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Chair's column: Stalking No Contact Orders

By Brian L. McPheters

A significant major change occurred in Civil No Contact Orders effective January 1, 2010 in that Civil No Contact Orders prohibiting stalking are now available under the Stalking No Contact Order Act (P.A. 96-246) at 740 ILCS 21/1 et. seq. This is a remedy long-needed for many situations not previously covered.

Prior to the effective date of January 1, 2010 of P.A. 96-246, victims of stalking could only get an order of protection if they met the criteria for an order of protection. The Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 et. seq.) authorized the issuance of an order of protection if all requirements of the Act were met. These included pleading and proof of the petitioner's relationship with the respondent, which could be spouse, former spouse, in-laws, siblings, boyfriend, ex-boyfriend, roommate, former roommate and the like. Orders of Protection are available only to those in a present or past domestic or family relationship with the respondent. (The other "relationship" of a non-family nature enabling a victim to seek an order of protection under the Illinois Domestic Violence Act deals with caregivers of the elderly or high-risk adults with disabilities, seldom-seen relationships for obtaining orders of protection).

Under the previous version of the Domestic Violence Act, a female petitioner could seek an order of protection against a former boyfriend who simply will not accept their relationship is over and keeps contacting her, phoning her, showing up at her place of employment, waiting in his vehicle outside of her apartment or

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Editor's column: Backup, backup, backup—There are bad things out there just waiting to damage your system, plus computers really do fail!

By John T. Phipps

For years we have all heard the phrase, "backup, backup, backup" when it comes to our computers. Many years ago I learned the hard way that not all backups are good. Our office was struck by lightning about 15 years ago and the backup program we used simply didn't work for the current data. Fortunately, we did have a backup that was good so we were able to salvage most of our data and especially our forms. In addition, we had paper backups for the other forms and data so we didn't really lose much other than the time it took to restore the missing items. Unfortunately, for a number of years there were gaps in our forms file and it took time to find the proper document and then remedy the problem. As a result now we have to try to maintain current backups in multiple forms for all of our data. We even have a bookkeeping backup that goes quarterly to our accountant's office where they keep the information on file on their server. Over time we have had some failures that required us to restore some of our data or

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Chair's column

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house, sending her flowers at home or work or similar contacts that cause her to become emotionally upset and fear a continuation of his unwanted contact. Stalking was a recognized form of "harassment" and actionable under the Act. See 750 ILCS 60/103 (7). What the prior Act did not provide was any opportunity for an able-bodied person to seek an order of protection for stalking by a respondent with whom the Petitioner had never had any relationship or had been a relative of the victim.

Public Act 96-246 remedied this deficiency in the Illinois Domestic Violence Act of 1986 by providing for a Stalking No Contact Order in situations where relief is not available under the Illinois Domestic Violence Act of 1986 (740 ILCS 21/15). The nomenclature is similar to the No Contact Order authorized under the Illinois Civil No Contact Order Act (740 ILCS 22/101 et. seq.). Before the effective date of Public Act 96-246 on January 1, 2010, Civil No Contact Orders were available only for sexual penetration of the victim by Respondent or for Respondent engaging in non-consensual "sexual conduct" with Petitioner. The remedy of a Civil No Contact Order has often been sought when a victim of sexual conduct or sexual penetration fears further contact from the perpetrator but does not want to pursue criminal prosecution. Often the victim wants some form of protection against further contact by respondent without the anguish attendant to being the complaining witness in a public criminal trial.

A person who has had no prior relationship with the stalker may now seek a Stalking No Contact Order under the Stalking No Contact Order Act (740-ILCS 21/1 et. seq.). No prior relationship by blood, affinity or occupying a common dwelling or household or being a victim of an incident of sexual conduct or sexual penetration is required if "stalking" can be truthfully alleged.

Under Section 10 of the Stalking No Contact Order Act, "Stalking" is defined as follows:

> "Stalking" means engaging in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety or the safety of a third person or suffer emotional distress. Stalking does not include an exercise of the right of free speech of assembly that is otherwise lawful or picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute, including any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance, and pension or retirement provisions, the making or maintaining of collective bargaining agreements, and the terms to be included in those agreements.
>
> (740 ILCS 21/10).

The addition of the Stalking No Contact Order to the arsenal of remedies available to victims of unwanted attention is significant and long overdue. Prior to availability of the Stalking No Contact Order, a victim not having had any of the required relationships with the perpetrator only had the hard-to-obtain remedy of a restraining order and subsequent injunction as a practical matter.

The class of persons expected to seek a Stalking No Contact Order is usually thought to be single, young women living alone or on their own who have unwittingly caught the attention of someone, and that person starts to pursue them through means that fall within the definition of "stalking" in the Act. Another class of victim of "stalking" was considered by the Legislature of needing protection under the Act. That class is the victims of bullying and unwanted continued attention sufficient to meet the Section 10 definition of "stalking" who attend our schools. The Legislature clearly indicated students were covered by the Act by including a remedy under 740 ILCS 22/213 (b-6) for all No Contact Orders that allows the court to order the respondent transferred to another school.

