THE IDC MONOGRAPH:

Legal Malpractice v. Breach of Fiduciary Duty: Determining the Proper Remedy

Adam C. Carter
Iwan Cray Huber Horstman & VanAusdal LLC
Chicago, IL

In one respect, the initial pleadings in legal malpractice claims in Illinois are no different than the initial pleadings in any number of other causes of action. Plaintiff's counsel will often include in the complaint as many causes of action as possible, even though the pled facts do not support each cause of action. By doing so, attorneys often overload the complaint in an attempt to set forth permutations of every conceivable claim, under the mindset that if one count is good, then two counts must be better. The most common example of an ancillary cause of action that accompanies a legal malpractice claim is that for breach of fiduciary duty. These two claims are often conflated by plaintiff's counsel despite the fact that they are distinct causes of action. In actions sounding in legal malpractice, or the more generalized "professional negligence" as it relates to attorneys, it is incumbent upon defense counsel to analyze the oft-pled ancillary count of breach of fiduciary duty to determine whether it is ultimately duplicative of the malpractice count. With respect to the interplay between legal malpractice and breach of fiduciary duty, a body of case law in Illinois has evolved which more clearly defines these two seemingly related, yet independent, causes of action.

This paper will illustrate the distinctions between causes of action for legal malpractice and breach of fiduciary duty and will provide guidance to the practitioner as to when motions may be brought to distill the claims made against an attorney. Additionally, this paper will examine the Illinois case law which assists defense counsel in the task of dissecting a cause of action to discern when the pleading of these two causes of action is duplicative. This analysis not only serves the important role of dismissing a duplicative cause of action, but also allows counsel to identify a plaintiff's themes and relevant evidence in support of his or her case.

I. Defining Legal Malpractice and Breach of Fiduciary Duty Claims

In an action for legal malpractice in Illinois, a plaintiff must allege and ultimately prove four elements: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission that breached that duty; (3) proximate cause that establishes that but for the attorney's negligence, the plaintiff would not have suffered an injury; and (4) damages.[1] In a legal malpractice case, the existence of an attorney-client relationship is typically, but by no means always, a relatively easy element to ascertain early in the investigation of the claim. The attorney-client relationship is a fiduciary relationship that exists as a matter of law.[2] At least one appellate court has theorized that because the relationship between an attorney and client is a fiduciary relationship, in effect any alleged malpractice by an attorney also evidences a simultaneous breach of trust.[3] However, the court further noted that it does not mean that every cause of action for professional negligence also sets forth a separate and independent cause of action for breach of fiduciary duty.[4] Such a result would render the causes of action indistinguishable.

In order to properly state a cause of action for breach of fiduciary duty, it must be alleged that: (1) a fiduciary duty exists between the parties; (2) that the fiduciary duty was breached; and (3) that such breach proximately caused the injury of which the plaintiff complains.[5] As set forth above, the fiduciary duties owed by an attorney to a client exist as a matter of law. These duties owed are without regard to the specific terms of any contract or engagement.[6] Among the fiduciary duties imposed upon an attorney are those of fidelity, honesty, and good faith in both the discharge of contractual obligations to, and professional dealings with, a client.[7] When an attorney places personal interests above the interests of the client during the course of representation, the attorney is in breach of his or her fiduciary duty by reason of this direct conflict.[8] Such a breach gives rise to an action on behalf of the client for proximately-resulting damages.[9]

II. Asserting Claims for Both Legal Malpractice and Breach of Fiduciary Duty

When defense counsel reviews a complaint alleging both legal malpractice and breach of fiduciary duty, it must be determined whether there are distinct facts alleged that support both causes of action, separate and independent of the other.

About the Author

Adam C. Carter is an associate with *Iwan Cray Huber Horstman & VanAusdal LLC* in Chicago, Illinois. He focuses his practice in the areas of professional liability, commercial litigation, product liability and transportation litigation. Mr. Carter is a member of the Illinois Association of Defense Trial Counsel, the American Bar Association, the American Bar Association Section of Litigation, the Illinois State Bar Association, the Chicago Bar Association and the Defense Research Institute. He earned his B.A. *cum laude* from Augustana College in 1998 and earned his juris doctorate *cum laude* from the University of Illinois College of Law in 2001. He was admitted to the Illinois Bar and United States District Court, Northern District of Illinois in 2001, and has been admitted pro hac vice to defend litigation in numerous state and federal districts across the country.

