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A Survey of Illinois Code of Civil Procedure Section 2-619(A), 48 J. Marshall L. Rev. 1009 (2015)

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A SURVEY OF ILLINOIS CODE OF CIVIL PROCEDURE SECTION 2-619(A)

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ABSTRACT

The paper examines the requirements of each section of Illinois Code of Civil Procedure Section 2-619(a) in greater depth by examining appellate and Illinois Supreme Court rulings in cases brought under each section of 2-619(a). It also analyzes the standards of review appellate courts apply under each section of 2-619(a). Finally, because 619(a) motions require affidavits in support of the motion, it is also necessary to consider the nature and sufficiency of affidavits.

I. INTRODUCTION

A 2010 survey of the Illinois Code of Civil Procedure discussed recent amendments to the Illinois Supreme Court Rules that apply to civil practice issues and cases.¹ The survey included a review of cases involving motions brought under section 2-619. However, the authors did not examine section-by-section 2-619(a) motions to dismiss in detail. Their purpose was to “illustrate the serious, even case-dispositive, consequences that can follow from a failure to comply fully with the Code of Civil Procedure (the ‘Code’) and the Supreme Court Rules (the ‘Rules’).”²

Likewise, Dellinger³ recently presented an overview of 2-615 motions to dismiss based on defects in the pleadings,⁴ 2-1005 motions for summary judgment,⁵ and 2-619 motions to dismiss based on other affirmative matter.⁶ However, Dellinger’s article was intended more as broad “guide for young attorneys in understanding basic Illinois pretrial motion practice,”⁷ rather than a more narrow, critical analysis of 2-619(a) motions.

This paper examines the requirements of each section of Illinois Code of Civil Procedure Section 2-619(a) in greater depth by examining appellate and supreme court rulings in cases

¹Timothy J. Chorvat and Christine P. Benavente, Survey of Illinois Law: Civil Procedure, 3 S. ILL. U. L.J., 807-853 (2010).

²Id. at 807.

³Steve L. Dellinger, The Art of Motions: Understanding Illinois Civil Pretrial Motions, 38 S. ILL. U. L.J. 183 (2014).

⁴735 Ill. Comp. Stat. 5/2-615 (2015), available at <http://ilga.gov/legislation/ilcs/documents/073500050K2-615.htm>.

⁵735 Ill. Comp. Stat. 5/2-1005 (2015), available at www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=2017&ChapterID=56&SeqStart=10200000&SeqEnd=11500000.

⁶735 Ill. Comp. Stat. 5/2-619 (2015), available at www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=2017&ChapterID=56&SeqStart=6200000&SeqEnd=8800000.

⁷Dellinger, *supra* note 2 at 183.

brought under each section of 2-619(a) and the standards of review appellate courts apply under each section of 2-619(a). The purpose is to highlight the requirements and limitations of 619(a) motions, often overlooked by both parties and trial courts, which can cause confusion and delays. Section 2-619(a)(9) motions can be particularly problematic for both moving and non-moving parties as discussed in section III.I, *infra*, because it is essentially a “catch-all” for matters not specified in sections (a)1-(a)8. Not only do both moving and non-moving parties frequently confuse the requirements and limitations of a 619(a)(9) motion, but trial courts do as well. Finally, because 619(a) motions require affidavits in support of the motion, it is also necessary to consider the nature and sufficiency of affidavits.

The rest of the paper is organized as follows. First, the requirements of motions to dismiss under the Illinois Code of Civil Procedure 2-615 and motions for summary judgment under the Illinois Code of Civil Procedure 2-1005 are compared and contrasted to motions made under 2-619. This includes a discussion of the necessity of affidavits as well as the nature and sufficiency of affidavits. Second, the requirements of 619(a) motions are discussed. Due to the volume of cases, the third section reviews salient, representative cases in which 619(a) motions have been made, and how the Illinois appellate courts or the state supreme court have ruled. The fourth section is a discussion and analysis, followed by the conclusion and recommendations.

II. ILLINOIS CODE OF CIVIL PROCEDURE SECTION 2-619(A).

Illinois Code of Civil Procedure 2-619 governs the involuntary dismissal of an action by the motion of a defendant (or other party against whom a claim is asserted) based upon specified defects or defenses. They are in the “nature of affirmative defenses,”⁸ although affirmative defenses are treated separately under Illinois Code of Civil Procedure Section 2-613.

Section 2-619 states as follows:

Sec. 2-619. Involuntary dismissal based upon certain defects or defenses.

(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

⁸ Longust v. Peabody Coal Co., 502 N.E.2d 1096, 1098 (Ill. App. Ct. 5th Dist.1986).

- (1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.
- (2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.
- (3) That there is another action pending between the same parties for the same cause.
- (4) That the cause of action is barred by a prior judgment.
- (5) That the action was not commenced within the time limited by law.
- (6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.
- (7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.
- (8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.
- (9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

....

(c) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.

....

(f) The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule [all emphasis added].^{9,10}

Affirmative defenses are set forth in Illinois Code of Civil Procedure Section 2-613 which states in relevant part:

Sec. 2-613. Separate counts and defenses.

(d) The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress,

⁹735 ILL. COMP. STAT. 5/2-619 (2015), available at www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=2017&ChapterID=56&SeqStart=6200000&SeqEnd=8800000 (emphasis added).

¹⁰ The rule governing affidavits is given in ILL. SUP. CT. R. 191, discussed *infra*.

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.¹¹

As can be seen, there is some overlap between affirmative defenses under Illinois Code of Civil Procedure Section 2-613 and affirmative matter as outlined in Illinois Code of Civil Procedure Section 2-619. The distinction is that affirmative defenses must be set forth in the answer or reply, while affirmative matters are made by motion. For example, a defendant may move for dismissal under 2-619(a)(6) based on satisfaction, or may assert an affirmative defense of satisfaction under 2-613(d). Or, a defendant may move for dismissal under 2-619(a)(7) based on statute of frauds, or may set forth an affirmative defense of statute of frauds under 2-613(d).

A. *AFFIDAVITS*

A 619 motion requires the use of affidavits to support the motion if the grounds are not apparent on the face of the pleading. Therefore, Supreme Court Rule 191, which governs affidavits, must be followed. The relevant sections of Rule 191 state:

Rule 191. Proceedings Under Sections 2-1005, 2-619 and 2-301(b) of the Code of Civil Procedure

(a) Requirements. Motions for summary judgment under section 2-1005 of the Code of Civil Procedure and motions for involuntary dismissal under section 2-619 of the Code of Civil Procedure must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. Affidavits...submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure...***shall be made on the personal knowledge of the affiants***; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn

¹¹735 ILL. COMP. STAT. 5/2-613 (2015), available at www.ilga.gov/legislation/ilcs/documents/073500050k2-613.htm (emphasis added).

as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

(b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion rule [emphasis added].¹²

Since 619(a) motions must be supported by affidavits, it is therefore necessary first to consider what constitutes an affidavit and the sufficiency of an affidavit under Rule 191. As acknowledged by the Third District, neither the Code of Civil Procedure nor the Supreme Court Rules specify a method for testing the sufficiency of an affidavit.¹³ However, the Illinois Supreme Court has stated that an objection to the sufficiency of an affidavit should be made either by a motion to strike, or otherwise.¹⁴

Accepting an affidavit as sufficient is normally a two-step process.¹⁵ First, as the Supreme Court stated in *Roth v. Illinois Farmers Ins. Co.*,¹⁶ "Illinois courts have defined [affidavits] in consistent fashion for over 100 years...[a]n affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths."¹⁷ Therefore, for a court to accept the sufficiency of an affidavit requires first that there be a declaration, on oath, in writing, sworn to by a party before a person who has authority under the

¹² Ill. Sup. Ct. R. 191.

¹³ *Anderson v. Dorick*, 327 N.E.2d 541, 543 (Ill. App. Ct. 3d Dist. 1975).

¹⁴ *Fooden v. Bd. of Governors of State Colls. and Univs. of Ill.*, 272 N.E.2d 497, 501 (Ill. 1971).