Under Section 213 (b-6) of the Civil No Contact Order Act, which covers all No Contact Orders under either No Contact Order Act, when the petitioner and the respondent attend the same public or private elementary, middle, or high school, some very significant considerations and consequences are to be considered under Section (b-6), which states:

> When the petitioner and the respondent attend the same public or private elementary, middle, or high school, the court when issuing a civil no contact order and providing relief shall consider, among the other facts of the case, the severity of the act, any continuing physical danger or emotional distress to the petitioner, and the expense, difficulty, and educational disruption that would be caused by a transfer of the respondent to another school. The court may order that the respondent not attend the public or private elementary, middle, or high school attended by the petitioner. In the event the court orders a transfer of the respondent to another school, the parents or legal guardians of the respondent are made responsible for transportation and other costs associated with the change of school by the respondent.
>
> (740 ILCS 22/213 (b-6)).

As can be readily seen, a change of school for respondent may be ordered by the court for stalking of any student, including elementary students. Further, any expenses of the transfer of the student respondent including transportation are the responsibility of the respondent's parents or guardian.

How frequently this rather drastic remedy of a school transfer will be ordered is yet to be seen. Further, taxing the respondent's parents or guardian with all expenses relating to the transfer, including respondent's transportation to the new school, may create significant hardship for the parent or guardian. They may not even be aware "Little Johnnie" is a hellion at school terrorizing selected other students. This Act is a legislative determination that it is appropriate under the right circumstances to make the parents or guardian pay the cost of protecting the victims from further bullying and harassment by Little Johnnie.

Many questions about this remedy come to mind. The school shall be served with a copy of the order, but does the school or school district have to be brought into the case or made a party after being served with summons? What happens if the District only has one suitable school? Can out-of-district placement be required? In rural areas this will

be a consideration.

Just as with plenary orders of protection that may be extended indefinitely, the Stalking No Contact Order may also be extended indefinitely if good cause is shown at a hearing after the request for extension is made. The initial plenary Stalking No Contact Order is for two years.

Available order under both the Civil No Contact Order Act (740 ILCS 22/101 et. seq.) and the Stalking No Contact Order Act (740 ILCS 21/1 et seq.) are an emergency order and a plenary orders. These are unlike the Illinois Domestic Violence Act of 1986 (740 ILCS 60/101 et. seq.) which has 30-day interim orders as an available remedy (750 ILCS 60/218) in addition to emergency and plenary orders of protection.

Counsel may be appointed for a petitioner if respondent is represented by counsel under both No Contact Order Acts (740 ILCS 22/204.3 and (740 ILCS 21/35). No right to a jury trial exists under any of the three Acts.

This newly available Stalking No Contact Order fills a serious gap in remedies previously available to victims of unwanted attention. Arguably, ex-boyfriends that won't accept the fact that the relationship is over are dangerous. They are usually emotionally upsetting. The "creep" that was never a boyfriend who stalks his prey may be even more dangerous to their victims. Similarly, the school bully that humiliates his victims deeply wounds the emotions of his young victims, and often makes going to school intolerable for the victim. A relatively straightforward procedure now exists for emergency and plenary orders to prevent further victimization under the Stalking No Contact Order Act.

Being very familiar with the order of protection and civil no-contact order court call, I urge all general practitioners to familiarize themselves with the forms required to be used in these cases, some of which have been updated effective January 1, 2010, and some are new. The Petition for Stalking No Contact Order and the Stalking No Contact Order are totally new forms and must be used. Modification of the current Civil No Contact Order forms is not feasible or permitted for Stalking No Contact Orders. Your Circuit Clerk has electronically been sent the forms to reproduce as needed. ■

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Editor's column

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use the backup to install the data on a new computer. This has always worked very well.

In February, my assistant's computer got a virus even though we had good virus protection. We replaced the computer and restored the data. Then after everything was working, we installed an upgrade to our case management system. In doing so the installation was done remotely and we had to turn off our antivirus protection. Bingo—a virus or worm came in during the upgrade process and destroyed our server software. This meant we had to go back and reinstall all of the server software and once again restore the data. While it permitted us to upgrade the server, this was both a chore and expensive. We have learned that we need to backup our entire installation on a regular basis so that if we go down again we will be able to restore the entire system using the backup or simply switch to the backup drive. Fortunately, our data was all backed up and the only thing we lost were a few e-mails that came in during the few hours on the day the system crashed. We now backup the entire network system, including the data, by replicating everything on duplicate hard drives in the server and on a back up drive. That way if there is a mechanical failure then we have a separate hard drive in the server as well as to a separate detached hard drive that can take over. We also backup the data to other media so we have duplications. It may be redundant, but over time it appears that redundant protection is important because backups can also fail. This time the backups did work.

