Defendant.)
)
_____,)
)
Third-Party Plaintiff)
)
v.)
)
_____,)
)
Third-Party Defendant)
)

THIRD-PARTY COMPLAINT [AT LAW]

NOW COMES defendant-third-party plaintiff, _____, by [his] [her] attorney, _____, and complaining of third-party defendant, _____, states:

D. [7.74] Filing

An answer should be filed within 30 days of service of the complaint unless an extension of time has been granted. S.Ct. Rule 181(a). It is best to file an original and a copy of the answer. Of course, a copy should be served by mail on each party's counsel of record.

IV. [7.75] REPLY

The plaintiff must respond to new matter raised by the defendant's answer or the plaintiff will be deemed to admit the new matter. 735 ILCS 5/2-602; *Romano v. Village of Glenview*, 277 Ill.App.3d 406, 660 N.E.2d 56, 213 Ill.Dec. 799 (1st Dist. 1995) (failure to reply to new matters raised by way of affirmative defenses constitutes admission of those allegations); *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill.App.3d 574, 485 N.E.2d 1281, 1289, 93 Ill.Dec. 71 (2d Dist. 1985) (“[A] reply to a defendant’s answer is mandatory where a new matter by way of a defense is pleaded. If a plaintiff fails to so reply, his failure constitutes an admission as to the proof of the new matter alleged.”). The pleading that the plaintiff must file is designated as the “reply.” In general, a reply is necessary when the defendant asserts a defense.

The reply must be signed in accordance with Supreme Court Rule 137 (see §7.18 above) and should be verified if it is filed in response to a verified answer. A reply should be filed within 21 days after the last day allowed for the filing of the answer. S.Ct. Rule 182(a). *But see State Farm Mutual Automobile Insurance Co. v. Haskins*, 215 Ill.App.3d 242, 574 N.E.2d 1231, 158 Ill.Dec. 838 (2d Dist. 1991) (insurer's failure to respond to affirmative defense was not admission when complaint negated defense and defendants waived objection by introducing evidence in support of affirmative defense).

V. AMENDMENTS AND SUPPLEMENTAL PLEADINGS

A. [7.76] Amendments — Generally

The Code of Civil Procedure allows for amendments of pleadings at any time before final judgment with leave of court and on just and reasonable terms. 735 ILCS 5/2-616(a). New parties may be added, new causes of action may be pleaded, and new defenses may be asserted. The right to amend is not absolute; rather, it rests within the sound discretion of the trial court. *See Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill.App.3d 1, 812 N.E.2d 419, 285 Ill.Dec. 599 (1st Dist. 2004); *Misselhorn v. Doyle*, 257 Ill.App.3d 983, 629 N.E.2d 189, 195 Ill.Dec. 881 (5th Dist. 1994). *See also Barille v. Sears Roebuck & Co.*, 289 Ill.App.3d 171, 682 N.E.2d 118, 224 Ill.Dec. 557 (1st Dist. 1997) (trial court did not abuse its discretion in refusing to vacate dismissal with prejudice or reconsider motion to file second amended complaint when proposed complaint did not cure failure to state causes of action); *Green v. University of Chicago Hospitals & Clinics*, 258 Ill.App.3d 536, 631 N.E.2d 271, 197 Ill.Dec. 268 (1st Dist. 1994) (no absolute right to amend answer; amendments not favored after trial commences); *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 586 N.E.2d 1211, 166 Ill.Dec. 882 (1992) (trial court abused its discretion in denying plaintiff's motion for leave to file amended complaint; Supreme Court identified four factors in determining whether court abused its discretion).