¹⁵ Wm. Dennis Huber, *The Curious, Perjurious Requirements of Illinois Supreme Court Rule 12(b)3*, S. Ill. U. L.J. 451-473 (2015).

¹⁶ *Roth v. Ill. Farmers Ins. Co.*, 782 N.E.2d 212, 214 (Ill. 2002) (citing *Harris v. Lester*, 80 Ill. 307 (1875) and *People v. Smith*, 317 N.E.2d 300 (Ill. App. Ct. 4th Dist. 1974)).

¹⁷ *Roth*, *supra* note 16 at 493.

law to administer oaths.¹⁸

Second, the statements in the affidavit must be made on personal knowledge. A sworn declaration on oath in writing is rarely, if ever, a problem in motions to dismiss or for summary judgment. Problems have occurred when courts consider whether the statements are made on personal knowledge. For example, the court in *People v. Schoffner* ruled that where an affidavit does not set forth specific facts to support that it is based upon personal knowledge, the affidavit is insufficient.¹⁹

In 619(a)(9) cases, however, there is a third step. The affidavits must be “something more” than evidence offered to refute well-pleaded facts in the complaint.²⁰ Furthermore:

A 619(a)(9) motion “does not authorize motions asserting plaintiff’s essential allegations are ‘not true.’” When the defendant submits a ‘Not true’ motion, defendant’s burden of production has not been met—there is no affirmative matter—and the burden does not shift to the plaintiff to refute the defendant’s factual allegations contained in the motion. Where the defendant uses the material [external to the affidavit] to support its version of the facts, point out the factual deficiencies in plaintiff’s case, or allege plaintiff cannot prove his case, it is apparent the defendant is merely challenging the truthfulness of the plaintiff’s factual allegations and a fact-based motion such as a section 2–1005 motion should be used.²¹

Affidavits in support of a motion to dismiss or for summary judgment “**shall have** attached thereto sworn or certified copies of all documents upon which the affiant relies.”²² However, Section 191 requirements that affidavits “**shall be** made on the personal knowledge of the affiants” and “**shall have** attached thereto sworn or certified copies of all documents upon which the affiant relies” have not always been strictly enforced.²³

Some districts have interpreted the failure to attach the

¹⁸ Rule12(b) was recently revised to address the difficulties of *pro se* appellants in a correctional institution. Rule12(b) now includes the following: “(4) in case of service by mail by a pro se petitioner from a correctional institution, by affidavit, or by certification as provided in section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)) of the person who deposited the document in the institutional mail, stating the time and place of deposit and the complete address to which the document was to be delivered.”

¹⁹ *People v. Brown*, 864 N.E.2d 767, 778 (Ill. App. Ct. 1st Dist. 2007).

²⁰ *Longust*, 502 N.E.2d at 1098.

²¹ *Reynolds v. Jimmy John’s Enter., LLC*, 988 N.E.2d 984, 1000 (Ill. App. Ct. 4th Dist. 2013) appeal denied, 996 N.E.2d 23 (Ill. 2013) (citations omitted).

²² Ill. Sup. Ct. R. 191.

²³ Ill. Sup. Ct. R. 191.

required documents to the affidavit as “technical insufficiencies.”²⁴ For example, the Fifth District held that “[t]echnical insufficiencies in affidavits submitted to court in support of motion for summary judgment should be disregarded.”²⁵

However, the Illinois Supreme Court ruled that affidavits that did not have the required documents attached are to be rejected. In *Robidoux v. Oliphant*,²⁶ the Illinois Supreme Court ruled:

We have already held that Rule 191(a)’s requirements are to be construed according to the plain language of the rule. Here, the plain language clearly requires that such papers be attached to the affidavit. Moreover, supreme court rules, like statutes, should be construed as a whole, with individual provisions interpreted in light of other relevant provisions. The Rule 191(a) provisions barring conclusory assertions and requiring an affidavit to state facts with ‘particularity’ would have little meaning were we to construe the attached-papers provision as merely a technical requirement that could be disregarded so long as the affiant were competent to testify at trial.²⁷

A defendant is required to support a motion to dismiss under 619(a) with supporting affidavits. “If the grounds do not appear on the face of the pleading attacked the motion **shall be** supported by affidavit...”²⁸ The motion and affidavits, however, cannot attack the factual basis of the plaintiff’s claim. They are asserting “other affirmative matter avoiding the legal effect of or defecting the claim.”²⁹

However, section 2-619(c) does not require a plaintiff to submit opposing affidavits to contest the affirmative matter. “If, upon the hearing of the motion, the opposite party presents affidavits **or other proof** denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion.”³⁰ Thus, for example,

²⁴ *LaMonte v. City of Belleville*, 355 N.E.2d 70, 75 (Ill. App. Ct. 5th Dist. 1976); *See also Vavadakis v. Commercial Nat. Bank of Chicago*, 533 N.E.2d 70, 72 (Ill. App. Ct. 1st Dist. 1988) (referring to failure to attach required documents as a “technical defect”).

²⁵ *LaMonte*, 355 N.E.2d at 75.

²⁶ *Robidoux v. Oliphant*, 775 N.E.2d 987 (Ill. 2002).

²⁷ *Id.* at 996 (internal citations omitted).

²⁸ 735 Ill. Comp. Stat. 5/2-619(a) (2015), available at www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=2017&ChapterID=56&SeqStart=6200000&SeqEnd=8800000. (emphasis added).

²⁹ *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 603 N.E.2d 1215, 1222 (Ill. App. Ct. 5th Dist. 1992).

³⁰ 735 Ill. Comp. Stat. 5/2-619(c) (2015), available at www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=2017&ChapterID=56&SeqStart=6200000&SeqEnd=8800000. (emphasis added).

[t]he plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. The plaintiff may do so by ‘affidavit or other proof.’ A counteraffidavit is necessary, however, to refute evidentiary facts *properly asserted* by affidavit supporting the motion else the facts are deemed admitted.”³¹

However, evidentiary facts are not properly asserted by an affidavit supporting the motion where an affidavit does not have the required documents properly attached.³² Therefore, “[i]f an exhibit is attached to the complaint, the exhibit controls and a [619(a)] motion to dismiss does not admit allegations in conflict with facts disclosed in the exhibit.”³³

If an affiant is unable to obtain documentary evidence by reason of hostility or otherwise, such as being in the custody of the opposing party, Rule 191(b) “permits a party filing pleadings pertaining to summary judgment or involuntary dismissal to submit an affidavit stating that material facts are known only to persons whose affidavits the affiant has been unable to secure by reason of hostility or otherwise.”³⁴

B. *MOTIONS TO DIMISS AND MOTIONS FOR SUMMARY JUDGMENT DISTINGUISHED FROM 2-619(a) MOTIONS.*

Section 619(a) motions are both similar to, and different from, both motions for summary judgment and motions to dismiss (motions for judgment on the pleadings). Motions for summary judgment are governed by section 2-1005, while motions to dismiss are made pursuant to 2-615.

Moving parties frequently confuse 619(a) motions with 615 motions to dismiss or 1005 motions for summary judgment.³⁵ But section 619 motions may be combined with either 615 motions to dismiss or 1005 motions for summary judgment if done in parts.

Sec. 2-619.1. Combined motions.

Motions with respect to pleadings under Section 2-615, motions for

³¹ Kedzie and 103rd Currency Exch. v. Hodge, 619 N.E.2d 732, 735 (Ill. 1993) (emphasis added).

³² *Robidoux*, 775 N.E.2d at 998.

³³ Perkaus v. Chicago Catholic High Sch. Athletic League, 488 N.E.2d 623, 628 (Ill. App. Ct. 1st Dist. 1986).

³⁴ Cordeck Sales, Inc. v. Construction Systems, Inc., 887 N.E.2d 474, 489 (Ill. App. Ct. 1st Dist. 2008) *citing* Kane v. Motorola, Inc., 779 N.E.2d 302 (Ill. App. Ct. 1st Dist. 2002), *as modified on denial of reh'g* (Nov. 27, 2002).