Then the day after the "Ides of March" my laptop computer, which I used as my primary computer, failed. A third disaster, this time a mechanical failure. Needless to say, it's been a very trying eight weeks. I have used laptops as my primary computer in lieu of a desktop for six years. My computer consultant has constantly told me that I should use a desktop and not to rely on the laptop because the heavy use was burning up the laptop and it would shorten the life of the laptop and at some point, it would fail. At the time I began relying on my laptop as my primary computer we had a peer-to-peer network and it became important to use only one computer so that I could work remotely with my closed network. However, when some of my programs required upgrades in equipment and software we moved from a peer-to-peer to a dedicated network server where I can now work in my office remotely from wherever I am, as long as I can get a good wireless or hardwire connection. These connections are now readily available for mobile lawyers. In fact I'm set up wirelessly at home so I can work in the office on the laptop without having to hook up the laptop to a fixed connection. (I can also work remotely from the desktop computer at home but it is not always available.) This plan works well and I have a new desktop computer that is fast because I upgraded the processor in the new computer. I had not been planning to do all the upgrades and spend the money right now but we were already in the process of gradually upgrading our computer equipment. Now we had to do it much faster than I planned and what we did was different than I'd planned. The result is that while I spent a couple days waiting for the new computer, I had another workable laptop computer I could fall back on and use because the old laptop was used as a docking station in a spare office. We once again were then able to reinstall the software, update the data and were running again completely within three days after my laptop crash. After it was all finished, all we lost was some e-mail that came in during the conversion and some of that was caused by me hitting the wrong button on the temporary replacement computer.

One of the things that helped was the fact that I had the backup laptop. I kept my old laptop and used it to access the network and Internet because it retained access to both the network and internet. It previously had access to our case management program. Unfortunately, when we upgraded our case management program the older laptop could not accept the updated program because of its hardware limitations. This older laptop worked well at filling the gap so I was able to check my e-mail and get work done even though I could not access the case management program. Again, although it was not a perfect solution, redundancy saved the day.

"Backup, backup and more backup," with some redundancy, does work. I wish we could invent a way to predict computer failure, and sometimes we get warnings, but most of the time we don't and failures tend to be sudden and catastrophic. It therefore, pays to be paranoid and backup and keep redundant back up forms and older machines to fill gaps. It really isn't being paranoid, it's being realistic. We depend on our technology more than most of us realize so we need backup to be able to keep the office going when disaster strikes. ■

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I'm a nonresident of Illinois—maybe?

By David P. Dorner

Over the last few years, the Illinois Department of Revenue ("Department"), like many other states' tax agencies, has focused considerable attention on high-net-worth former residents now claiming to be residents of another state. The Department has generally limited its audits to prior Illinois residents who accumulated significant wealth while living in Illinois and then moved to another state which does not impose a personal income tax.[1] More often than not, these "nonresidents" of Illinois continue to maintain ties with Illinois, usually through ownership of a home or business in Illinois, or possibly a spouse who continues to reside in Illinois. Therefore, while these persons may believe they are no longer residents of Illinois, they in fact may still be considered residents for Illinois income tax purposes.

Under Illinois law, you are a resident of Illinois for Illinois Income Tax purposes if: (1) you are in Illinois for other than a temporary or transitory purpose, or (2) your domicile is in Illinois but you are absent from Illinois for a temporary or transitory purpose.[2] A resident of Illinois is usually, but not always, domiciled in Illinois. The term "domicile" commonly means an individual's "permanent home," which is where the individual intends to return to after a period of absence.[3] A person has only one domicile and does not acquire a new domicile without first abandoning the prior domicile.[4] The outcome of residency cases often depends on whether the person is absent from Illinois for other than a temporary purpose, but is often discussed in terms of domicile. The parties and the courts generally focus on domicile because the mere absence from one's domicile does not generally create residency somewhere else. For instance, if a person maintains two homes—one in Illinois and the second in Florida, and the person spends a substantial amount of time in each home, then the person, for tax purposes, will almost always be a resident of the state in which the person is domiciled since the person's activities in the other state will generally be viewed as transitory or temporary in nature.[5]

Whether a person is "domiciled" in Illinois or present in Illinois only for a "temporary or transitory" purpose depends on the facts and circumstances specific to each situation. There is a presumption, however, that an individual is a resident of Illinois if the individual spends in the aggregate more than nine months of any taxable year in Illinois. Additionally, if an individual is absent from Illinois for one year or more it will be presumed that the individual is a nonresident of Illinois.[6] A person's residency status is generally a matter of intent—i.e., intent to create a new home in another state (or country), or intent to remain in or be absent from a state for other than a temporary or transitory purpose. Intent is evidenced by the facts and deeds supporting the person's behavior. Testimonial evidence of a person's intent to become domiciled or to reside outside of Illinois is generally not sufficient to prove a change in domicile or residency.[7] Rather, documentary evidence must be presented to substantiate a person's claim that he or she is a resident of another state. Such documentary evidence may include: 1) voter registration cards; 2) automobile and driver's license registrations; 3) maintenance of other state licenses (e.g., CPA, broker's, hunting, fishing, boating, etc.); 4) home ownership or long-term rental agreements; 5) club, gym or organizational memberships; 6) religious affiliation with a place of worship; 7) establishment of regular medical and pharmacy providers; 8) if applicable, the filing of income tax returns as a resident in the other state; 9) the opening of bank and investment accounts; 10) burial plots; and 11) safety deposit boxes.[8] The more factors present in the claimed state of residency, the more likely you will be found to be a nonresident of Illinois.