This permissive language, however, must be tempered. Defendants have a right to rely on allegations pleaded, especially when the plaintiff has been aware of the facts to be added by way of the amended complaint but has offered no excuse for the delay. *See Profit Management Development, Inc. v. Jacobson, Brandvik & Anderson, Ltd.*, 309 Ill.App.3d 289, 721 N.E.2d 826, 242 Ill.Dec. 547 (2d Dist. 1999) (court considers timeliness of proposed amendment and whether other parties have been prejudiced or surprised by amendment in deciding whether to allow amendment); *Friestedt v. Chicago Transit Authority*, 129 Ill.App.2d 153, 262 N.E.2d 771 (1st Dist. 1970) (on motion to amend, court may consider previous opportunities to amend; motion may be denied when record shows no valid reason for failure to make timely amendments). *See also Gray v. City of Plano*, 141 Ill.App.3d 575, 490 N.E.2d 1020, 95 Ill.Dec. 928 (2d Dist. 1986) (knowledge of facts existing at time of original complaint but that were included only in amended complaint precluded amendment of complaint during trial); *Arroyo v. Chicago Transit Authority*, 268 Ill.App.3d 317, 643 N.E.2d 1322, 205 Ill.Dec. 715 (1st Dist. 1994) (motion to amend at close of plaintiff's case-in-chief properly denied when plaintiff had knowledge of facts at time of original pleading and offered no good reason for not filing at that time); *Stichauff v. Cermak Road Realty*, 236 Ill.App.3d 557, 603 N.E.2d 828, 177 Ill.Dec. 758 (1st Dist. 1992) (amended complaint filed with leave of court but which added additional parties without express leave

amounted to legal nullity); *In re Purported Election of Durkin*, 299 Ill.App.3d 192, 700 N.E.2d 1089, 233 Ill.Dec. 381 (2d Dist. 1998) (in applying Illinois' pleading principles to election contest, appellate court denied contesting party leave to file first amended petition to add new causes of action when he had possessed information on which he had based proposed first amended petition when he was allowed to make two previous amendments to original petition).

Pleadings may be amended notwithstanding the fact that a statute of limitation has run if it appears that the matter grew out of the same transaction or occurrence as that contained in the original pleading. If this is so, the amendment is deemed to "relate back" to the time of the original filing. *Porter v. Decatur Memorial Hospital*, 227 Ill.2d 343, 882 N.E.2d 583, 317 Ill.Dec. 703 (2008). See also *In re Marriage of Wolff*, 355 Ill.App.3d 403, 822 N.E.2d 596, 290 Ill.Dec. 1011 (2d Dist. 2005) (relation-back doctrine of action inapplicable to amended motion to reconsider final judgment of divorce because motion was not cause of action, cross-claim, defense, or pleading); *Castro v. Bellucci*, 338 Ill.App.3d 386, 789 N.E.2d 784, 273 Ill.Dec. 610 (1st Dist. 2003) (fourth complaint related back to second complaint when hospital was adequately informed of patient's claim in second complaint and additional dates of alleged malpractice arose out of same transaction or occurrence and involved same claims). See 735 ILCS 5/2-616(b); *Gonzalez v. Thorek Hospital & Medical Center*, 143 Ill.2d 28, 570 N.E.2d 309, 155 Ill.Dec. 796 (1991) (allegations in 1984 complaint that were insufficient to state cause of action were sufficient to constitute complaint and, thereby, tolled statute of limitations for 1985 complaint).

A party seeking to amend its pleading should keep in mind that the Code of Civil Procedure allows for amendments with respect to the legal theory alleged. 735 ILCS 5/2-616. Section 2-616, however, does not allow for amendments with respect to the particular factual allegations. Compare *Zeh v. Wheeler*, 111 Ill.2d 266, 489 N.E.2d 1342, 95 Ill.Dec. 478 (1986) (amended complaint that alleged only different address did not relate back); *Smetzer v. County of LaSalle*, 53 Ill.App.3d 741, 368 N.E.2d 933, 11 Ill.Dec. 325 (3d Dist. 1977) (allegations of defendants' negligent failure to cut weeds along roadway grew out of different occurrence than allegations of wrongful deposit of hazardous chemical on state route; trial court properly denied plaintiff's motion to amend); *Bailey v. Petroff*, 170 Ill.App.3d 791, 525 N.E.2d 278, 121 Ill.Dec. 472 (5th Dist. 1988) (second amended complaint alleging that physician negligently and carelessly failed to diagnose unborn child's genetic disorders and notify parents did not relate back to original complaints alleging negligent prescription of Bendectin), and *Braun-Skiba, Ltd. v. LaSalle National Bank*, 279 Ill.App.3d 912, 665 N.E.2d 485, 216 Ill.Dec. 425 (1st Dist. 1996) (trial court did not abuse its discretion in denying leave to file third amended complaint when lienholder's case-in-chief did not involve issues of reformation or specific performance), with *Halberstadt v. Harris Trust & Savings Bank*, 55 Ill.2d 121, 302 N.E.2d 64 (Ill. 1973) (second amended complaint alleging violations of Structural Work Act, 740 ILCS 150/0.01, *et seq.* (since repealed by P.A. 89-2, 5 (eff. Feb. 14, 1995)), grew out of same transaction or occurrence set up in original negligence pleading).