³⁵ Dellinger, *supra* note 2 at 237.

involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based.³⁶

Such motions are often referred to as hybrid motions.³⁷ However, such hybrid motions are not permitted.³⁸ Section 2-619.1 motions must be made in parts. At the same time, the failure to properly designate a motion as being brought pursuant to section 2-615 or section 2-619 will not require reversal unless prejudice results to the non-movant...A hybrid motion normally will only cause prejudice when the plaintiff is induced to forego the submission of counter-affidavits or other material to contest a defendant's affirmative defense and to rely solely on his complaint."³⁹

1. MOTIONS FOR SUMMARY JUDGMENT

The requirements for motions for summary judgment are governed by Section 1005 of the Code of Civil Procedure. The requirements of Section 1005 are as follows:

Sec. 2-1005. Summary judgments.

(a) For plaintiff. Any time after the opposite party has appeared or after the time within which he or she is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment in his or her favor for all or any part of the relief sought.

(b) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her.

(c) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A

³⁶ 735 ILL. COMP. STAT. 5/2-619.1 (2015), available at www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=2017&ChapterID=56&SeqStart=6200000&SeqEnd=8800000.

³⁷ Dellinger, *supra* note 2 at 237.

³⁸ Reynolds, *supra* note 21 at 990-91.

³⁹ Downers Grove Assoc. v. Red Robin Int'l, Inc., 502 N.E.2d 1053, 1057 (Ill. App. Ct. 1st Dist. 1986). (citations omitted).

summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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

(e) Form of affidavits. The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule.

40

While a 619(a) motion is similar to a motion for summary judgment “in that affidavits and other evidentiary matter is permitted to support the affirmative matter, and a shifting burden of proof upon satisfaction of the defendant’s burden of producing an affirmative matter that completely bars the plaintiff’s cause of action,”⁴¹ a 619(a) motion should not be used as a substitute for a summary judgment motion.⁴² The difference between a 619(a) motion and a motion for summary judgment is that in a 619(a) motion the trial court may weigh evidence and resolve factual disputes, while in a motion for summary judgment material factual disputes preclude summary judgment.⁴³

2. MOTIONS TO DISMISS

The requirements for motions to dismiss are governed by the Code of Civil Procedure 2-615, which states:

Sec. 2-615. Motions with respect to pleadings.

(a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask

⁴⁰735 ILL. COMP. STAT. 5/2-1005 (2015), available at www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=2017&ChapterID=56&SeqStart=10200000&SeqEnd=11500000.

⁴¹ Reynolds, *supra* note 20, at 1000.

⁴² *Id.*; Longust, 502 N.E.2d 1096 at 1098; Malanowski v. Jabamoni, 688 N.E.2d. 732, 735 (Ill. App. Ct. 1st Dist. 1997)

⁴³ Michel v. Gard, 536 N.E.2d 1375 (Ill. App. Ct. 3d Dist. 1989), Consumer Elec. Co. v. Cobelcomex, Inc., 501 N.E.2d 156 (Ill. App. Ct. 1st Dist. 1986).

for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

(b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

(c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered.

(d) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.

(e) Any party may seasonably move for judgment on the pleadings.⁴⁴

The difference between section 2-615 motions to dismiss and section 2-619 motions to dismiss is that a section 2-615 motion to dismiss is based solely on the pleadings rather than on the underlying facts. “A section 2-615 motion is solely concerned with defects on the face of the complaint In contrast, a section 2-619 motion admits the legal sufficiency of the complaint ... but asks for a dismissal based on other affirmative matters of law or easily proved issues of fact.”⁴⁵

III. A SURVEY OF SECTION 2-619 CASES

There are too many cases in which defendants moved for dismissal under Section 2-619 to survey them all. Therefore, only the more salient representative cases are discussed below.

As stated in *Zedella v. Gibson*,⁴⁶ “[t]he purpose of a motion to dismiss under section 2-619 of the Code of Civil Procedure is to afford litigants a means to dispose of issues of law and easily proved issues of fact at the outset of a case, reserving disputed questions of fact for a jury trial.”⁴⁷ Accordingly, the Fifth District ruled in *Barber-Colman Co. v. A & K Midwest Insulation Co.*⁴⁸ that “section 2-619 motions should not be used to attack the factual basis of the claim itself; if such an attack is to be made, it

⁴⁴ 735 ILL. COMP. STAT. 5/2-615 (2015), available at <http://ilga.gov/legislation/ilcs/documents/073500050K2-615.htm>.

⁴⁵ *Becker v. Zellner*, 684 N.E.2d 1378, 1383 (Ill. App. Ct. 2d Dist. 1997).

⁴⁶ *Zedella v. Gibson*, 650 N.E.2d 1000 (Ill. 1995).

⁴⁷ *Id.* at 1002.

⁴⁸ *Barber-Colman Co.*, 603 N.E.2d 1215 (Ill. App. Ct. 5th Dist. 1992).

should be by a summary judgment motion under section 2-1005.”⁴⁹ Likewise, the Illinois Supreme Court held that a 619(a)(9) motion “admits the legal sufficiency of the plaintiff’s cause of action much in the same way that a section 2-615 motion to dismiss admits a complaint’s well-pleaded facts” but challenges the legal sufficiency of the complaint. Unlike a 615 motion, however, a 619 motion admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff’s claim.⁵⁰

“Affirmative matter” is any defense “other than a negation of the essential allegations of the plaintiff’s cause of action.”⁵¹ Affirmative matter is “something in the nature of a defense which negates the cause of action completely.”⁵² Affirmative matter “refers to something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint.”⁵³ “A party may not submit evidentiary material in support of a section 2–619 motion for the purpose of contradicting well-pleaded facts in the complaint.”⁵⁴

The Third District court in *Michel v. Gard*⁵⁵ considered the rules of law pertinent to the sufficiency of affidavits to support a 2-619 motion. Citing *Venezky v. Central Illinois Light Co.*,⁵⁶ and *Dangeles v. Marcus*,⁵⁷ the court explained that

A section 2-619 motion is not an appropriate method for a defendant to utilize merely to controvert the allegations of ultimate facts in the complaint.... Where the matters claimed in the affidavit as a defense to the cause of action are nothing more than the evidence which defendant would expect to present in contesting facts alleged in the complaint, then the affidavits are insufficient to support a motion to dismiss based on “affirmative matter avoiding the legal effect of or defeating the claim.”⁵⁸

The Supreme Court had another opportunity to consider the nature of affirmative matter and the sufficiency of affidavits in

⁴⁹ *Id.* at 1224.

⁵⁰ *Kedzie & 103rd Currency Exchange*, *supra* note 26 at 735.

⁵¹ *Id.*

⁵² *Van Meter v. Darien Park Dist.*, 799 N.E.2d 273, 278 (Ill. 2003) (citations omitted).

⁵³ *Glisson v. City of Marion*, 720 N.E.2d 1034, 1039 (Ill. 1999).

⁵⁴ *Green v. Trinity Int’l Univ.*, 801 N.E.2d 1208 (Ill. App. Ct. 2d Dist. 2003); *See also John v. Wheaton Coll.*, 2014 IL App (2d) 130524-U, appeal pending (Sept. Term 2014).

⁵⁵ *Michel v. Gard*, 536 N.E.2d 1375 (Ill. App. Ct. 3d Dist. 1989).

⁵⁶ *Venezky v. Central Ill. Light Co.*, 522 N.E.2d 901 (Ill. App. Ct. 3d Dist. 1988)

⁵⁷ *Dangeles v. Marcus*, 373 N.E.2d 645 (Ill. App. Ct. 1st Dist. 1978).

⁵⁸ *Michel*, 536 N.E.2d at 1380.