In addition to the above documents, the Department may request or subpoena other records such as: 1) flight records from a person's airline reward programs; 2) credit card statements; 3) landline telephone and cell phone bills; 4) property tax records; 5) federal and state income tax returns; 6) trust documents and wills; and 7) insurance policies. The Department requests such documents to determine how often the individual is in Illinois during the audit period. Additionally, if the person has Illinois property, the Department will almost always check to see if the person is claiming an Illinois homeowner's exemption on the property, since the homestead exemption for property tax is limited to property used as a primary dwelling place.[9] Trust documents and wills frequently identify the person's state of residency, and insurance policies may be used to identify the location of other real or personal property. The Department may also inquire as to the domicile of a spouse and/or children, given that a person will generally share a domicile with their immediate family. Ownership interests in a business located in Illinois, particularly if the individual is a director, managing member, partner, or otherwise actively involved in the business, may also draw additional scrutiny from the Department. The Department may also look into a person's employment, especially employment agreements that outline duties, duration of employment or terms of an out-of-state work assignment.

A particular area of caution and concern is where one spouse remains a resident of Illinois while the other spouse establishes residency outside of Illinois. Although it is not uncommon for married persons to reside in different states, the Department will understandably be more vigilant in their examination of such arrangements. Moreover, resident and nonresident spouses should be very careful as to how they file their Illinois income tax returns. For instance, when one spouse resides outside of Illinois, the State of Illinois requires the married couple to file separate Illinois income tax returns, unless the nonresident spouse elects to be treated as a resident of Illinois for purposes of taxation.[10] By filing a joint Illinois income tax return, the nonresident spouse is electing to be treated as a resident of Illinois.[11] It should be noted that it is incorrect and inconsistent to file a joint Illinois income tax return that includes a nonresident schedule (i.e., Illinois Schedule NR) for one spouse.[12] In such instances, the Department requires the nonresident and resident spouses to refile their Illinois income tax return(s) and either file a joint return, without a nonresident schedule, or separate Illinois income tax returns if both spouses have Illinois sourced income.[13] Historically, due to the inconsistencies of a joint return filed with a resident and nonresident spouse, the Department has not treated the filing of a joint return with a nonresident schedule as an election by the nonresident spouse to be deemed, for tax purposes, as a resident of Illinois. However, an administrative law judge (ALJ) recently ruled, under similar circumstances, that a taxpayer did in fact waive his right to claim that he was a nonresident of Illinois, since he had filed a joint Illinois income tax return with his wife,

who was an Illinois resident.[14]

As indicated above, a change of residency for state income tax purposes is not as easy as it may seem, particularly for persons who maintain more than one home or reside separately from their spouse or young children. There is nothing wrong with changing one's domicile for the primary purpose of reducing or avoiding taxes; in fact it may be financially prudent for some people to do so. However, in such instances it becomes even more important to have clear, admissible documents and records reflecting the change in residency and to be cognizant of other records (i.e., credit cards, phone records, frequent flyer programs) that may evidence intent to change residency, including records which demonstrate the amount of time a person spends in their prior state of residency. ■

1. Please note, changing one's domicile for the primary purpose of tax planning is fine, as long as requirements for establishing residency somewhere else are met and can be established by admissible books and records.

2. 35 ILCS 1501(a)(20).

3. 86 Ill. Admin. Code 100.3020(d).

4. *Id*.

5. *See* the decision in *Dods v. Dep't of Rev.*, Cook County Case No. 07 L 050695 (8/24/2009), currently on appeal.

6. 86 Ill. Admin. Code 100.3020(f).

7. *Mel-Park Drugs, Inc. v. Dep't of Rev.*, 218 Ill. App. 3d 203, 217, 577 N.E.2d 1278, 1287 (1st Dist. 1991).

8. 86 Ill. Admin. Code 100.3020(g); *Dods*, *supra* note 5, at 5, (citing *Klemp v. Franchise Tax Board*, 45 Cal. App. 3d 870, 873–874 (2d Dist. 1975)).

9. 35 ILCS 200/15-175.

10. 35 ILCS 5/502(c)(3). *Note:* For tax years ending on or after December 31, 2009, if a husband and wife file a joint federal income tax return, then they may elect for the same tax year to file separate Illinois income tax returns. 35 ILCS 5/502(c)(1)(B). The election to file separate Illinois income tax returns must be made on or before the extended due date of the return and, once made, the election is irrevocable. *Id*. For tax years 2008 and earlier, married persons filing a joint federal income tax return are required to file a joint Illinois tax return if both spouses were Illinois residents. 35 ILCS 5/502(c)(1)(A).

11. *Id*.

