The Occasional Litigator's Guide to Making the Most of Pleadings and Motions

By Patrick M. Kinnally

If you're not a full-time litigator or are otherwise inexperienced, you may not know that you can win a motion but harm your case by unnecessarily educating your opponent, delaying the outcome, and increasing costs. Here's advice about using motions and pleadings wisely and avoiding pitfalls.

In analyzing a legal problem, you must understand that for every position you might advance there is always an antithesis. This is nothing new, of course, but we too often forget in the tempest of litigation.

This is certainly true for motion practice, especially motions with respect to pleadings. The key, then, is to convince the court of the essential rectitude of your client's position. This is no easy task. To succeed, you must (1) believe your opponent is smarter than you, (2) prepare your response not merely to win the immediate battle but the litigation war, and (3) style your response in a simple, coherent matter that the judge will want to read.

I. Analyze Your Opponent's Pleadings

A. Pleadings Generally

Motions to dismiss. You can only file a motion to dismiss in Illinois state court when you understand what is required to file a pleading. Is the defense truly an affirmative one?[1] It only will be viewed as such where the answer or defense gives color to the opposing party's claim and then asserts a new matter by which that apparent right is defeated.[2]

Nice jargon. What does it mean? In a contract action, for example, failure of consideration is an affirmative defense, because it admits that a contract exists but offers an excuse for non-performance.[3] On the other hand, a lack of consideration is not an affirmative defense, because it contends there is no contract. If you evaluate your opponent's pleadings, you can then decide whether filing a motion to dismiss[4] or for involuntary dismissal[5] or both[6] is the proper course of action. The trial judge will thank you for doing this.

Plead facts, not conclusions. Illinois is a fact pleading state. Unlike in federal courts, notice pleading is not permitted. So, what does that mean? Basically, a complaint or affirmative defense must state facts plainly and concisely and contain the elements necessary to state a cause of action against the appropriate parties.[7] Conclusions of fact and/or law are insufficient.[8]

Consider this analogy – in civil trials, the plaintiff has a right to make a jury demand. When a defendant appears, she need not make a jury demand, but has the right to rely on the plaintiff's demand. If the plaintiff waives his jury demand prior to trial, the defendant then has a right to make his own jury demand and pay the appropriate fee.

Thus it is with pleadings.[9] The defendant has a right to rely on what the plaintiff stated in his complaint, not only as to the content of the complaint and who the parties are, but more importantly, the relief sought in the ad damnum portion of the pleading.[10] Hence, without amendment of the complaint, the court is only permitted to change the amount of the ad damnum clause by fashioning orders that protect

1. 735 ILCS 5/2-613.
2. *Ferris Elevator Co, Inc v Neffco*, 285 Ill App 3d 350, 354, 674 NE2d 449, 452 (3d D 1996).
3. *Worner Agency, Inc v Doyle*, 121 Ill App 3d 219, 221, 459 NE2d 633, 635 (4th D 1984).
4. 735 ILCS 5/2-615.
5. 735 ILCS 5/2-619.
6. 735 ILCS 5/2-619.1.
7. 735 ILCS 5/2-603.
8. *Knox College v Celotex Corp*, 88 Ill 2d 407, 430 NE2d 976 (1982).
9. *Cook v Burnette*, 341 Ill App 3d 652, 662-663, 793 NE2d 160, 167 (1st D 2003).
10. 735 ILCS 5/2-604.

the adverse party against not only prejudice, but surprise.

Be specific. Where pleading a breach of statutory duty or a judgment order, recite the existence of such statute, ordinance, or judgment.[11] In pleading a condition precedent in a contract action, you must plead that your client performed the triggering condition or you will not have stated a necessary element of your cause of action. Contrariwise, in setting up your answer, you cannot merely say the plaintiff did not perform, but must state how the failure to perform occurred. Supreme Court Rule 133(c) says:

> In pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform.[12]

Thus, in the commercial context where you merely deny the plaintiff's claim that he performed his obligations under a contract requiring performance, that general denial merely acts as an admission of the plaintiff's performance. The rule requires the person responding to the complaint to say how the pleader failed to perform.[13] An unwitting admission of plaintiff's performance, if she has not performed, may be a serious error.