*Longust v. Peabody Coal Co.*⁵⁹

‘Affirmative matter’ within the meaning of section 2-619(a)(9)...is something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. It must, however, be something more than evidence offered to refute a well-pleaded fact in the complaint.⁶⁰

In *Longust*, “something more” was absent because all the defendant attempted to do in its 619 motion was to negate the factual allegations of the complaint. The defendant merely offered “a contrary version of the legal relationship between the parties.”⁶¹ Therefore the dismissal of the complaint was reversed with the suggestion that the defendant should have filed a motion for summary judgment.

Section 2-619 motions are subject to two standards of review on appeal—abuse of discretion and *de novo*. An appellate court will usually apply a *de novo* standard to a 619 motion to dismiss because the motion usually does not require the trial court to weigh facts or determine credibility. However, an abuse of discretion standard will be applied when a motion to dismiss is inherently procedural, such as a motion under 619(a)(3), discussed *infra*, where the trial court is required to weigh the appropriate factors in determining whether to grant a dismissal. A trial court's decision to grant or deny comity will not be reversed absent an abuse of discretion which occurs when a ruling is “arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view.”⁶²

Some 619 sections present greater challenges than others. For example, in a 619(a)(5) motion (“The action was not commenced within the time limited by law”) the court must determine the date an action was commenced and compare that date with the time limit set by the statute under which the action was brought (e.g., contract, personal injury, fraud, professional malpractice, etc.). A 619(a)(2) motion (“That there is another action pending between the same parties for the same cause”), on the other hand, requires

⁵⁹ *Longust*, 502 N.E.2d at 1098.

⁶⁰ *Id.* (citations omitted).

⁶¹ *Id.*

⁶² *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 966 N.E.2d 396, 402, 404 (Ill. App. Ct. 1st Dist. 2012), appeal pending (May Term 2012) (citations omitted). Abuse of discretion standard is also applied when reviewing a trial court's refusal to allow an amended complaint, denial of vacating a judgment, imposing sanctions, motions to reconsider, and motions for attorney fees in relation to 619 motions. However, since these are not directly related to 619 motions they are not reviewed here.

the court to weigh and balance various factors.

The requirements and conditions of each section of 619 are examined in the following sections.

A. *Sec. 2-619(a)(1). The court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.*

As the court stated in *Russell v. Kinney Contractors, Inc.*,⁶³ “[t]he presence or absence of subject matter jurisdiction is determined from the nature of the case and the relief sought.”

Section 2-619(a)(1) motions often arise from actions that arguably should have been brought in another jurisdiction, whether in another court, or in another state or another country. For example, in a malpractice action the circuit court dismissed the complaint on the grounds that the action should have been brought in Indiana. The appellate court reversed and remanded. On appeal, the Supreme Court affirmed the appellate court, and held that the circuit court had subject matter jurisdiction over the medical malpractice claim arising in Indiana.⁶⁴

In *Russell v. Kinney Contractors, Inc.*,⁶⁵ the defendant moved to dismiss under 619(a)(1), arguing that the National Labor Relations Act preempted state causes of action. The circuit court dismissed the action, but the Fifth District held that the National Labor Relations Act did not preempt state causes of action and the court did have subject matter jurisdiction.

B. *Sec. 2-619(a)(2). The plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.*

Issues of capacity usually involve questions of minority or mental status. However, in *A Plus Janitorial Co. v. Group Fox, Inc.*,⁶⁶ a dissolved corporation had commenced an action against a former employee for various causes including breach of contract. The First District affirmed the dismissal of the action because even though the causes of action were based on rights that existed

⁶³ *Russell v. Kinney Contractors, Inc.*, 795 N.E.2d 340, 343 (Ill. App. Ct. 5th Dist. 2003).

⁶⁴ *Ransom v. Marrese*, 524 N.E.2d 555 (Ill. 1988).

⁶⁵ *Russell*, 795 N.E.2d at 342.

⁶⁶ *A Plus Janitorial Co. v. Grp. Fox, Inc.*, 988 N.E.2d 178 (Ill. App. Ct. 1st Dist. 2013).

prior to the dissolution, the causes of action did not accrue until after the dissolution.

C. *Sec. 2-619(a)(3). That there is another action pending between the same parties for the same cause.*

Section 619(a)(3) motions often arise where the defendant asserts that another action is pending between the same parties for the same cause in a court in another state, a court in a foreign country, or a federal court.

For purposes of 2-619(a)(3) motions, “action” has been interpreted as referring to proceedings “which finally adjudicate controversy on merits.”⁶⁷ However, “finally adjudicate controversy on merits” does not mean it has already been finally adjudicated, but will, when the action is finally concluded, have been finally adjudicated. (A finally adjudicated action is addressed in Sec. 2-619(a)(4), discussed *infra*.)

A 2-619(a)(3) motion is inherently procedural.⁶⁸ As a procedural tool to avoid duplicate litigation, 2-619(a)(3) motions should therefore be construed liberally.⁶⁹ At the same time, no “bright-line test exists in determining whether the litigants’ interests in two actions are sufficiently similar.... [E]ach case is decided on a case-by-case basis after considering all the relevant facts.”⁷⁰

Trial courts are required to weigh a host of factors before deciding whether to grant or deny a 2-619(a)(3) motion. Decisions to grant or deny a 2-619(a)(3) motion are discretionary with the trial court.⁷¹ Therefore, the standard for appellate review of Section 2-619(a)(3) motions, unlike motions under other 619 sections, is abuse of discretion.⁷²

Infrequently, however, a *de novo* standard is used. For example, a *de novo* standard was used in *In re the Marriage of Marilyn D. Epsteen*,⁷³ an action by a former wife against her ex-husband’s estate to enforce a judgment of divorce for support for her adult child who was mentally disabled. The appellate court

⁶⁷ *Ransom*, 524 N.E.2d at 560.

⁶⁸ *Combined Ins. Co. of Am. v. Certain Underwriters at Lloyd's London*, 826 N.E.2d 1089, 1094 (Ill. App. Ct. 1st Dist. 2005).

⁶⁹ *Midas Int'l Corp. v. Mesa, S.p.A.*, 988 N.E.2d 679, 683 (Ill. App. Ct. 1st Dist. 2013).

⁷⁰ *Northbrook Property and Cas. Ins. Co. v. GEO Intern. Corp.*, 739 N.E.2d 47, 49 (Ill. App. Ct. 1st Dist. 2000).

⁷¹ *Kellerman v. MCI Telecomm. Corp.*, 493 N.E.2d 1045, 1053 (Ill. 1986).

⁷² *Zurich Ins. Co. v. Baxter Int'l, Inc.*, 670 N.E.2d 664,668 (Ill. 1996); *Kellerman*, 493 N.E.2d at 1053-54 (1986); *Uesco Indus., Inc. v. Cont'l Cas. Co.*, 2012 IL App (2d) 120433-U, ¶ 15.

⁷³ *In re Marriage of Epsteen*, 791 N.E.2d 175 (Ill. App. Ct. 1st Dist. 2003).

reviewed de novo the trial court's dismissal of the action for failure to timely file claims against her former husband pursuant to the Probate Act for restitution for the former husband's failure to pay premiums on life insurance policies and for modification of monthly support payments for their disabled child.

A trial court's decision to dismiss an action under 2-619(a)(3) due to another action pending between the same parties for the same cause will not be overturned absent an abuse of discretion. An abuse of discretion is evident when the ruling is "arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view."⁷⁴

Factors that a trial court must weigh include the following:

- comity, prevention of multiplicity, vexation, and harassment, likelihood of obtaining complete relief from foreign jurisdiction, and res judicata effect of foreign judgment in local forum.⁷⁵ ("Comity" is qualified, however. "Comity is to be accorded to an act of a foreign court as long as that court is of competent jurisdiction and the laws and the public policy of the forum state are not violated."⁷⁶)
- comity, prevention of multiplicity, vexation, and harassment, likelihood of obtaining complete relief in foreign jurisdiction, and res judicata effect of foreign judgment in local forum, and prejudice to the nonmovant if motion is granted against policy of avoiding duplicative litigation.⁷⁷

However, these factors are not all-inclusive, and as a matter of discretion, a trial court may consider additional factors that bear on its discretion.⁷⁸

When a trial court weighs the above factors, "two actions need not be identical, but rather, there need only be a substantial similarity of issues between them."⁷⁹ Two actions are also for the same cause "when the relief requested is based on substantially the same set of facts."⁸⁰ "The crucial inquiry is whether the two actions arise out of the same transaction or occurrence, not

⁷⁴ *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, *supra* note 62, at 402.