12. *See* Form IL-1040-X Instructions, Step 1, Line C (R-12/09) ("If you originally filed a joint return, but did not treat both yourself and your spouse as Illinois residents, you must correct that error by either filing a joint IL-1040-X treating yourselves as Illinois residents or by filing separate IL-1040-X forms, even if the extended due date has passed.")

13. *Id*.

14. Illinois Department of Revenue Decision IT 09-8 (8/3/2009). The ALJ also surprisingly opined that the nonresident spouse, in order to prove that he abandoned his domicile in Illinois, should have transferred his rights in their home in Illinois to his resident spouse. Although a potentially clear indication of intent to abandon one's domicile, this recommendation seems drastic, particularly when there are non-income tax related reasons for not transferring ownership in the home to the resident spouse.

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Voluntary Nonsuit? You'd better think twice

By Jewel Klein

This article discusses the minefield facing practitioners who file multi-count complaints and live in an imperfect world. For a much more thorough and scholarly analysis of the Illinois Supreme Court decision which has caused much consternation and confusion, see Ann Lee Drushal's "Free to Litigate or Free from Litigation: Balancing Plaintiffs' Rights with Court Considerations and Defendants' Interests in *Hudson v. City of Chicago*," 40 Loyola U.Chi.L.J. 994 (2008).1

Suppose the following scenario: The complaint alleges negligence, both ordinary and wilful and wanton, plus intentional and negligent infliction of emotional distress and conspiracy. The facts: Plaintiff was walking down the street, fell on a patch of ice in front of a building owned by two brothers who took turns shoveling. Plaintiff was seriously injured. Upon seeing the accident, one of the brothers hollered, "Hey, dummy. Why did you walk there? Can't you see I hadn't finished shoveling?" The example may be far-fetched but many of us have seen these multi-count complaints naming every theory in the books and/or engaging in overkill.[2]

So. In our hypothetical, there's some motion practice and the intentional infliction and conspiracy counts are dismissed with prejudice. Perhaps the wilful and wanton count gets dismissed on summary judgment. The case is set for trial. Something happens. Plaintiff has moved and hasn't left a forwarding number. The treating doctor is now in another state. Whatever the problem, plaintiff's counsel can't proceed with the trial. Do some research and the answer seems straight forward and easy. Take a voluntary nonsuit, pursuant to Section 2-1009(a) of the Illinois Code of Civil Procedure,[3] and refile within one year as permitted by Section 13-217 of the Code and include, in your dismissal order, the right language, i.e., "without prejudice," as hinted at in Supreme Court Rule 273 which provides:

> Unless the order of dismissal or a statute of the State, otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

The answer is not easy as it appears because you can not always accomplish what the statutes and rules seem to permit. Confronted with voluntary dismissals and re-filings in a variety of contexts, re-filed cases are now being dismissed based on the principles of *res judicata*. One would think that if the attorney who takes the voluntary dismissal puts the words "without prejudice" in the dismissal order, the plaintiff's claim would be safe. Not any more. The words "without prejudice" in a voluntary dismissal order will not automatically prevent a re-filed case from being dismissed based on *res judicata*.

A good starting point for understanding why the statutes and rule don't mean what they say is the Illinois Supreme Court's 1996 decision in *Rein v. David A. Noyes & Co.*[4] There, Plaintiffs' multi-count complaint alleged fraud in the sale of securities and sought rescission of their purchases. The rescission counts were dismissed on statute of limitations grounds and the motion to reconsider was denied. Plaintiffs then voluntarily dismissed the remaining counts and appealed the dismissal of the rescission counts. Plaintiffs lost the appeal and then filed a second

complaint. The second complaint was dismissed on *res judicata grounds*. A divided appellate court affirmed the dismissal[5] and the Supreme Court took the case and likewise affirmed the dismissal.[6]

Rein re-iterates that *res judicata* applies when:

(1) there was a final judgment on the merit rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies.[7]

The *Rein* court reasoned that the fraud counts in the first case became final when plaintiff voluntarily dismissed them in order to appeal the rescission counts, because the fraud counts *could have been decided* in the first suit. The Supreme Court also held that plaintiff was guilty of claim splitting which occurs a party pursues a claim in one action and then sues for the remainder of the claim in another.[8]

In 2008, the Illinois Supreme Court had the chance to limit *Rein* to its facts. After all, it does seem unfair to a defendant to allow a plaintiff to litigate in the piecemeal fashion (voluntarily dismissing the viable count in order to appeal the dismissed count, losing the appeal, and then refiling both counts).

Hudson v. City of Chicago[9] was a case where plaintiff's negligence count was dismissed on statutory immunity grounds, the intentional tort claims were pursued for three years, but the case was dismissed on the eve of trial because plaintiff's lead counsel died.[10] Within a year, suit based solely on the alleged intentional tort was re-filed. *Hudson* involved the alleged wrongful death of a five year old child. If ever a case had a sympathy factor, this was it. Nonetheless, on a four to two vote, the Illinois Supreme Court affirmed the lower court's dismissal on *res judicata* grounds, holding that the voluntary dismissal order in the first case made all prior orders, including the dismissal of the negligence count, immediately appealable.