The same is true for pleading an affirmative defense. If your client wants to assert an affirmative defense at trial, he has to specifically plead it as a matter of fact. Otherwise, it is waived even if the trial evidence supports it.[14] You cannot just interpose an affirmative defense in a conclusory fashion, but must state facts that show it is truly affirmative. Think of pleadings as boundary markers that clearly delineate your client's position to avoid surprise. Even if you don't, the trial judge will.[15]

B. Exhibit Dos and Don'ts

The exhibit controls. When pleading, incorporation by reference is easy, simple, and efficient. As long as you adequately state your claim as a matter of fact, the rules permit you to incorporate that pleading in later allegations.[16] Take a look at the rule. In the incorporation by reference context, a few points are important concerning exhibits attached to the pleader's complaint. The Code of Civil Procedure says:

> If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her. In pleading any written instrument, a copy thereof may be attached to the pleading as an exhibit. In either case the exhibit constitutes a part of the pleading for all purposes.[17]

The overriding consideration here is choice. Do you want to attach an exhibit to the pleading? The decision may be critical, because an exhibit not only binds the pleader to the exhibit's contents, but to the extent it contravenes a pleaded allegation of fact, the exhibit controls.[18]

You may or may not want to attach an exhibit at the outset of litigation if you are uncertain as to the position or strategy of your opponent. You do not need to attach the 118-page franchise agreement. The trial judge will thank you for not doing that. Attach only the portions upon which the claim or defense rests.

Proceed with caution. So, must you attach the exhibit if your claim or defense is based on a written instrument? Probably not. The Code says the exhibit "must be attached to the pleading as an exhibit or recited therein." Thus, it would appear the "recitation" of the relevant portion of the exhibit in the complaint should suffice.

Although the supreme court has only ruled on this issue in dicta,[19] every exhibit appended to a complaint upon which a claim or defense is based denotes that its contents, to the extent they conflict with actual allegations of the pleading, are controlling. But if the document is not one upon which a claim or defense is founded, the exhibit will not control.

For example, in an employment claim where the plaintiff attached to her complaint copies of the grievance and the arbitrator's findings on that grievance and other documents, the appellate court determined that such exhibits were types of evidence supporting her claim and were not instruments sued upon.[20] A healthcare professional's report required by 735 ILCS 5/2-622 is not an exhibit, since it is merely evidence supporting the pleader's allegations and is not an instrument upon which a claim or affirmative defense is founded. Additionally, incorporating the exhibit by reference also seems to be required.

Yes, you can attach other documents to your complaint that have evidentiary worth. Should you? What value do you gain? A request to admit filed later in the litigation may better serve your client's interests. Incorporating exhibits in a complaint or defense provides you with strategic choices for forcing admissions on the one hand and, perhaps, forcing your opponent into an unwanted position. But if used unwisely, they can have unhelpful consequences for your client.

C. Verified Complaints and Other Pleadings Pointers

In reviewing or preparing any complaint, there is no prohibition against

11. S Ct Rule 133.
12. S Ct Rule 133(c).
13. *Wilbur v Potpora*, 123 Ill App 3d 166, 171, 462 NE2d 734, 737 (1st D 1984).
14. *Van Meter v Darien Park Dist*, 207 Ill 2d 359, 799 NE2d 273 (2003).
15. 735 ILCS 5/2-613(d).
16. S Ct Rule 134.
17. 735 ILCS 5/2-606.
18. *Fowley v Braden*, 4 Ill 2d 355, 359, 122 NE2d 559, 562 (1954).
19. *Moorman Mfg Co v National Tank Co*, 91 Ill 2d 69, 92-93, 435 NE2d 443 (1982).
20. *Jones v Lazerson*, 203 Ill App 3d 829, 832-833, 561 NE2d 151, 153 (5th D 1990); see also *Garrison v Choh*, 308 Ill App 3d 48, 54-55, 719 NE2d 237, 241-42 (1st D 1999).

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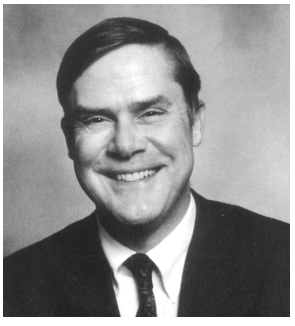

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pleading equitable and legal matters together or individually,[21] nor are you barred from pleading in the alternative as to substance[22] or relief.[23] By the same token, make sure that the plaintiff has made a specific prayer for relief[24] on each claim for which relief is sought.