⁷⁵ *Kellerman*, 493 N.E.2d at 1053.

⁷⁶ *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, *supra* note 62.

⁷⁷ *Kapoor v. Fujisawa Pharm. Co.*, 699 N.E.2d 1095, 1099 (Ill. App. Ct. 1st Dist. 1998); *Midas Int'l Corp.*, 988 N.E.2d at 687-88.

⁷⁸ *May v. SmithKline Beecham Clinical Labs., Inc.*, 710 N.E.2d 460, 465 (Ill. App. Ct. 5th Dist. 1999).

⁷⁹ *Overnite Transp. Co. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, AFL-CIO, 773 N.E.2d 26, 32 (Ill. App. Ct. 1st Dist. 2002).

⁸⁰ *Id.*

whether the legal theory, issues, burden of proof or relief sought materially differs between the two actions.”⁸¹

The “same parties” condition is met “where litigants’ interests are sufficiently similar, even though litigants differ in name or number.”⁸² The “same cause” means “that the relief sought is requested on the same set of facts.”⁸³ However, “even when the ‘same cause’ and ‘same parties’ requirements are met, section 2-619(a)(3) does not mandate automatic dismissal.”⁸⁴

In *Terracom Development Group, Inc. v. Village of Westhaven*,⁸⁵ the First District ruled that the trial court did not abuse its discretion when it dismissed the action as duplicative to an action pending in federal court. The state action was an attempt to circumvent the federal court’s order and the two actions involved same facts and issues.

However, the First District in *Rodgers v. Cook County*⁸⁶ reversed the circuit court’s dismissal of the state court action brought by the representative of a deceased inmate’s estate against the county, a doctor, and a mental health specialist for negligence and medical malpractice after the inmate died as a result of the denial of his prescription medicine while a federal lawsuit against the same parties was pending. The First District held that the “dismissal of plaintiff’s claims in federal court against the individual defendants tips the scales against dismissing the state suit and we reverse the trial court with directions to stay the proceedings until the federal court decides the question of the statute of limitations.”⁸⁷

The First District also ruled in *Skipper Marine Electronics, Inc. v. Cybernet Marine Products*,⁸⁸ that the trial court did not abuse its discretion in an action by an Illinois distributor against a California manufacturer. The court stated that “[w]e do not find that the relationship between the State of Illinois and the proceedings in the present case was so strong that trial court’s dismissal [of suit on grounds that there was another action

⁸¹ *Id.* See also *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, *supra* note 69; *Vill. of Mapleton v. Cathy’s Tap, Inc.*, 729 N.E.2d 854 (Ill. App. Ct. 3d Dist. 2000).

⁸² *Doutt v. Ford Motor Co.*, 659 N.E.2d 89, 92 (Ill. App. Ct. 1st Dist. 1995).

⁸³ *May*, 710 N.E.2d at 464.

⁸⁴ *Combined Ins. Co. of America v. Certain Underwriters at Lloyd London*, *supra* note 65, *Kellerman v. MCI Telecommunications Corp.*, *supra* note 68.

⁸⁵ *Terracom Dev. Group, Inc. v. Vill. of Westhaven*, 568 N.E.2d 376 (Ill. App. Ct. 1st Dist. 1991).

⁸⁶ *Rodgers v. Cook County*, 998 N.E.2d 164, 175 (Ill. App. Ct. 1st Dist. 2013).

⁸⁷ *Id.* at 882.

⁸⁸ *Skipper Marine Elec., Inc. v. Cybernet Marine Prods.*, 558 N.E.2d 324 (Ill. App. Ct. 1st Dist. 1990).

pending between distributor's California affiliate and manufacturer in California court] could be considered an abuse of its discretion." It also appeared that the California litigation was broader and more dispositive of the two actions.⁸⁹

The Third District held in *In re Marriage of Muruges and Kasilingam*⁹⁰ that the Illinois action was not subject to dismissal based on a pending divorce action in a foreign country between the same parties, because the state court was not required to recognize or enforce divorce judgments from foreign countries under the full faith and credit clause.⁹¹

Not all 619(a)(3) motions arise as a result of actions in other jurisdictions. The Second District ruled in *Bank of Northern Illinois v. Nugent*⁹² that the trial court abused its discretion in dismissing a bank's fraud complaint against the estate of a deceased business owner because the facts underlying the bank's previous judgment entered on notes. However, the facts underlying fraud claims in the subsequent case were not the same. The fraud complaint sought relief not encompassed by the prior judgment on notes.

D. Sec. 2-619(a)(4). The cause of action is barred by a prior judgment.

The Fifth District provided an extensive review of the requirements of a 619(a)(4) motion in *Yorulmazoglu v. Lake Forest Hospital*.⁹³ A defendant may seek to bar a plaintiff's claim using either a theory of collateral estoppel or *res judicata*. Since both collateral estoppel and *res judicata* are equitable doctrines they should only be applied using principles of fairness and justice. Therefore, "[c]ourts must balance the need to limit litigation against the right to a fair adversarial proceeding in which a party may fully present its case."⁹⁴

Three conditions must be fulfilled in order to apply *res judicata* (also called estoppel by judgment): there must have been a final judgment on the merits rendered by a court of competent jurisdiction; there must be an identity of cause of action; and there must be an identity of parties or their privies.⁹⁵ Furthermore, "*res*

⁸⁹ *Id.* at 327.

⁹⁰ *In re Marriage of Muruges & Kasilingam*, 993 N.E.2d 1109 (Ill. App. Ct. 3d Dist. 2013), reh'g denied (Sept. 9, 2013), appeal denied sub nom.

⁹¹ *Id.* at 1115.

⁹² *Bank of N. Ill. v. Nugent*, 584 N.E.2d 948 (Ill. App. Ct. 2d Dist. 1991)

⁹³ *Yorulmazoglu v. Lake Forest Hosp.*, 834 N.E.2d 468 (Ill. App. Ct. 5th Dist. 2005).

⁹⁴ *Id.* at 475.

⁹⁵ *Id.*

judicata stands as a bar to relitigating not only the issues which were previously tried, but also those issues which could have been tried⁹⁶ or “might have been raised” in the previous proceeding.⁹⁷ A judgment is on the merits “where it amounts to a decision as to the respective rights and liabilities of parties based on the ultimate facts or the state of the facts disclosed by pleadings or evidence, or both, and on which the right of recovery depends irrespective of formal, technical or dilatory objections or contentions” and therefore may bar a subsequent action.⁹⁸

Three conditions must also be fulfilled in order to apply collateral estoppel (also called estoppel by verdict or issue preclusion): the issue previously adjudicated must be identical to the issue presented in the current action; a final judgment on the merits must exist in the previous case; and the plaintiff against whom estoppel is directed was a party to the prior litigation or is in privity with such a party.⁹⁹ It applies when a party or someone in privity with a party

takes part in two separate, consecutive cases arising from different causes of action and some fact controlling, or question material to, the determination of both cases has been adjudicated against that party in the prior case by a court of competent jurisdiction...Unlike *res judicata*, collateral estoppel bars subsequent actions only as to the point or question actually litigated and determined in the prior suit, and not as to other matters which might have been litigated and determined.¹⁰⁰

Moreover,

unlike *res judicata*, mutuality of parties is not required; only one party or his privy, the one against whom estoppel is asserted, must be identical in the first and subsequent causes of action...collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.¹⁰¹

Whether a party has had a full and fair opportunity to be heard depends on whether the party was denied a procedural, substantive or evidentiary opportunity to be heard on the issue...The parties need not have been arrayed on opposite sides in the prior suit, nor must formal issues have been raised between them....¹⁰²

⁹⁶ *Singer v. Brookman*, 578 N.E.2d 1, 5 (Ill. App. Ct. 1st Dist. 1991).

