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TIME WARPS AND IDENTITY CRISES: MUDDLING THROUGH THE MISNOMER/MISIDENTIFICATION MESS

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INTRODUCTION

This article addresses two statutory provisions of the Illinois Code of Civil Procedure: the "misnomer" provision, paragraph 2-401(b),¹ and the "misidentification" provision, paragraph 2-616(d).² Both provisions are intended to cure pleading errors regarding the naming of defendants³ after the expiration of the statute of limitations. However, the misnomer provision simply cures spelling errors while the misidentification provision permits the post-limitations joinder of a new party. Although the statutes are facially dissimilar and the courts purport to construe each independently, the factors which distinguish one circumstance from the

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1. As of January 1, 1993, the Illinois Revised Statutes were replaced with the Illinois Compiled Statutes (ILL. COMP. STAT.), a reorganization and renumeration of the Illinois statutes, adopted pursuant to P.A. 87-1005, effective September 3, 1992. The "misnomer" provision, formerly ILL. REV. STAT. ch. 110, para. 2-401(b) (1991) is now cited as 735 ILL. COMP. STAT. 5/2-401(b) (1992). For simplicity, this provision will be referred to as ¶ 2-401(b) in the text. For a history of ¶ 2-401, see Albert E. Jenner, Jr., et al., *Historical and Practice Notes [of 2-401]*, ILL. REV. STAT. ch. 110, para. 2-401 (Smith-Hurd 1983) [hereinafter *Historical and Practice Notes of 2-401*].

2. See 735 ILL. COMP. STAT. 5/2-616(d) (1992) (ILL. REV. STAT. ch. 110, para. 2-616(d) (1991)). For the sake of clarity, the provision will be referred to simply as ¶ 2-616(d). For a history of prior laws see Albert E. Jenner, Jr., et al., *Historical and Practice Notes [of 2-616]*, ILL. REV. STAT. ch. 110, para. 2-616 (West 1983 and Supp. 1993) [hereinafter *Historical and Practice Notes of 2-616*].

Perhaps of interest to the reader, the Illinois Code of Civil Procedure does not provide a truly adequate means of identifying this provision. Thus, the authors have borrowed the term "misidentification" from federal statute, FED. R. CIV. P. 15(c), and those corresponding committee and advisory notes which use the term as it relates to failure to name the real party in interest.

3. For an interesting discussion of situations where defendants were added to suits under special circumstances, see *Changes in Party After Statute of Limitations Has Run*, 8 A.L.R.2D 6, 29 (1949) (discussing adding defendants as a necessary party, after acquiring an interest *pendente lite*, as a joint obligor, additional tortfeasor, successor in title, as additional party in proceedings *in rem*, or on his own application).

other are vague and confused and frequently overlap. An improper application of misnomer is usually of no consequence to the outcome of the suit, whereas an improper application of misidentification will bar plaintiff's redress against the defendant. To avoid the severe penalty imposed by the improper use of misidentification, lawyers frequently argue misidentification and misnomer as alternatives to each other. Some courts have exacerbated the confusion by skewing their analyses to protect favored parties who are on the wrong side of the applicable provision. As a result, Illinois case law is now permeated with the confusion generated by the uses and misuses of these two provisions.

Sections I and II of this article analyze the case law arising under the misnomer and misidentification provisions. Section III addresses specific areas of confusion and sets forth guidelines which categorize various situations appropriate for either the misnomer or misidentification provisions. Section IV proposes statutory amendments which are intended to resolve the problems caused by the current statutory scheme.

I. MISNOMER

Paragraph 2-401(b) of the Illinois Code of Civil Procedure provides: "Misnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires."⁴ Courts have limited the scope of the term "misnomer"⁵ to two specific situations: the correction of spelling errors⁶ and the

4. 735 ILL. COMP. STAT. 5/2-401(b) (ILL. REV. STAT. ch. 110, para. 2-401(b)).

5. Misnomer is defined as "a mistake in name." BLACK'S LAW DICTIONARY 1000 (6th ed. 1990). Unfortunately, this common meaning has probably contributed greatly to the confusion regarding interpretation of the term and application to case law. The only Illinois Supreme Court guidance presently available is the comment that misnomer signifies "misspelling" rather than misnaming. *Vaughn v. Speaker*, 126 Ill. 2d 150, 158, 533 N.E.2d 885, 888 (1988), *cert. denied*, 492 U.S. 907 (1989); *see also Historical and Practice Notes of 2-401*, *supra* note 1 (stating that the misnomer provision in ¶ 2-401(b) does not include naming the wrong party, which is provided for in ¶ 2-616). Limiting misnomer's definition to refer to the "misspelling" of a proper party's name, rather than the naming of a wrong party makes the most sense since a separate provision covering the "mishnaming" of a party already exists. 735 ILL. COMP. STAT. 5/2-616(d) (ILL. REV. STAT. ch. 110, para. 2-616(d)). This theory is further supported by the relative stringency of each provision: ¶ 2-401(b)'s requirements are very liberal, in keeping with the correction of simple spelling errors; on the other hand, ¶ 2-616(d)'s requirements are numerous and strict, in an effort to protect innocent parties. For a discussion of the requirements of the two statutes, see *infra* notes 7-187 and accompanying text.