In the case of *Calhoun v. Rane*, the plaintiff alleged that the defendant attorney failed to represent him before the Illinois Industrial Commission in regard to injuries that arose from his employment.[10] The defendant allegedly allowed the petition to be dismissed for want of prosecution, failed to vacate said dismissal or otherwise reinstate the plaintiff's claim, and then failed to inform his client that the claim had been dismissed.[11] Further, two and one half years after the dismissal of the complaint, the defendant allegedly wrote a letter to his client asserting that the complaint was still pending and, in fact, that there was an offer to settle.[12]

In addition to a count alleging professional malpractice, the plaintiff included counts alleging a breach of fiduciary duty and willful and wanton misconduct.[13] The trial court dismissed the cause of action for breach of fiduciary duty and the plaintiff appealed, arguing that the breach of fiduciary duty count was a separate and independent cause of action from the count alleging professional malpractice.[14] The appellate court acknowledged that Illinois has recognized that an injured plaintiff may plead separate counts alleging both professional malpractice and a breach of fiduciary duty.[15] However, because the language of the plaintiff's allegations in the breach of fiduciary duty count was virtually identical to that in the professional malpractice count, the court found the action for breach of fiduciary duty was not distinct from the malpractice action, and therefore, was properly dismissed by the trial court.[16]

The *Calhoun* opinion is instructive as to the issue of defense counsel's ability to have a breach of fiduciary duty count dismissed where the breach of fiduciary duty count simply mirrors the facts of a professional negligence claim. It was in *Calhoun* that the concept of the potential for duplicity between causes of action for legal malpractice and breach of fiduciary duty gained solid footing. Prior to *Calhoun*, the Appellate Court, First District had held, in the case of *Coughlin v. SeRine*, that a former client's causes of action against his attorney, sounding in both legal malpractice and breach of fiduciary duty, were properly pled.[17]

In *Coughlin*, the plaintiff engaged the defendant attorney for representation with respect to determining the plaintiff's rights and obligations under a stock redemption agreement.[18] Part of their agreement was that the attorney would receive a bonus, to be agreed upon by the parties, if there was a satisfactory solution.[19] Following the resolution of the matter, the attorney's fees were paid except for the alleged bonus.[20] The attorney sued his former client, and was served with a counterclaim in return, in which the former client ultimately alleged counts for professional malpractice and breach of fiduciary duty, in addition to counts for accounting, breach of contract and fraud, with each of these counts related to the alleged charging of excessive fees by the attorney.[21] The entire complaint was dismissed at the trial court level,[22] and the appellate court reviewed the dismissal, determining simply whether the facts stated were sufficient, as a matter of law, to support the cause of action and to permit the counterclaim to proceed.[23] The case was remanded, allowing both the counts of professional malpractice and breach of fiduciary duty to stand, with the court opining that the pleadings satisfied each of the elements of the causes of action.[24]

The opinion in the *Coughlin* case lacked any type of in-depth analysis as to whether or not simply overcharging a client is a sufficient basis for a malpractice claim. Based on the opinion of the court and the relative lack of analysis on this issue, there did not appear to have been argument by the defendant that the two counts were duplicative. Further, the court did not appear to be troubled by the reality that the factual basis of both counts was the alleged overcharging of the client.

The Appellate Court, First District has provided one of the more interesting pieces of analysis on the interplay between causes of action for legal malpractice and breach of fiduciary duty at the end of its opinion in *Metrick v. Chatz*,[25] decided after both *Coughlin* and *Calhoun*. This analysis could be considered *gratis dictum*, as arguments regarding the dismissal of the plaintiff's count alleging breach of fiduciary duties were waived. Yet, the court considered the count in conjunction with an existing count for legal malpractice. It was noted that one could argue that all breaches of fiduciary duty on the part of an attorney in the representation of a client amount to legal malpractice; however, the court was "unwilling to concede that all negligence on the part of an attorney in the rendition of legal services rises to the level of a breach of fiduciary duty."[26] The court noted that errors by attorneys may render them liable to clients for any resulting damages, but this "mere negligence is a far cry from a breach of fiduciary duty."[27] A distinction was outlined between allegations that an attorney erred, and allegations that an attorney was unfaithful, dishonest, acting in bad faith or acting with a conflict of interest.[28] As the factual allegations supporting the original cause of action for breach of fiduciary duty in that matter simply mirrored the allegations of the negligence counts, these counts did not rise to the level of a breach of fiduciary duty.[29]