⁹⁷ *Fried v. Polk Bros.*, 546 N.E.2d 1160 (Ill. App. Ct. 2d Dist. 1989).

⁹⁸ *Id.* at 1164.

⁹⁹ *Yorulmazoglu v. Lake Forest Hosp.* *supra* note 90.

¹⁰⁰ *Fried*, 546 N.E.2d at 1164 (citations omitted).

¹⁰¹ *Id.*

¹⁰² *Id.*

In considering the “same evidence” test for *res judicata*, the Second District court ruled in *American National Bank & Trust Co. of Chicago v. Village of Libertyville*,¹⁰³ that the present suit should not have been dismissed because the relief sought in the two actions “was sufficiently distinguishable to require different proof and evidence.”¹⁰⁴

In *Law Offices of Nye & Associates, Ltd. v. Boado*¹⁰⁵ the Second District court affirmed the dismissal of an action based on *res judicata*. The court held that “*res judicata* applied, because the claims raised could have been litigated in a previous action that was adjudicated to a final order on the merits, and that the trial court correctly determined that no exceptions to the application of *res judicata* applied.”¹⁰⁶

In *Halverson v. Stamm*,¹⁰⁷ *res judicata* was not applied in a breach of contract action by a policyholder against an automobile insurer for recovery of medical expenses incurred in a motor vehicle accident. The court determined that the same evidence would not sustain both causes of action, in that the breach of contract action required essential facts to sustain its cause of action that were different from those in the negligence case.¹⁰⁸

Res judicata was also not applied to a 619(a)(4) motion to dismiss a paternity action brought by Department of Public Aid where the minor was neither a party nor in privity with a party to a prior action brought by the child’s mother.¹⁰⁹

Res judicata did apply, however, to a circuit court’s unappealed judgment dismissing an action for damages which resulted from the death of a passenger caused by an intoxicated minor driver.¹¹⁰

E. Sec. 2-619(a)(5). The action was not commenced within the time limited by law.

Courts must necessarily look to other statutes for determining the time limits for certain actions in 619(a)(5) motions. Therefore, much of the trial courts’, and consequently

¹⁰³ *American Nat. Bank & Trust Co. of Chicago v. Vill. of Libertyville*, 645 N.E.2d 1013 (Ill. App. Ct. 2d Dist. 1995).

¹⁰⁴ *Id.* at 1016.

¹⁰⁵ *Law Offices of Nye & Assocs., Ltd. v. Boado*, 970 N.E.2d 1213 (Ill. App. Ct. 2d Dist. 2012), appeal denied, 979 N.E.2d 879 (Ill. 2012).

¹⁰⁶ *Id.*

¹⁰⁷ *Halverson v. Stamm*, 769 N.E.2d 1076 (Ill. App. Ct. 5th Dist. 2002).

¹⁰⁸ *Id.* at 1084.

¹⁰⁹ *Dep’t of Pub. Aid ex rel. Skelton v. Liesman*, 578 N.E.2d 310 (Ill. App. Ct. 4th Dist. 1991).

¹¹⁰ *Jachim v. Townsley*, 619 N.E.2d 1317 (Ill. App. Ct. 2d Dist. 1993).

appellate courts', attention is devoted to determining what are the limitations for commencing an action as specified in other statutes.

The time limits differ with each type of action and specific time limits are not reviewed here. What is reviewed are the principles applied by the courts in determining whether an action is barred by the time limits for that action. The standard of review is, therefore, *de novo*.¹¹¹

If a defendant raises a statute of limitations defense in a 619(a)(5) motion to dismiss, the plaintiff must provide enough facts to avoid the application of the statute of limitations.¹¹²

In *Villanueva v. Sweiss*,¹¹³ the First District affirmed the dismissal of an action for breach of contract and negligence against an accounting firm where the facts on the face of the complaint showed the action was time-barred. An action for malicious prosecution was similarly also properly dismissed as barred by the statute of limitations.¹¹⁴ However, a dismissal of an action under 619(5) was reversed where the appellate court found that genuine issues of material fact existed as to whether a company could have asserted a breach of contract claim against defendant accounting firms right after they stopped providing services, precluding summary judgment on statute of limitations grounds.¹¹⁵

F. Sec. 2-619(a)(6). The claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

If a defendant moves to dismiss an action under 619(a)(6) and shows the existence of a facially valid release, the burden shifts to the plaintiff to prove that a material issue of fact exists which would invalidate the agreement.¹¹⁶

In an action against a purchaser for breach of promissory note, and counter-claims against the vendor for misrepresentation, fraud, breach of contract, and duress, the Second District, in *Krilich v. American National Bank & Trust Co. of Chicago*,¹¹⁷ held that mutual releases entered into by all partners in a joint venture terminated the duty of a vendor's former partners to indemnify the

¹¹¹ *Ferguson v. City of Chicago*, 820 N.E.2d 455 (Ill. 2004).

¹¹² *Clay v. Kuhl*, 696 N.E.2d 1245 (Ill. App. Ct. 2d Dist. 1998).

¹¹³ *Villanueva v. Sweiss*, 2014 IL App (1st) 133444-U.

¹¹⁴ *Ghosh v. Roy*, 566 N.E.2d 873 (Ill. App. Ct. 5th Dist. 1991).

¹¹⁵ *MC Baldwin Fin. Co. v. DiMaggio, Rosario & Veraja, LLC*, 845 N.E.2d 22 (Ill. App. Ct. 1st Dist. 2006).

¹¹⁶ *Roberts v. Dow Chem. Co.*, 614 N.E.2d 252 (Ill. App. Ct. 1st Dist. 1993).

¹¹⁷ *Krilich v. Am. Nat. Bank & Trust Co. of Chicago*, 778 N.E.2d 1153 (Ill. App. Ct. 2d Dist. 2002).

vendor against claims by a purchaser. The appellate court held that the trial court correctly dismissed Krich's third-party complaint for indemnification because a mutual release terminated the joint venturers' duty to indemnify him for counterclaims.

In *Currie v. Wisconsin Central, Ltd.*,¹¹⁸ the First District held that a former employee's claims of a "hostile work environment, discrimination with respect to training, privileges, and conditions of employment, and retaliation [were] in identity" with causes of action in a prior class action against the employer for race discrimination, hostile work environment, and retaliation, and had therefore been released as a result of failing to opt out of a consent decree approving a settlement in the class action.¹¹⁹

The Third District, in *Dickman v. E.I. Du Pont de Nemours & Co.*,¹²⁰ reversed a circuit court's judgment dismissing a farmer's action against a chemical company for damages for stunted corn crops but which entered a judgment for the farmer. The chemical company argued that the farmer had previously signed a release to settle his claim. The farmer argued that the release was not valid because he had not accepted his settlement check after determining his damages were greater than amount of settlement. The appellate court ruled that the farmer's release was valid.

In *Mason v. John Boos & Co.*,¹²¹ the trial court dismissed an injured worker's action against his employer because his claim was barred, first by the Workers' Compensation Act which provided the exclusive remedy for injured workers' claims, and second, because the worker's claim had been released in a settlement agreement. The appellate court affirmed the dismissal.

In *Schultheis v. McWilliams Electric Co.*,¹²² the trial court dismissed an action for personal injury after the plaintiff had accepted a check in full satisfaction of the claim. On appeal the plaintiff argued that he did not intend a release and the defendant could neither prove that there was an agreement to settle the entire claim nor establish that the plaintiff had signed a release. The First District ruled that the trial court reasonably concluded that the "plaintiff's endorsement and cashing of the check with knowledge of the contents of the accompanying letter demonstrated an intent to release defendant from the claim."¹²³

¹¹⁸ *Currie v. Wisconsin Cent., Ltd.*, 961 N.E.2d 296 (Ill. App. Ct. 1st Dist. 2011).

¹¹⁹ *Id.* at 304-05.

¹²⁰ *Dickman v. E.I. Du Pont de Nemours & Co.*, 663 N.E.2d 507 (Ill. App. Ct. 3d Dist. 1996).