Finally, is the complaint verified? This is an important consideration since the allegations, if verified and alleged as matters of fact and made upon personal knowledge, may be evidentiary or judicial admissions.[25]

Remember, a judicial admission made in an unverified pleading signed by an attorney is binding on your client and cannot be later contradicted.[26] More importantly, in preparing your answer or motion to such a pleading, you must make a verified response.[27] If using an affidavit, prepare it the right way and in a timely manner.[28] Base it on your client's everyday speech as to what, where, who, when, and how – not in conclusory fashion.

Make it something worth reading because of its content, and founded upon the affiant's personal knowledge. Remember, it must be admissible as evidence. Then, verify it and notarize it.

Finally, review article VIII of the Code of Civil Procedure.[29] When preparing your pleadings, there are a host of matters of which a trial court may take judicial notice.[30]

D. Avoiding Conclusory Language – A Case Study

Conclusory language in pleadings is commonplace. Don't let it happen where you have the firm belief the pleader will never be able to plead a cause of action or defense.

A good example is a claim based on willful and wanton misconduct. Allegations appear where a defendant is claimed to have "falsely, maliciously or knowingly engaged in some act." All such statements are conclusions and, therefore, not proper.[31] These conclusions have no value for pleading purposes where they are not supported by reference to specific facts.

In preparing or responding to a complaint based on a willful and wanton theory, it is helpful to look at the Illinois Pattern Jury Instruction. The instruction says:

> When I use the expression 'willful and wanton conduct' I mean a course of action which [shows actual or deliberate intention to harm] [or which, if not intentional] [shows an utter indifference to or conscious disregard for (a person's own safety)(and)(the safety of others)].[32]

That describes the law for the jury and should be the template for your complaint based on facts, or the theory for your motion to strike or for involuntary dismissal.[33]

Determine whether your motion will be counterproductive – that is, will you be educating your opponent, who will simply replead based on information you supply?

In the commercial context, the same analysis applies. In *Knox College v Celotex Corp*,[34] the plaintiff college brought an action against a supplier of roofing materials and a general contractor for a roof installed on one of the college's buildings. Among other things, the college alleged the contractor breached its contract with the college by allegedly installing the roof in an improper manner, through one of its subcontractors. The plaintiff made the following allegations in its pleadings:

COUNT V

46. Defendant, [Contractor], failed to comply with said contract in one or more of the following respects.

a. Failed to supervise and direct the work of its subcontractors;

b. Failed to correct the work of its subcontractors which did not conform to the requirements of the contract documents;

c. Failed to remedy defects to faulty materials, equipment and workmanship of its contractors;

d. Contrary to standard practice and good workmanship allowed concrete deck to be made in a manner which allowed the concrete to crack, thereby causing leaks to occur in said roof at the cracks;

e. Contrary to standard practice and good workmanship installed said concrete decking in a manner which caused the concrete decking to crack, causing leaks to occur in said roof at the cracks;

f. Contrary to standard practice and good workmanship allowed [Subcontractor] to install on the Math-Science Center defective roof membrane of a two-ply specification manufactured by Defendant [] as described in Paragraphs 12 and 13 which said roof membrane because of said defects split and cracked causing said roof to crack and peel;

g. Contrary to standard practice and good workmanship allowed [Subcontractor] to install defective roof insulation [] as described in Paragraphs 29 and 30, which said insulation because of said defects caused the said roof to leak and split;

h. Contrary to specifications, standard practice, and good workmanship failed to inspect the work of its agents, servants and subcontractors; and,

i. Otherwise failed to follow standard practice and good workmanship in the installation of the deck, insulation and roof.[35]

Unfortunately, with the exception of paragraph 46, subsections (f) and (g), the allegations of count V were merely conclusions of fact or law. In short, the balance of the count is not based on any specific facts as to how or what the contractor did or did not do to breach its contract with the college.

Although the plaintiff alleged that the contractor was duty bound to perform in accordance with the plans and specifications, it failed to allege how the contractor deviated from such requirements in performing its obligations. Therefore, the trial court's dismissal of this count was upheld by the supreme