The decision in *Hudson* has been interpreted in a number of contexts involving both "re-filed" cases and "second" suits involving similar fact patterns or parties. Although the term is used by this author, "re-filed" is the wrong term. Citing *Hudson*, the First District has held, "The refiling of a cause of action that the party had previously and voluntarily dismissed does not constitute a continuation of the previous action; rather, it is an entirely new action."[11]

Lane v. Kalcheim[12] was the legal malpractice outgrowth of a domestic relations matter. In the first case, a count was dismissed with prejudice on statute of limitations grounds. Litigation continued on the other counts involving conduct by defendants which had occurred much later in time than the dismissed count. Two years later, the case was voluntarily dismissed and was re-filed eleven and a half months after that. The re-filed case did not assert the claims that had previously been involuntarily dismissed. Plaintiff argued that the second case was not barred by *res judicata* because the evidence to support the re-filed claims had not been ruled upon in the prior case. The First District disagreed and accepted the defendants' argument by ruling that the "transactional test" applied. Relying on *River Park v. City of Highland Park*,[13] the Court sustained the dismissal because the causes of action "arose from a single group of operative facts, namely defendants' representation of plaintiff in his marital dissolution case ...."[14]

In *Keifer v. Rust-Oleum Corp.*,[15] plaintiff was injured by a product made in Canada. He sued alleging negligence and products liability. His products count was involuntarily dismissed because Canadian law does not recognize the theory of strict products liability. Amended complaints were filed alleging negligence. A few weeks before trial was set to begin, plaintiff voluntarily dismissed the negligence claims without prejudice. Within a year, the negligence case was re-filed. Relying on *Hudson* and *Rein*, the First District sustained the trial court's dismissal on *res judicata* grounds citing *Rein* for the proposition that the involuntary dismissal of a count in the complaint constituted a final adjudication on the merits for purposes of *res judicata* even though there was no adjudication on the merits of the other claims in the voluntarily dismissed action.[16] (Try explaining that to a lay person!).

Matejczyk v. City[17] was a slip and fall which began in 2006. A motion to dismiss one count of the amended complaint was granted on statute of limitations grounds, but plaintiff was given leave to file an amended complaint containing only an amended version of the other count. Plaintiff filed the amended complaint and the following day voluntarily dismissed it via an agreed order. Twelve days later, plaintiff filed a new complaint which plaintiff identified as a re-filed complaint. The re-filed complaint was dismissed based on *res judicata*. The *Matejcesk* opinion repeats the scary warning in a footnote in *Hudson*[18] and in *Keifer*[19] that the absence of the words "with prejudice" in a dismissal order does not trump a *res judicata* defense, when another count of the complaint has been dismissed with prejudice.

Not only did *Hudson*'s interpretation of *res judicata* bar a re-filed suit by plaintiff against a fertility clinic, but it also barred suit against the new owners of the clinic who were found to be in privity with the prior owners in *Doe v. Gleicher*.[20]

Hudson was been distinguished in a number of cases as the courts wrestle with its expanded definition of *res judicata*. Taking a voluntary nonsuit when the trial court has given you leave to amend (and thus not issued a "final" judgment), may be the key to avoiding the "final judgment on the merits" prong of *res judicata*. For example, *Jackson v. Victory Memorial Hospital*,[21] a pro se plaintiff filed a medical malpractice case without attaching the required 622 affidavit. A 2-615 motion to dismiss was granted and plaintiff advised to obtain a lawyer. Plaintiff was given several continuances and ten months after the case was filed, plaintiff's motion for a voluntary nonsuit was granted. The re-filed suit was dismissed, but the Appellate Court reversed, ruling that the dismissal of the first case was not a final judgment on the merits, because plaintiff had been given leave to amend.

After the Illinois Supreme Court decided *Hudson* it issued a supervisory order directing the Appellate Court to vacate its judgment in *Piagentini v. Ford Motor Co*. and reconsider. Upon reconsideration, the First District held that when plaintiff re-filed after a voluntary dismissal of his first case, there had been no final adjudication on the merits in that first case.[22] Two facts stand out in *Piagentini*. In the first case, sub-paragraphs of the negligence and strict liability counts had been dismissed, but plaintiff had been granted leave to amend. Thus, claims under both counts remained viable when the voluntary dismissal was taken and there was no final decision on either branch of the controversy.[23] Also, Ford litigated the second suit for three and a half years before moving for summary judgment on *res judicata* grounds three months before trial. The Appellate Court treated Ford's delay in raising the *res judicata* defense an "acquiesence" and an exception to the rule against claim-splitting.[24]

The Fourth District adopted the *Piagentini* approach in *Curtis v. Lofy*,[25] finding that the dismissal of two subparagraphs of the pedestrian's allegations of negligence against a driver in the first suit did not have *res judicata* effect on a re-filed suit because the entire

negligence cause of action had not been dismissed.