Since *Coughlin*, Illinois courts appear to have altered their approach to analyzing motions to dismiss when both malpractice and breach of fiduciary duty have been pled. More scrutiny has been applied to the specific actions alleged against the defendant attorneys. Courts have re-directed their delib-

(Continued on next page)

erations from solely ascertaining whether each of the elements of both counts was properly pled, to analyzing the specific facts pled by the plaintiff in an attempt to discern the gravamen of the complaint. In drawing attention to the specific actions alleged of the defendant attorney in support of each count, defense counsel can frame the arguments in a motion to dismiss to inform the court that the counts are duplicative. Consequently, in conducting a more pointed analysis of the alleged conduct of the defendant attorney, a court can then make a more informed decision as to whether the alleged conduct fulfills the elements of each cause of action.

While Illinois courts have begun to provide a more pointed factual analysis in deciding motions to dismiss in legal malpractice cases, there are still some decisions that do not follow this pattern. In *Hanumadass v. Coffield, Ungaretti and Harris*, the Court began its analysis by noting that claims against attorneys for breach of fiduciary duty, breach of contract and negligence were all included "within the rubric of legal malpractice."[30] The *Hanumadass* case involved a plaintiff physician who sued the law firm that represented him and seven additional medical malpractice defendants in litigation arising from the death of a patient at Cook County Hospital.[31] The plaintiff alleged that after settling the medical malpractice case, the defendant law firm breached its duties of competent representation, undivided loyalty and providing representation that constituted a reasonable degree of care and skill by failing to perform a number of different actions, including failing to inform the plaintiff of the settlement for approximately eight months.[32] The plaintiff went on to allege that he suffered noneconomic damages including loss of reputation, embarrassment, health and state of mind.[33] The issue analyzed by the appellate court was one of legal malpractice as a contract action or tort action and the damages recoverable under each. Thus, the term "legal malpractice" was loosely used in that matter, not as a synonym for professional negligence (as most courts and practitioners use the term), but as an overarching term incorporating all causes of action against attorneys by their clients in an effort to analyze what types of damages are recoverable.

While the *Hanumadass* court indicated that breach of fiduciary duty and negligence belong under a larger umbrella of causes of action that could all be called "legal malpractice," the court in *Majumdar v. Lurie*[34] took a step in the opposite direction, attempting to further distinguish the two causes of action. In *Majumdar*, the court made the next logical step beyond the framework set forth in the *dicta* in the *Metrick* decision. It was noted in *Metrick* that the factual allegations did not rise to the level of breach of fiduciary duty, and therefore, it was appropriate to dismiss that cause of action while the cause of action for legal malpractice was allowed to proceed.[35]

The *Majumdar* case involved a physician who was a shareholder and director of a professional medical corporation. While still a shareholder, officer and director, the plaintiff contacted the defendant attorneys and requested that they represent him in forming a medical corporation independent of the first corporation, Bel-Austin.[36] The defendants did so, and Amalendu Majumdar, M.D., S.C. (AMSC) was incorporated, with the corporate purpose of engaging in the unrestricted practice of medicine—the same purpose as contained in Bel-Austin's articles of incorporation.[37] The plaintiff became the sole shareholder, officer and director of AMSC.[38] Through AMSC, he eventually began seeing patients outside of his relationship with Bel-Austin, and Bel-Austin's other shareholder, Dr. Bruce Zummo, then used the defendant attorneys—as corporate counsel for Bel-Austin—to send a letter to the plaintiff, outlining a proposed acquisition of the plaintiff's interest in Bel-Austin.[39] Using other counsel, the plaintiff ultimately filed a cause of action against Bel-Austin and Dr. Zummo, who then responded with their own action against the plaintiff, alleging that he breached his fiduciary duty as an officer and director of Bel-Austin by engaging in direct competition and diverting fees from it to himself.[40]