Section 2-616(d) allows additional defendant parties to be added by amendment to the plaintiff's complaint even though the period of limitations for the initial commencement of action has expired if (1) the original complaint was timely filed; (2) the new defendant had notice of the action during the limitations period plus the time for reasonably diligent service under S.Ct. Rule 103(b) and knew or should have known that the suit would have been brought against him or her

but for a mistake in identity; and (3) it appears from the original and amended pleadings that the cause of action asserted in the amended complaint grew out of the same transaction or occurrence alleged in the original complaint.

A plaintiff may amend his or her complaint to add a new defendant if that new defendant would have been sued but for a mistake in identity. A court determines whether there is mistaken identity by looking at the plaintiff's intent in bringing the lawsuit. *Polites v. U.S. Bank National Ass'n*, 361 Ill.App.3d 76, 836 N.E.2d 133, 296 Ill.Dec. 718 (1st Dist. 2005). Insufficient information as to the proper defendants is not mistaken identity so as to allow relation-back. *Id.* When misrepresentations as to the identity of the proper defendants occurs, there is mistaken identity, and courts do allow relation-back of the complaint. *But see Santiago v. E.W. Bliss Co.*, 406 Ill.App.3d 449, 941 N.E.2d 275, 346 Ill.Dec. 717 (1st Dist. 2010) (appellate court reversed and dismissed suit when plaintiff intentionally filed complaint using fictitious name without leave of court pursuant to 735 ILCS 5/2-401, then subsequent to expiration of statute of limitations, filed amended complaint with correct plaintiff's name).

The new defendant must also have notice of the commencement of the action within the limitations period or within the time for reasonably diligent service as required by S.Ct. Rule 103(b). Whether service is "reasonably diligent" is determined by considering factors such as

(1) the defendant's actual notice or knowledge of the suit; (2) lack of prejudice to the defendant; (3) the length of time used to obtain service of process; (4) the plaintiff's activities; (5) the plaintiff's knowledge of the defendant's location; (6) the ease of ascertaining the defendant's location; (7) special circumstances that affected the plaintiff's efforts; and (8) actual service on the defendant. *Polites, supra*, 836 N.E.2d at 141, citing *Womick v. Jackson County Nursing Home*, 137 Ill.2d 371, 561 N.E.2d 25, 27, 148 Ill.Dec. 719 (1990).

For purposes of applying the relation-back doctrine, three types of notice suffice to charge the new defendant with knowledge of the commencement of the action: (1) actual notice received by the party; (2) actual notice received by the party's agent; or (3) constructive notice. 836 N.E.2d at 143 (though defendant's insurance claims service was not defendant's agent, defendant had constructive knowledge of pending action vis-à-vis its claims service).

However, dismissal is proper pursuant to S.Ct. Rule 103(b) when the plaintiff has made minimal or no efforts to serve the defendant for a significant period of time after the filing of his or her complaint, even if the defendant had notice of the lawsuit before being served. 836 N.E.2d at 142 (nine-month delay in serving complaint was not excused by ongoing settlement negotiations).

The Code of Civil Procedure establishes separate requirements for the amendment of pleadings in suits against a beneficiary of a land trust who was not named as a defendant in the original complaint.

A cause of action against a beneficiary of a land trust not originally named a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if all

the following terms and conditions are met: (1) the cause of action arises from the ownership, use or possession of real estate, record title whereto is held by a land trustee; (2) the time prescribed or limited had not expired when the original action was commenced; (3) the land trustee of record is named as a defendant; and (4) the plaintiff proceeds with reasonable diligence subsequent to the commencement of the action to serve process upon the land trustee, to determine the identity of the beneficiary, and to amend the complaint to name the beneficiary as a defendant. 735 ILCS 5/2-616(e).