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21. S Ct Rule 135.
22. 735 ILCS 5/2-613.
23. 735 ILCS 5/2-616.
24. 735 ILCS 5/2-614.
25. M. Graham, *Cleary & Graham's Handbook on Illinois Evidence* §802.12 (8th ed 2004).
26. *Allen v US Fidelity & Guaranty Co,* 269 Ill 234, 109 NE 1035 (1915); *Wausau Ins Co v Chicagoland Moving and Storage Co,* 333 Ill App 3d 1116, 777 NE2d 1062 (2d D 2002).
27. 735 ILCS 5/2-605.
28. *Robidoux v Oliphant*, 201 Ill 2d 324, 344, 775 NE2d 987 (2002).
29. 735 ILCS 5/8-101 et seq.
30. 735 ILCS 5/8-1001 et seq.
31. *Adkins v Sarah Bush Lincoln Health Center,* 129 Ill 2d 497, 518-520, 544 NE2d 733 (1989).
32. *Illinois Pattern Jury Instr-Civ* 14.01 (2000 ed).
33. See *J.D. v Forest Preserve Dist of Kane County*, 313 Ill App 3d 919, 731 NE2d 955 (2d D 2000).
34. 88 Ill 2d 407, 430 NE2d 976 (1982).
35. Id at 424-426, 430 NE2d at 985.

court because it failed to plead the elements of a cause of action for breach of contract.

II. Motions to Dismiss: Are They Worth It?

A. Motions to Dismiss Educate Your Opponent

Motions to dismiss are only worthwhile if you win. Why? Because in preparing and arguing any motion to dismiss, you are educating your opponent not only about your theory of the case but, more importantly, your strategy.

Lose and you've given your opponent a free shot. Not only might it cause your client to doubt you, it could cause the trial judge to question your motives. These are two strikes you do not want. For any motion to dismiss, the trial judge will usually give the nonmovant one or more chances at a new drawing board.

That is not a discount for being a bad lawyer. In fact, it should not only be expected, but is required by law because a litigant, not his lawyer, is entitled to attempt to plead a claim, even if that claim is cast in the vernacular. Litigation is about parties, not their lawyers. Case law in Illinois permits liberal amendments, and attempted amendments, at pleadings.[36]

Therefore, winning a motion to dismiss may be illusory if your opponent can make a complaint stick. Raising an affirmative defense, with a view toward summary judgment in whole or in part, may be a more efficient way to proceed. So what do you do – sit on the sidelines?

Quite the contrary. At the pleading stage, your goal should be to limit the claims made against your client. You might be able to do this by motion practice, but you might be able to do it more successfully by demanding a bill of particulars. Let's take a look at this underused provision of our civil practice law.

B. The Underused Bill of Particulars

If you do not know what someone is claiming compensation for, then it is eminently reasonable to ask that he or she be required to say it in an understandable way. This is what a bill of particulars is all about.[37] In other words, if the pleading is defective or lacking in detail, then you may request a bill of particulars, which points out not only the defects but also the details desired.[38]

But might you again be merely educating your opponent? Perhaps, but probably not. Let's say you are faced with the following allegation made by your opponent: "7. The defendant in the manner in which he drove his vehicle was reckless with conscious disregard for the plaintiff's safety."

In demanding a bill of particulars of your opponent in lieu of filing a motion to strike,[39] you state:

> Your pleading as a matter of law in Paragraph 7 pleads no facts other than legal conclusions as to how the defendant acted recklessly or with conscious disregard for the plaintiff's safety.
>
> Accordingly, a bill of particulars is requested that you state with specificity every act or omission by which the defendant's behavior amounted to reckless conduct or showed a conscious disregard for the plaintiff.

The strategic role that a bill of particulars plays is that when it is responded to by the pleader, the bill itself becomes part of the pleading and the pleader is limited, at trial, to the proof necessary to support the cause of action the bill recites.[40] You are limiting your opponent's options to those facts stated in the bill. That may not be the end of things, but it definitely is a good start.

A bill of particulars, however, is not a discovery device. Perhaps because it has been used as one, its deployment has been frowned upon. But it is a useful implement that requires a pleader to clearly delineate what it is she seeks in the factual basis for his claim. It can be a very valuable limiting defense before you have to answer or even file a motion to strike or for involuntary dismissal.

III. Pleading Motions

As indicated above, the Code of Civil Procedure permits two types of pleading motions, a motion to strike[41] or a motion for involuntary dismissal.[42] These motions may be combined.[43] Unfortunately, commingling both motions under the same title results in a misunderstanding of the nature of the two.

A. Motions to Strike

Motions to dismiss under 735 ILCS 5/2-615 (other than motions for judgment on the pleadings) are usually procedural attacks on an opponent's pleadings based on the legal insufficiency of pleaded facts to state a cause of action. A favorable result on such motion is usually, though not always, a dismissal with the right to re-file or amend. In short, it's kind of an ambush.