After that case ended with the plaintiff paying a settlement and assigning all of his Bel-Austin stock to Zummo, the plaintiff brought a cause of action for legal malpractice and breach of fiduciary duty, as well as breach of contract, against the defendant attorneys for failing to advise him of his fiduciary duties and failing to advise him of his conflict of interest in incorporating AMSC.[41] In determining if the trial court's granting of the defendant's motion to dismiss was proper, the Appellate Court, First District cited *Metrick* to note that not all legal malpractice actions rise to the level of a breach of fiduciary duty.[42] It then went on to emphasize that the plaintiff pled the same operative facts in support of both the actions for legal malpractice and breach of fiduciary duty and further alleged that the same actions of the defendant attorneys resulted in the same injury to the client. Therefore the court found that the actions were identical and the breach of fiduciary duty count was dismissed as duplicative.[43]

As in *Majumdar*, the court in *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd* also dismissed a count of breach of fiduciary duty as duplicative of a count of legal malpractice.[44] The *Fabricare Equipment Credit Corp.* case involved the corporate plaintiff filing its cause of action against the defendant attorneys due to alleged legal malpractice and breach of fiduciary duties in their representation of the plaintiff with regard to the negotiation of a non-compete agree-

ment and subsequent litigation involving the non-compete agreement.[45] In each of these cases, it was the breach of fiduciary duty claim that was ultimately dismissed. In *Fabricare Equipment*, the court cited *Majumdar* as the basis for its dismissal of the breach of fiduciary duty claim with the rather simple analysis that if the operative facts supporting the breach of fiduciary duty claim were the same as those supporting the legal malpractice claim, the breach of fiduciary duty claim is then duplicative and must be dismissed.[46] What was missing in each of these opinions was any analysis of whether the actions alleged arose to the level of breach of fiduciary duty either in addition to, or in lieu of, the malpractice claim. Reviewing these cases through the lens of the language in *Metrick*, it appears that these cases involved relatively simple issues regarding errors by the defendant attorneys, and were not examples of attorneys who were unfaithful, dishonest or self-dealing.

III. A Breach of Fiduciary Duty is Above and Beyond Legal Malpractice

The cases thus far examined primarily deal with factual situations in which plaintiffs allege failures in the defendant attorneys' representation of their interests, including a failure to prosecute a case (*Calhoun*), a failure to inform (*Hanumadass*), a failure to advise or disclose (*Metrick* and *Majumdar*), and a failure to investigate (*Fabricare Equipment*). These allegations are all within the ambit of the attorneys' professional legal performance. If successfully proven, all would be examples of legal malpractice, as the actions amount to negligence due to the fact the attorneys' actions failed to meet the standard of care required. A breach of fiduciary duty, though, rises above the realm of simple negligence in the representation of a client, and may be more appropriately characterized as misconduct. Perhaps the most all-encompassing manner in which to describe the actions or omissions that would rise to the level of breach of fiduciary duty is that of an attorney who acts in his or her own self-interest in lieu of the interest of the client.

In the course of their professional dealings, an attorney who places personal interests above the interests of the client is in breach of their fiduciary duty by reason of that inherent conflict.[47] In *Doe v. Roe*, the plaintiff retained the defendant attorney to represent her in a divorce action.[48] According to her complaint, the defendant coerced the plaintiff into an intimate relationship with him while the dissolution proceedings were ongoing.[49] When the plaintiff's former husband walked in on the plaintiff and her attorney in a compromising position in her home, he was outraged and later claimed that he would not continue to pay any of the plaintiff's attorney's fees.[50] According to the plaintiff, the defendant attorney ultimately declined to pursue the plaintiff's right to seek reimbursement of her attorney fees from her former husband out of fear of personal embarrassment and potential professional discipline.[51] The court found that on so doing, the defendant placed his own self interest above the interests of the client.[52]

The Appellate Court, Second District encountered similar factual allegations regarding an intimate relationship between an attorney and client in *Kling v. Landry*, and sought to clarify the First District's decision in *Doe* by noting that the intimate relationship between attorney and client in and of itself was not actionable conduct.[53] Rather, the violation of the fiduciary duty would lie in making the legal representation contingent upon an intimate relationship, compromising the client's interests as a result of the relationship or using information obtained in the representation of the client which would suggest

(Continued on next page)

A breach of fiduciary duty, though, rises above the realm of simple negligence in the representation of a client, and may be more appropriately characterized as misconduct. Perhaps the most all-encompassing manner in which to describe the actions or omissions that would rise to the level of breach of fiduciary duty is that of an attorney who acts in his or her own self-interest in lieu of the interest of the client.

that the client might be unusually vulnerable to the suggestion of such an intimate relationship.[54]

An additional, and perhaps more common, example of improper self-interested action by an attorney is that of fraudulent or excessive billing. Such actions clearly violate the fiduciary duty owed to the client.[55] In *Cripe v. Leiter*, the allegations of the attorney were that he billed outrageously excessive and unreasonable fees that bore no relationship to the actual time spent in representation of the plaintiff.[56] Fraudulent charging by an attorney is an unmistakable example of placing the interests of the attorney before the interests of the client.