The attorney seeking to amend must not overlook the necessity of obtaining leave of court. Unauthorized amendments (*i.e.*, those filed without first seeking leave) are nullities and do not toll the statute of limitations. *Moyer v. Southern Illinois Hospital Service Corp.*, 327 Ill.App.3d 889, 764 N.E.2d 155, 261 Ill.Dec. 864 (5th Dist. 2002) (first amended complaint filed without leave of court is nullity). *See also Fischer v. Senior Living Props., L.L.C.*, 329 Ill.App.3d 551, 771 N.E.2d 505, 264 Ill.Dec. 801 (4th Dist. 2002) (filing of amended complaint when judge has not signed order is not per se inadequate); *McGinnis v. A.R. Abrams, Inc.*, 141 Ill.App.3d 417, 490 N.E.2d 115, 95 Ill.Dec. 642 (4th Dist. 1986). *See also First Robinson Savings & Loan v. Ledo Construction Co.*, 210 Ill.App.3d 889, 569 N.E.2d 304, 155 Ill.Dec. 304 (5th Dist. 1991) (party not permitted to amend and add new claim against new party without leave of court); *People ex rel. Hartigan v. E&E Hauling, Inc.*, 218 Ill.App.3d 28, 577 N.E.2d 1262, 160 Ill.Dec. 691 (1st Dist. 1991) (whether to allow amendment is left to sound discretion of trial court), *aff'd in relevant part*, 153 Ill.2d 473 (1992); *Trans World Airlines, Inc. v. Martin Automatic, Inc.*, 215 Ill.App.3d 622, 575 N.E.2d 592, 159 Ill.Dec. 94 (2d Dist. 1991) (test applied in determining proper exercise of discretion is whether allowing amendment furthers ends of justice).

B. [7.77] Amendment After Motion To Strike Is Sustained

When the court sustains a motion to strike made pursuant to 735 ILCS 5/2-615 (see §7.54 above for a discussion of motions in lieu of pleadings), it usually allows the pleader to amend. In such a case, the pleader must be careful not to waive the right to appeal the adverse ruling on the motion to strike. In *Foxcroft Townhome Owners Ass'n v. Hoffinan Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983), the Illinois Supreme Court held that allegations in former pleadings not incorporated in amended pleadings are waived by the filing of the amended pleading. The pleader should therefore replead the stricken material, clearly noting in parentheses that the material was stricken pursuant to motion but that the matter is being repleaded in order to preserve it for a reviewing court. *See W.W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill.App.3d 752, 814 N.E.2d 960, 286 Ill.Dec. 734 (1st Dist. 2004) (plaintiffs waived appellate review of trial court's dismissal of claims in first amended complaint when second and third amended complaints failed to re-allege, incorporate, or refer to those claims); *Petrowsky v. Family Service of Decatur, Inc.*, 165 Ill.App.3d 32, 518 N.E.2d 664, 666, 116 Ill.Dec. 42 (4th Dist. 1987) (“[A] party filing an amended complaint which does not refer to or adopt the earlier pleading waives any objection to the trial court’s dismissal of the original complaint. . . . [T]he waiver principle applies whether or not the dismissal was ‘with prejudice.’ ” [Citations omitted.]).

C. [7.78] Distinctions Between Amended Pleadings, Amendments to Pleadings, and Supplemental Pleadings

An amended pleading restates in its entirety the claim or defense of the pleader, adding or recasting those matters omitted from the initial pleading. By comparison, an amendment to a pleading is an addition to a preexisting pleading. The complaint or answer is not entirely repleaded; instead, the omitted allegations are added by amendment to the original pleading. Often, it may be wiser for a plaintiff's attorney to file an amendment to the complaint rather than an amended complaint. When an amendment to a complaint is filed, the defendant should be allowed to address only the new matter.

Supplemental pleadings authorized by 735 ILCS 5/2-609 are employed to plead "matters which arise after the original pleadings are filed." These pleadings are rarely employed.