¹²¹ *Mason v. John Boos & Co.*, 959 N.E.2d 209 (Ill. App. Ct. 5th Dist. 2011).

¹²² *Schultheis v. McWilliams Elec. Co.*, 579 N.E.2d 1100 (Ill. App. Ct. 1st Dist. 1991).

¹²³ *Id.* at 1102.

G. *Sec. 2-619(a)(7). The claim asserted is unenforceable under the provisions of the Statute of Frauds.*

In *Oliva v. Amtech Reliable Elevator Co.*,¹²⁴ the defendants argued that the complaint should be dismissed for failure to state a cause of action and because an alleged agreement to extend a lease for a second three-year term failed to comply with the statute of frauds. The trial court dismissed the complaint for failure to state a cause of action and therefore ignored the 619(a)(7) motion. The First District held that since the parties' agreement did not require that the option to extend a three-year lease be accepted in writing, the option could be accepted either verbally or by voluntary action manifesting an intent to exercise the option. The plaintiff demonstrated its intent to exercise the option by holding over and paying the increased rent due for the new term.

H. *Sec. 2-619(a)(8). The claim asserted against defendant is unenforceable because of his or her minority or other disability.*

Cases arising under 2-619(a)(8) are less common. In an action by a minor's next friend on behalf of the minor against a corporation for injuries sustained on the job as a result of the defendant's violation of Sections 18, 19 and 26 of the Child Labor Act,¹²⁵ the corporation filed a counter-claim but the trial court sustained the plaintiff's motion to strike the counter-claim. A trial resulted in a verdict against the defendant. The defendant's motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial were denied. The defendant appealed. The First District found that the jury properly inferred that the defendant did not keep a register recording data relative to minors under the age of 16 years and affirmed the judgment of the trial court.

"Other disability" has been interpreted to include failure to exhaust administrative remedies, thus precluding judicial action. For example, in a class action by a taxpayer challenging an unemployment insurance tax assessment, the circuit court dismissed the action. The First District court affirmed the dismissal, ruling, in part, that the taxpayer was required to use the administrative review process to challenge the tax

¹²⁴ *Oliva v. Amtech Reliable Elevator Co.*, 851 N.E.2d 256 (Ill. App. Ct. 1st Dist. 2006).

¹²⁵ *Hylak v. Marcal, Inc.*, 80 N.E.2d 411 (Ill. App. Ct. 1st Dist. 1948).

assessment.¹²⁶ The dissent believed that the trial court's order should have been reversed and the cause reinstated for a full and proper hearing.

In *Northwestern University v. City of Evanston*,¹²⁷ the circuit court dismissed an action by the university against the city alleging that a zoning ordinance that forbade commercial activity in the university district was unconstitutional. The First District reversed. On appeal, the Illinois Supreme Court reversed the appellate court and ruled that the university was obliged to exhaust its administrative remedies.

I. *Sec. 2-619(a)(9). The claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.*

Section 2-619(a)(9) motions are more problematic because the section is essentially a "catch-all" for matters not specified in sections 1-8. As a "catch-all," it allows movants to be creative. Frequently, issues of standing are presented. Other issues include immunity, specific performance, and no private right of action, among others. Not only do both moving and non-moving parties frequently confuse the requirements and limitations of a 619(a)(9) motion, but trial courts do as well.

There are caveats that are associated with motions to dismiss under section 2-619(a)(9). An affirmative matter does not include

evidence upon which defendant expects to contest an ultimate fact stated in the complaint...Accordingly, section 2-619(a)(9) does not authorize the defendant to submit affidavits or evidentiary matter for the purpose of contesting the plaintiff's factual allegations and presenting its version of the facts....Where a defendant seeks to address the complaint's factual allegations, a summary judgment motion pursuant to section 2-1005 of the Code is the proper vehicle.¹²⁸

"A motion to dismiss under section 2-619(a)(9) alleges that the complaint must be dismissed because of 'affirmative matter avoiding the legal effect of or defeating the claim.'... If the affirmative matter is merely evidence contesting facts alleged in

¹²⁶ *Illinois Bell Tel. Co. v. Allphin*, 326 N.E.2d 737 (Ill. App. Ct. 1st Dist. 1975).

¹²⁷ *Northwestern Midland Univ. v. City of Evanston*, 383 N.E.2d 964 (Ill. App. Ct. 1st Dist. 1978).

¹²⁸ *Reynolds v. Jimmy John's Enterprises, LLC*, *supra* note 21 at 995 (citations omitted).

the complaint, use of section 2-619 is inappropriate.”¹²⁹

The following sections examine types of cases brought under 2-619(a)(9).

1. *STANDING*

Lack of standing is frequently raised in a 2-619(a)(9) motion and qualifies as an “affirmative matter” which defeats the claim. That does not imply, of course, that the movant will prevail.

Where standing is challenged by way of a motion to dismiss based on an affirmative matter which avoids the legal effect of or defeats the claim, a court must accept as true all well-pleaded facts in the plaintiff’s complaint and all inferences that can reasonably be drawn in the plaintiff’s favor.¹³⁰ When an appellate court determines that a plaintiff lacks standing to pursue an action against a defendant, “there is no reason to examine whether plaintiff has stated a cause of action”¹³¹ and the action will be dismissed.

2. *IMMUNITY*

Immunity is also considered an appropriate “affirmative matter” for a 619(a)(9) motion and has been raised several times. For example, in *Van Meter v. Darien Park District*,¹³² municipal defendants filed motions to dismiss pursuant to section 2-619 (a)(9) alleging that they were entitled to discretionary immunity under the Local Governmental and Governmental Employees Tort Immunity Act. The circuit court granted the defendants’ motions to dismiss, and the Second District affirmed. However, the Supreme Court reversed the appellate court finding that “[i]mmunity under the Act is an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss.”¹³³

However, a supervisor’s affidavit that attempted to negate the essential allegations of a workers’ compensation retaliatory discharge claim and attempted to show that the employee’s discharge was discretionary was not an “affirmative matter” that could defeat the employee’s allegations. Therefore, the employee’s failure to respond to the employer’s affidavit does not constitute an adequate basis for the dismissal of [the] complaint under section

¹²⁹ *Venezky v. Cent. Ill. Light Co.*, 522 N.E.2d 901 (Ill. App. Ct. 3d Dist. 1988).

¹³⁰ *Int’l Union of Operating Eng’rs, Local 148, AFL-CIO v. Illinois Dep’t of Employment Sec.*, 828 N.E.2d 1104, 1110 (Ill. 2005).

¹³¹ *Glisson v. City of Marion*, 720 N.E.2d 1034, 1045 (Ill. 1999).

¹³² *Van Meter v. Darien Park Dist.*, *supra* note 29 at 367.

¹³³ *Id.* at 560.

2-619(a)(9)” because negating essential allegations of a claim is not an “affirmative matter.”¹³⁴

3. MISCELLANEOUS

A defense of nonlienability is an “affirmative matter” within the scope of 619(a)(9) sufficient to defeat foreclosure of a mechanic’s lien.¹³⁵ The defendant’s argument of nonlienability was not merely evidence which contradicted the facts alleged in the complaint, but would act to negate the cause of action completely.¹³⁶

The exclusivity of workers’ compensation has also been held to be an affirmative matter sufficient to defeat an action.¹³⁷

A more recent example of a miscellaneous “affirmative matter,” coupled with a standing issue, is seen in a case in the Seventh Circuit of the Fourth District. The case illustrates the inconsistencies that may occur and the confusion by both a party and the court that may be present in a 2-619(a)(9) motion.

In an action commenced in 2011 arising under the Illinois General Not For Profit Corporation Act of 1986,¹³⁸ the petitioner petitioned the court for judicial dissolution of an Illinois not-for-profit membership corporation¹³⁹ on the grounds that “those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent”¹⁴⁰ since its incorporation.