IV. Ensuring that the Correct Cause of Action is Applied to the Factual Allegations

There has been an evolution in the analysis conducted by Illinois courts in cases involving the causes of action for legal malpractice and breach of a fiduciary duty to a point where there appears to be an unstated litmus test, that if met, would allow for the co-existence of these two causes of action. Based on the opinions to date, a reasonable recitation of this yet-unspecified litmus test appears to be as follows: If the factual allegations and damages are duplicative and do not rise to the level of unfaithfulness, dishonesty, bad faith, conflict of interest or self-dealing, then Illinois courts will reject the breach of fiduciary duty claim, as the factual allegations must then in some manner illustrate an error on the part of the defendant attorney in the discharge of his or her duties while representing the client. If, on the other hand, the factual allegations are duplicative and rise to the level of misconduct, dishonesty or self-interest, then breach of fiduciary duty is the appropriate cause of action, as the allegations would illustrate ethical misconduct or a pattern of behavior that is beyond simple error or negligence in the legal performance. The third option is for both causes of action to stand, albeit due to a more stringent analysis than that applied in *Coughlin*. Illinois courts have found that it is *possible* to plead separate counts alleging both professional negligence and a breach of fiduciary duty.[57] But the *same operative facts* and the *same injury to the client* cannot be alleged in support of each.[58] The aforementioned third option would have to support a breach of fiduciary duty claim with operative facts revealing misconduct by the attorney, in addition to separate and distinct operative facts that also reveal errors or negligence related to the legal work conducted by the attorney in the representation of the plaintiff.

While this third "option" is yet to have been illustrated by an Illinois court, it is interesting to note that the most convincing example of such an analysis was set forth by the United States District Court for the Northern District of Illinois in the unreported opinion of *Eckmann v. Diedrich*.[59] While this decision carries no weight in Illinois because it is not reported and it is a federal court's interpretation of Illinois law, the analysis is applicable, if only as an illustration. Interpreting Illinois law as set forth in *Majumdar*, the federal district court properly noted that when the same operative facts support actions for legal malpractice and breach of fiduciary duty resulting in the same injury to the client, the actions are identical and the latter should be dismissed as duplicative. *Eckmann* was found not to be such a case. In that matter, the plaintiff alleged that the defendant committed legal malpractice by failing to fully inform the plaintiff of her rights to proceed under the settlement in a suit brought by her against a school district that was negotiated by the defendant, as well as by negligently miscalculating the amount owed to her in her settlement.[60] Additionally, the plaintiff alleged that the defendant breached his duty of loyalty (i.e. fiduciary duty) when he wrongfully retained for himself portions of the settlement checks to which he was not entitled.[61] The operative facts pled were closely related, yet there were facts that would indepen-

If the factual allegations and damages are duplicative and do not rise to the level of unfaithfulness, dishonesty, bad faith, conflict of interest or self-dealing, then Illinois courts will reject the breach of fiduciary duty claim, as the factual allegations must then in some manner illustrate an error on the part of the defendant attorney in the discharge of his or her duties while representing the client.

dently fulfill the elements of each cause of action. Despite its status as an unreported federal case interpreting Illinois law, *Eckmann* provides an example of how these two independent, but related, causes of action may co-exist.

V. Conclusion

While there is undisputedly a relationship between the causes of action for legal malpractice and breach of fiduciary duty, the defense practitioner must be aware that they are two separate and distinct causes of action. Each requires operative facts that support its own elements independent of the other. The key to dismissing the duplicative cause of action is to initially focus on the factual allegations, regardless of the theory of recovery pled by the plaintiff. In ascertaining the nature of the factual assertions made against the defendant attorney, the proper remedy or remedies should become apparent. Illinois courts' analysis of the relationship between these two causes of action has evolved to the point where a well-argued motion to dismiss, supported by a small number of key decisions, can demonstrate to a trial court that a complaint is improperly pled, and potentially result in the court elminating a plaintiff's cause of action early in the proceedings.