The identity of causes of action has been the focus of at least three post-*Hudson* cases. *City of Chicago v. Midland Smelting*[26] has a complicated historical background. Suffice it to say that the City of Chicago attempted to use its power of eminent domain to purchase a large parcel of land, but the trial court ruled that the taking was excessive and dismissed the City's complaint. Thereafter, the City Council adopted a new ordinance approving a smaller taking and the City sued the same defendant again, this time to take the smaller parcel. The trial court denied Midland Smelting's motion to dismiss on *res judicata* grounds. The Appellate Court affirmed focusing on the second prong of the *res judicata* test, namely whether there was an identity of causes of action. The Court reasoned that the City could not amend the first suit because the ordinance required the taking of all of Midland Smelting's property, so the issue of the propriety of taking the smaller portion was never reached.

Hudson holds that *res judicata* bars not only what was actually decided, but also what could have been decided in a lawsuit. *Kasny v. Coonen and Rath, Ltd*.[27] did not extend that logic to a legal malpractice lawsuit filed after the lawyers had gotten a default judgment for unpaid legal fees against their former client. The former client alleged, in his malpractice suit, that he did not know that a malpractice claim existed until he consulted with an attorney experienced in malpractice matters. Accepting these allegations as true at the motion to dismiss stage, the Appellate Court held that dismissal of the former client's lawsuit was error.[28]

Another case in which plaintiff did not know of the existence of a claim, and therefore was not barred by *res judicata* is *Fakhoury v. Pappas*.[29] Plaintiff had objected to his tax valuation, filed the appropriate complaint and ultimately an agreed judgment order was entered granting him the refund and ordering the Treasurer to issue a refund with interest. When plaintiff and the Treasurer could not agree on the amount of interest, plaintiff filed a class action on behalf of all those whose refund checks included interest below the newly enacted statutory interest rate. The Appellate Court made quick work of the Treasurer's *Hudson* argument, finding that the retroactivity of the interest statute was not a part of the judgment granting plaintiff the refund, nor was it anticipated or argued and, therefore, there was no final decision on the merits.

In re D.W., V.R., and N.B., Jr,[30] the Juvenile Court had found that three minor children had been sexually abused by their stepfather and that the mother neglected them by allowing the abuse. Because the mother had been found guilty of similar neglect with respect to a fourth child, the Public Guardian argued that *res judicata* prevented her from appealing the case involving the other three children. The Appellate Court said no, the parties are different and *res judicata* was not a bar.[31] For a contrary result when the Appellate Court found privity, see *State Farm Fire & Co. v. John J. Rockhoff Sheet Metal Co.*,[32] an appeal resulting from a dispute over whether the insurer had a duty to defend or indemnify an additional insured.[33]

Because lawyers do indeed live in an imperfect world where they can not always control the progress of litigation, their own health and that of clients and witnesses, and manage all of the myriad factors that influence the development of a case, litigators will remain tempted to voluntarily dismiss. Given the draconian impact of *Hudson v. City of Chicago*, voluntary dismissal is no longer a step to be taken lightly. ■

About the Author: Jewel Klein practices in Chicago in the Law Firm of Barry H. Greenburg, 180 N. LaSalle, Suite 3150. Ms. Klein's case load includes all manner of civil litigation including nursing home defense, contract disputes, family law,appearance before administrative agencies, and appeals. Ms. Klein has twice chaired the ISBA's Administrative Law Section Council and is delighted to now serve on the General Practice, Solo, and Small Firm Section Council.

1. Ms. Drushal was mentored by Judge Diane Larsen who handles motions in non-commercial cases in the Circuit Court of Cook County.

2. A cynic might suggest that the plaintiff's lawyer was searching for a cause of action that brought with it the right to attorney's fees. A philosopher would suggest that counsel searching for a way to push the boundaries of the common law, exactly what makes our legal system thrive.

3. 735 ILCS 5/2-1009 (a). "The plaintiff may, at any time before trial or hearing begins, upon notice to each party ... and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause."

4. 172 Ill.2d 325 (1996).

5. *Rein v. David A. Noyes & Co.*, 271 Ill.App.3d 768 (? Dist. 19??).

6. *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325 (1996). For a recent case finding that there was impermissible claim splitting, despite the parties alleged agreement, see *Cartwright v. Moore*, 394 Ill. App.3d 1163 (1st Dist. 2009).

7. 172 Ill.2d at 334.

8. 172 Ill.2d at 340.

9. 228 Ill.2d 462 (2008).

10. The majority opinion in *Hudson* does not reveal the fact that plaintiff's attorney died. This fact is found in the dissent.

11. *Long v. Elborne*, __ N.E.2d __, 2010 WL 246146, *5 (1st Dist. 2010). *Hudson* becomes easier to understand when you think of the "re-filed" case as a brand new case, since most of us know that you can't sue twice over the same thing.

12. 394 Ill.App.3d 324 (1st Dist. 2009).

13. 184 Ill.2d 290 (1998).