A motion for involuntary dismissal, on the other hand, is not merely a skirmish but an attempt to resolve all or a major portion of the litigation and thus terminate, or seriously curtail, the hostilities once and for all.[44] Such a motion considers matters that are admissible in evidence but may be extrinsic to the pleadings.

Motions to strike are nothing more than the movant claiming that the complaint is on its face insufficient as a matter of law.[45] There may be several reasons for this: necessary parties need to be added, parties have been misjoined, the pleading should be made more definite and certain, allegations in the pleading are immaterial, or the action fails to state a claim. Regardless of how you paint it, all of these reasons denote legal insufficiency as a matter of law.[46]

Regardless of the reason for a motion to strike, the determination of the propriety of the motion is based solely on pleadings, including any bill of particulars. Affidavits, discovery materials, documentary evidence not incorporated by reference into the pleadings as exhibits, or extrinsic matter to the complaint are not considered.

Furthermore, the trial judge will consider as true all well-pleaded facts that support the claim, along with any inferences to be drawn from such facts. In connection with this type of motion, the court is not going to dismiss the case, although it may strike the pleading, unless it is clearly apparent that no set of facts could be proven which would entitle the plaintiff to relief.

The final variant of section 2-615 is a motion for judgment on the pleadings.

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36. *Loyola Academy v S&S Roof Maintenance, Inc*, 146 Ill 2d 263, 273, 586 NE2d 1211 (1992).
37. 735 ILCS 5/2-607.
38. *Kling v Landry*, 292 Ill App 3d 329, 338, 686 NE2d 33, 40 (2d D 1997).
39. 735 ILCS 5/2-615.
40. *Bazzell-Phillips and Associates, Inc v Cole Hospital, Inc*, 54 Ill App 3d 188, 191, 369 NE2d 337, 339-40 (4th D 1977).
41. 735 ILCS 5/2-615.
42. 735 ILCS 5/2-619.
43. 735 ILCS 5/2-619.1.
44. See *Cwikla v Sheir*, 345 Ill App 3d 23, 801 NE2d 1103 (1st D 2003).
45. *Barber-Colman Co v A&K Midwest Insulation Co*, 236 Ill App 3d 1065, 1068, 603 NE2d 1215 (5th D 1992).
46. *Urbaitis v Commonwealth Edison*, 143 Ill 2d 458, 475, 575 NE2d 548, 555-56 (1991).

This is often confused as being identical to a motion for summary judgment. It is not.[47] A motion for judgment on the pleadings is not a fact motion, but instead is appropriate where admissions in the other parties' pleadings (i.e., complaint, affirmative defense) entitle the movant to judgment as a matter of law.[48]

B. Motions for Involuntary Dismissal

There are a wealth of common law opinions that can help practitioners understand pretrial motions in a commercial context, a noteworthy example of which is *Barber-Colman Co v A&K Midwest Insulation Co.*[49] Barber-Colman Company ("Barber") filed a two count complaint against A&K Midwest ("A&K") and its bonding agent, a guaranty company. Count I claimed A&K breached its agreement by failing to pay Barber for work performed. The second count sought to collect on the bond posted by the guarantor to insure A&K's performance.

The guaranty company filed a section 2-619 motion to dismiss count II, alleging that the action was not timely filed. The motion, supported by affidavits, claimed that Barber's complaint was filed on February 21, 1991, but that in order for the bond to be applicable, A&K must have worked on the project after February 21, 1990. The affidavits stated, factually, that A&K ceased work months prior to February 21, 1990.

Barber filed no counter-affidavits or other materials to controvert the guarantor's motion. The trial court dismissed Count II. Barber appealed. The appellate court reversed the trial court and, in so doing, issued an opinion that is must reading for litigators in any context.

Barber contended on appeal that a section 2-619 motion could not be used to raise a limitations defense unless the defect appeared on the face of the pleadings. Additionally, Barber argued that its complaint stated that it (i.e., the complaint) was filed within the statute of limitations and that the statement was admitted for purposes of the guarantor's motion to dismiss. The appellate court disagreed with both of these contentions, sending the case back to the trial court to permit the plaintiff to file counter-affidavits.

The court observed that a section 2-619 motion provides a method of resolving not only issues of law, but also commonplace issues of fact. Comparing this motion to a summary judgment procedure, the court opined as follows.