Endnotes

[1] *Kehoe v. Saltarelli, et al.*, 337 Ill. App. 3d 669, 676, 786 .E.2d 605, 612, 272 Ill.Dec. 66, 73 (1st Dist. 2003).

[2] *Calhoun v. Rane*, 234 Ill. App. 3d 90, 94, 599 N.E.2d 1318, 1321, 175 Ill.Dec. 304, 307 (1st Dist. 1992).

[3] *Calhoun*, 234 Ill. App. 3d at 94.

[4] *Id.*

[5] *Neade v. Portes, et al.*, 193 Ill.2d 433, 444, 739 N.E.2d 496, 502, 250 Ill.Dec. 733, 739 (2000).

[6] *Kling v. Landry*, 292 Ill. App. 3d 329, 335-336, 686 N.E.2d 33, 39, 226 Ill.Dec. 684, 690 (2nd Dist. 1997).

[7] *Kling*, 292 Ill.App.3d at 336.

[8] *Id.*

[9] *Doe v. Roe*, 289 Ill. App. 3d 116, 122-123, 681 N.E.2d 640, 645, 224 Ill.Dec. 325, 330 (1st Dist. 1997).

[10] *Calhoun*, 234 Ill. App. 3d at 91.

[11] *Id.*

[12] *Id.* at 92.

[13] *Id.*

[14] *Id.* at 93.

[15] *Id.* at 94.

[16] *Id.*

[17] *Coughlin v. SeRine* 154 Ill. App. 3d 510, 514-515, 507 N.E.2d 505, 508-509, 107 Ill.Dec. 592, 595-596 (1st Dist. 1987).

[18] *Coughlin*, 154 Ill. App. 3d at 514-515.

[19] *Id.* at 511.

[20] *Id.* at 512.

[21] *Id.* at 513.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 514-515.

[25] *Metrick v. Chatz*, 266 Ill. App. 3d 649, 639 N.E.2d 198, 203 Ill.Dec. 159 (1st Dist. 1994).

[26] *Metrick*, 266 Ill. App. 3d at 656.

[27] *Id.*

(Continued on next page)

[28] *Id.*

[29] *Id.*

[30] *Hanumadass v. Coffield, Ungaretti and Harris*, 311 Ill. App. 3d 94, 99-100, 724 N.E.2d 14, 18, 243 Ill.Dec. 705, 709 (1st Dist. 1999).

[31] *Hanumadass*, 311 Ill. App. 3d at 96.

[32] *Id.* at 97.

[33] *Id.* at 98.

[34] *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 653 N.E.2d 915, 210 Ill.Dec. 720 (1st Dist. 1995).

[35] *Metrick*, 266 Ill. App. 3d at 656.

[36] *Majumdar*, 274 Ill. App. 3d at 268-269.

[37] *Id.* at 269.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 273-274.

[43] *Id.*

[44] *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 787, 767 N.E.2d 470, 263 Ill.Dec. 19 (1st Dist. 2002).

[45] *Fabricare Equipment*, 328 Ill. App. 3d at 787.

[46] *Id.*

[47] *Doe v. Roe*, 289 Ill. App. 3d 116, 122, 681 N.E.2d 640, 645, 224, Ill.Dec. 325, 330 (1st Dist. 1997).

[48] *Doe*, 289 Ill. App. 3d at 123.

[49] *Id.* at 119.

[50] *Id.* at 121.

[51] *Id.*

[52] *Id.*

[53] *Kling*, 292 Ill. App. 3d at 337.

[54] *Id.*

[55] *Cripe v. Leiter*, 184 Ill.2d 185, 198, 703 N.E.2d 100, 107, 234 Ill.Dec. 488, 495 (1998).

[56] *Cripe*, 184 Ill.2d at 189.

[57] *Calhoun*, 234 Ill. App. 3d at 95.

[58] *Fabricare Equipment*, 328 Ill. App. 3d at 791.

[59] *Eckmann v. Diedrich*, No. 00 C 50227, 2001 WL 717489 (N.D.Ill. June 26, 2001).

[60] *Id.*

[61] *Id.*