The corporation had been incorporated in 2002. The articles of incorporation had created members.¹⁴¹ The articles of incorporation had also created both a board of directors and officers.¹⁴² The articles of incorporation gave unrestricted rights to elect both officers and directors.¹⁴³ However, shortly after the

¹³⁴ Smith v. Waukegan Park Dist., 896 N.E.2d 232, 238 (Ill. 2008), *as modified on denial of reh’g* (Sept. 22, 2008).

¹³⁵ Consumer Elec. Co. v. Cobelcomex, Inc., 501 N.E.2d 156, 159 (Ill. App. Ct. 1st Dist. 1986).

¹³⁶ *Id.*

¹³⁷ Murcia v. Textron, Inc., 795 N.E.2d 773, 776-77 (Ill. App. Ct. 1st Dist. 2003).

¹³⁸ 805 ILL. COMP. STAT. 105 (2015), *available at* www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65.

¹³⁹ Huber v. American Accounting Association, (*appeal denied on other grounds*, 2014 IL App (4th) 130278-U), *aff’d* 21 N.E.3d 433, (2014).

¹⁴⁰ 805 ILL. COMP. STAT. 105/112.50(b)(2) (2015), *available at* www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65.

¹⁴¹ Wm. Dennis Huber, *Does the American Accounting Association exist? An Example of Public Document Research*. 3 J. FORENSIC & INVESTIGATIVE ACCT. 2, 1-67 (2011).

¹⁴² *Id.*

¹⁴³ If the corporation is to have no members, that fact shall be set forth in

incorporation the initial officers declared that the officers would be the directors rather than the members electing the directors.¹⁴⁴ The members of the corporation elected officers but had not been informed that the articles of incorporation had created both officers and directors. Members were unaware they had a right to elect directors and directors were never elected.¹⁴⁵ The corporation had received dues from its members since its incorporation.¹⁴⁶

The petitioner, a member of the corporation, discovered the irregularities in 2011 and advised the officers that they were not legally elected as directors.¹⁴⁷ In response, the officers, as the self-appointed board of directors, filed a voluntary dissolution of the corporation without a vote of the members¹⁴⁸ and reinstated a not-for-profit corporation with the same name that had been incorporated in 1935 and which had been administratively dissolved by the Illinois Secretary of State in 1996.¹⁴⁹ The articles of incorporation of the 1935 corporation did not create members as did the articles of incorporation for the corporation incorporated in 2002.

The petitioner then petitioned the court to vacate both the dissolution of the 2002 corporation and the reinstatement of the 1935 corporation, and either to judicially dissolve the 2002 corporation¹⁵⁰ or alternatively, to retain jurisdiction and appoint

the articles of incorporation or the bylaws. 805 ILL. COMP. STAT. 105/107.03(c) (2015), available at <http://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65>. The articles of incorporation may deny or limit the rights of members to vote. 805 ILL. COMP. STAT. 105/102.10(b) (2015), available at <http://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65>.

¹⁴⁴ Wm. Dennis Huber, *supra* note 143.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* See, *American Accounting Association Financial Statements and Supplemental Information Year Ended May 31, 2011 and Nine Months Ended May 31, 2010*, http://aaahq.org/Portals/0/documents/about/Financials/FYE_May2011_AuditedFinancialStatements.pdf (last visited Dec. 31, 2104).

¹⁴⁷ *Id.* American Accounting Association Financial Statement, *supra* note 141.

¹⁴⁸ Where a corporation has members entitled to vote on dissolution, the dissolution of a corporation may be authorized by a vote of members entitled to vote (805 ILL. COMP. STAT. 105/112.15 (2015), available at www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65). Where a corporation has no members or no members entitled to vote on dissolution, the dissolution of a corporation may be authorized by a majority of the directors (805 ILL. COMP. STAT. 105/112.05 (2015), available at www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65).

¹⁴⁹ 805 ILL. COMP. STAT. 105/112.45 (2015), available at www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65.

¹⁵⁰ 805 ILL. COMP. STAT. 105/112.50(b)(2) (2015), available at www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65.

a custodian and oversee the election of a board of directors.¹⁵¹ Attached as an exhibit to the petition was the corporation's articles of incorporation from the Secretary of State on August 2, 2002.

The corporation moved to dismiss the petition pursuant to section 2-619(a)(9) arguing that the corporation was only a "shell" corporation. In contesting the factual allegations of the petition, an affidavit by the corporation's executive director claimed not only that as a shell corporation, the corporation never had any assets and the monies received from members for membership dues had been deposited in accounts of a corporation that had previously been administratively dissolved in 1996. More important, the affidavit by the corporation's executive director claimed there were never any members.¹⁵² The affidavit did not have attached to it sworn or certified copies of the documents required under Rule 191.¹⁵³

The corporation thus argued that since there were never any members the petitioner was not a member and therefore had no standing. The corporation further argued that the petition failed to state a cause of action and the court lacked jurisdiction since the corporation had been dissolved by the directors.¹⁵⁴

The trial court accepted the corporation's executive director's affidavit that the corporation never had members. It also accepted that the corporation had been dissolved. The court dismissed, without opinion, the petition to dissolve the corporation.¹⁵⁵

IV. DISCUSSION AND ANALYSIS

Section 2-619(a) motions to dismiss are more flexible than 2-615 motions to dismiss. At the same time, 2-619(a) requirements and limitations are very specific and present caveats for both moving and non-moving parties. Both 2-615 and 2-619(a) motions are made prior to serving an answer but they are not interchangeable. A 2-615 motion to dismiss is based on defects in the pleadings while a 2-619(a) motion to dismiss admits there are no defects in the pleadings. Furthermore, a 2-615 motion to

¹⁵¹ 805 ILL. COMP. STAT. 105/112.55 (2015), available at www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2280&ChapterID=65.

¹⁵² *Huber v. American Accounting Association*, *supra*, note 141.

¹⁵³ ILL. SUP. CT. R. 191.

¹⁵⁴ *Huber v. American Accounting Association*, *supra* note 143.

¹⁵⁵ *Id.* If no reason is given by a trial court for dismissing an action, it must be assumed that the dismissal is for the reasons argued by the movant. *Zielinski v. Miller*, 660 N.E.2d 1289 (Ill. App. Ct. 3d Dist. 1995), *as modified on denial of reh'g* (Feb 16, 1996).

dismiss does not address affirmative defenses or affirmative matters.

Section 2-619(a) motions cannot be used merely to controvert the factual allegations of a non-defective complaint. If a defendant wishes to challenge the factual allegations of a non-defective complaint, a motion for summary judgment under 2-1005 must be made after serving an answer.

Given the flexibility of “affirmative matter” of 619(a)(9) motions, both moving and not-moving parties frequently confuse the requirements and limitations of 619(a)(9) motions. Moreover, trial courts also confuse the requirements and limitations of 619(a)(9) motions resulting in anomalous judgments that are contrary to appellate court or supreme court rulings, particularly with respect to the necessity and sufficiency of affidavits and counter-affidavits.

V. CONCLUSION AND RECOMMENDATIONS

This paper surveyed Illinois Code of Civil Procedure Section 2-619(a) motions to dismiss on a section-by-section basis. It compared 2-615 motions to dismiss based on defects in the pleadings, 2-1005 motions for summary judgment, and 2-619 motions to dismiss based on other affirmative matter. Representative appellate and Supreme Court 2-619 cases were reviewed, along with standards of review under each section, and how appellate courts and the Supreme Court have interpreted the necessity and sufficiency of affidavits and counter-affidavits in support of, and in opposition to, 2-619 motions to dismiss.

As a matter of strategy, a defendant must decide whether to attack the pleadings as defective and move to dismiss under 2-615, admit the pleadings are not defective but present an affirmative matter and move to dismiss under 2-619(a), or serve an answer preserving affirmative defenses and move for summary judgment under 2-1005.

Unless the evidence supports an affirmative matter in the nature of an affirmative defense a defendant should not introduce evidence in a 2-619(a) motion to challenge the factual allegations of the complaint in an attempt to avoid answering a complaint. Such evidence belongs in a motion to dismiss under 2-1005.