> A section 2-619 motion provides a means of disposing not only of issues of law, but also easily proven issues of fact.[50] Motions to dismiss under section 2-619 involve essentially a summary judgment procedure,[51] but they differ from summary judgment motions in five important respects:
>
> "(1) they are defensive in nature and may be interposed only by a party who is opposing a cause of action; (2) they must be filed prior to that defendant's answer; (3) they may not be used to contest the essential allegations of the complaint, but may be used only to assert affirmative matter; (4) they allow a determination of the motion on the merits even if there is a genuine issue of material fact raised by the affirmative matter *as long as the party opposing the motion has not filed a jury demand;* and, (6) they need not be accompanied by supporting material if the affirmative matter appears on the face of the complaint."[52]

Litigation is costly. Don't make it more so by filing motions that do not advance the ultimate resolution of the parties' dispute.

The focus of a section 2-619 motion, then, is multi-faceted. First, it raises affirmative matters that defeat the plaintiff's claim. There are nine of these: (1) no subject matter jurisdiction, (2) legal incapacity, (3) prior action pending, (4) res judicata, statute of limitations, (5) release, (6) satisfaction or discharge in bankruptcy, (7) statute of frauds, (8) unenforcibility due to minority or disability, or, finally, (9) "other affirmative matters" defeating the claim.[53]

Next, it is not a motion that attacks the factual basis of a claim.[54] That is for another day, in the summary judgment context. Nor should it be granted where a jury demand is made. This is because 735 ILCS 5/2-619(c) mandates that a disputed factual issue cannot be entertained by such a motion where a jury demand has been made by the opponent. In short, in all cases where a jury demand is made, section 2-619 motions are employed to show, by way of affidavits, that there is other affirmative matter that defeats the plaintiff's claim.

IV. Conclusion

So, what does all this mean for pleading motion practice? Several things become apparent. First, if you are going to file a motion attacking a pleading, you must make a thorough analysis of your opponent's pleading. In doing so, you must have a complete understanding of the facts. This may be difficult to do at the outset of the case. Yet if you are sure that your opponent will never be able to plead a cause of action or an affirmative defense based on specific facts, file a motion to dismiss under 735 ILCS 5/2-615.

Next, determine whether your motion will be counterproductive – that is, will you be educating your opponent, who will simply replead based on information you supply? Leave-to-amend pleadings and file amendments are construed liberally by our trial courts, as well they should be. Filing motions to show how smart you are may boost your ego but deplete your client's pocketbook.

In any litigation, one of the most important strategic concerns is whether to file a jury demand. You will base this decision on the theme for the case and how well that sells to a jury, the client's jury appeal, as well as the composition of the potential venire. Furthermore, with respect to motions for involuntary

47. *Estate of Davis,* 225 Ill App 3d 998, 1000-1001, 589 NE2d 154, 157-58 (2d D 1990).

48. *Delgatto v Brandon Associates, Ltd,* 131 Ill 2d 183, 188-189, 545 NE2d 689, 692 (1989).

49. 236 Ill App 3d 1065, 603 NE2d 1215 (5th D 1992). See also, *Illinois Graphics Co v Nikkum,* 159 Ill 2d 469, 639 NE2d 1282 (1994); *Urbaitis v Commonwealth Edison,* 143 Ill 2d 458, 575 NE2d 548 (1991).

50. *Williams v Board of Educ of City of Chicago,* 222 Ill App 3d 559, 562, 584 NE2d 257, 260 (1st D 1991).

51. See *Ralston v Casanova,* 129 Ill App 3d 1050, 473 NE2d 444 (1st D 1984).

52. *Barber-Colman* at 1072, 603 NE2d at 1221, quoting 4 Ill Prac, *Civil Procedure Before Trial* §38.3 at 224 (West 1989).

53. See *Illinois Graphics* at 484-489, 639 NE2d at 1289-92.

54. *Green v Trinity Int'l University,* 344 Ill App 3d 1079, 801 NE2d 1208 (2d D 2003).

dismissal a jury demand has significance, since favorable action on such a motion where a jury demand is made should be frowned upon by the trial judge, even where a genuine issue of material fact has been raised.

Litigation is costly. We do not need to make it more so by filing motions that do not advance the ultimate resolution of the parties' dispute. By determining whether, and when, to file a pleading motion, we go a long way to delivering value to our client. At the same time, we don't squander judicial resources on motions that fail to resolve the conflict between the parties.

In pleading motion practice, winning is not everything. Winning a pretrial motion that disposes of a claim in whole or substantial part is the only thing. That's real value. ■

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