14. *Lane*, 394 Ill.App.3d at ___, 915 N.E.2d at 101. But see *Valdovinos v. Tomita*, 394 Ill.App.3d 14 (2009) where a chancery suit alleging *Petrillo* violations by a med mal plaintiff's treater, and seeking an injunction requiring the treater to meet with plaintiff prior to the trial against other defendants, was held not to bar plaintiff's second suit against the treater alleging the plaintiff's injuries were due to the treater's fraud.

15. 916 N.E.2d 22 (1st Dist. 2009).

16. 916 N.E.2d at 28, citing *Rein*, 172 Ill.2d at 337-39.

17. __ Ill.App.3d __, __ N.E.2d ___, 2009 WL 4981047 (1st Dist. 2009).

18. 228 Ill. 2d at 472, n.2.

19. 394 Ill.App.3d at 494.

20. 393 Ill.App.3d 31, 39 (1st Dist. 2009).

21. 387 Ill.App.3d 342 (2nd Dist. 2008).

22. 387 Ill.App.3d 887 (1st Dist. 2009).

23. 387 Ill.App.3d at 895.

24. 387 Ill.App.3d at 898.

25. ___ Ill.App.3d __, 914 N.E.2d 248 (4th Dist. 2009).

26. 385 Ill.App.3d 945 (1st Dist. 2008).

27. ___ N.E.2d ___, 2009 WL 3838995 (2nd Dist. 2009).

28. Quoting *City of Chicago v. Midland Smelting Co.*, 385 Ill.App.3d 945, 963 (1st Dist. 2008) ("*res judicata* is an equitable doctrine that should only be applied as fairness and justice require"), Justice McLaren in *Kasny* reminds us that "*res judicata*, at its core, is a doctrine of equity, not law." 2009 WL 3838995, *3. A cynic might wonder if the Justice was also ruminating about the justice and fairness of dismissing a lawsuit based on *res judicata* when the prior suit was dismissed because plaintiff's attorney died.

29. 395 Ill.App.3d 302 (1st Dist. 2009).

30. 386 Ill.App.3d 124 (1st Dist. 2008).

31. *In re D.W., V.R., and N.B., Jr.*, 386 Ill.App.3d at 135-36.

32. 394 Ill.App.3d 548 (1st Dist. 2009).

33. Justice Theis begins the *State Farm* opinion noting that the case "involves five layers of litigation." 394 Ill.App.3d at 550. Along the way, we learned that the injured party was paid $110,000 and State Farm paid about $82,000 in attorneys fees and other defense costs. 394 Ill.App.3d 552. A cynic might wonder whether so much money fighting over which insurance company pays is a wise use of legal resources and whether cooler heads might have achieved a cheaper result earlier on. The cynic does not wonder why people don't like lawyers.

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Friday, 6/18/10– Quincy, Stoney Creek Inn—Legal Writing: Improving What You Do Every Day. Presented by the Illinois State Bar Association. 8:30-12:45.

Monday, 6/21/10- Webinar—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <https://www1.gotomeeting.com/register/863461769>. 12-1.

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Wednesday, 6/23/10- Teleseminar—Buying and Selling Distressed Real Estate, Part 2. 12-1.

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Thursday, 6/24/10- Friday 6/25/10- St. Louis, Hyatt Regency St. Louis at the Arch—CLE Fest Classic St. Louis- 2010. Presented by the Illinois State Bar Association. 11:00-4:40; 8:30-4:10.

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September

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Thursday, 9/16/10- Chicago, Chicago History Museum—GAIN THE EDGE!® Negotiation Strategies for Lawyers. Master Series Presented by the Illinois State Bar Association. 8:30-4:00.

Friday, 9/17/10- Chicago, ISBA Regional Office—18 Months of HITECH: A Brave New HIPAA. Presented by the ISBA Healthcare Section. 10-12.

Friday, 9/17/10- Chicago, ISBA Regional Office—Hot Topics in Tort Law- 2010. Presented by the ISBA Tort Law Section. 1-4:15

Thursday, 9/23/10- Chicago, ISBA Regional Office—Experts and Litigators on Issues Impacting Children & Custody in Family Law. Presented by the ISBA Family Law Section. 8-6.

Friday, 9/24/10- Springfield, Illinois Primary Healthcare Association—Don't Make My Green Acres Brown: Environmental Issues Affecting Rural Illinois. Presented by the ISBA Environmental Law Section. 9-5.

October

Friday, 10/1/10 – Chicago, ISBA Regional Office—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co–Sponsored by the Federal Civil Practice Section. 9-5.

Friday, 10/1/10 – Webcast—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co–Sponsored by the Federal Civil Practice Section. 9-5.

Wednesday, 10/6/10- Webinar—Continuing Legal Research on Fastcase. Presented by the Illinois State Bar Association. 12-1.

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Friday, 10/8/10- Carbondale, Southern Illinois University, Courtroom 108—Divorce Basics for Pro Bono Attorneys. Presented by the ISBA Committee on Delivery of Legal Services. 1-4:45.

Friday, 10/15/10- Bloomington, Double Tree—Real Estate Update 2010. Presented by the ISBA Real Estate Section. 9-4:45. ■

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