6. For example, plaintiff serves the real party in interest but misspells the party's surname in the complaint and/or the summons. *See, e.g., Thielke v. Osman Constr. Corp.*, 129 Ill. App. 3d 948, 473 N.E.2d 574 (1st Dist. 1985) (permitting service of summons after plaintiff erroneously spelled Osman as Osmond).

designation of the real party in interest by reference to an incorrect name.⁷ Paragraph 2-401(b) does not require the plaintiff to re-serve the real party in interest, but it does allow an action commenced against a party of one name to be continued against the same party subsequently designated by another name.⁸ The linchpin of the misnomer provision is the naming of the real party in interest in the original action. If the plaintiff named the real party in interest, even though incorrectly, misnomer allows the error to be corrected at any time, before or after judgment. On the other hand, if the plaintiff did not name the real party in interest in the original action but later seeks to add that party, then the issue changes from misnomer to joinder and is governed by the misidentification provision, paragraph 2-616(d),⁹ which must take into account the applicable statute of limitations. The distinction between the correction of a current party's name and the addition of a new party comports with the rationale underlying paragraph 2-401(b), which is "to avoid dismissal of cases on a purely technical basis and to allow the action to reach its substantive merits."¹⁰

It is important to note that paragraph 2-401(b) does not avoid the statute of limitations. The plaintiff must still file the action within the applicable limitations period. However, if paragraph 2-401(b) applies, actual service of summons after the expiration of the statute of limitations will not bar an amendment.¹¹ This is a criti-

7. See, e.g., *Hatcher v. Kentner*, 120 Ill. App. 3d 571, 458 N.E.2d 131 (3d Dist. 1983) (allowing plaintiff to amend her complaint after erroneously naming defendant as "Danelle Kenter", when the true party was "Earline Kenter"). For a detailed discussion of the *Hatcher* case, see *infra* notes 34-41 and accompanying text.

8. See, e.g., *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991) (allowing misnomer to substitute individual in place of corporation); *Greil v. Travelodge Int'l, Inc.*, 186 Ill. App. 3d 1061, 541 N.E.2d 1288 (1st Dist. 1989) (allowing misnomer to correct an improper use of corporate name); *Thielke*, 129 Ill. App. 3d 948, 473 N.E.2d 574 (allowing amendment of the complaint after the statute of limitations had expired to correct a misspelling); *Hatcher*, 120 Ill. App. 3d 571, 458 N.E.2d 131 (allowing misnomer to be used to correct an error in the defendant's first name); *Griffith v. Pincham*, 67 Ill. App. 3d 316, 384 N.E.2d 870 (1st Dist. 1978) (holding that a police report identified the proper defendant, thereby precluding the plaintiff from serving summons after the statute of limitations expired); *Borkoski v. Tumilty*, 52 Ill. App. 3d 839, 368 N.E.2d 136 (3d Dist. 1977) (allowing plaintiff to use misnomer to amend complaint to name a municipal corporation doing business as a hospital); *Ingram v. MFA Ins. Co.*, 18 Ill. App. 3d 560, 309 N.E.2d 690 (2d Dist. 1974) (using appellate authority to correct a complaint naming an insurance company under its trade name).

9. 735 ILL. COMP. STAT. 5/2-616(d) (ILL. REV. STAT. ch. 110, para. 2-616(d)).

10. *Greil*, 186 Ill. App. 3d at 1066, 541 N.E.2d at 1291.

11. In general, the courts have held that so long as the summons is served with "due diligence," as defined under ILL. S.CT. RULE 103(b) (1971) (ILL. REV. STAT. ch. 110A, para. 103(b) (1991)), the claim will not be barred even if served after the expiration of the statute of limitations. This is assuming, of course, that a genuine misnomer situation has occurred. See *Barbour v. Fred Berglund and Sons, Inc.*, 208 Ill. App. 3d 644, 567 N.E.2d 509 (1st Dist. 1990) (holding that

cally important feature of misnomer since a great many paragraph 2-401(b) amendments are sought to cure naming problems arising in complaints filed at the eleventh hour.¹² Illinois case law has steadfastly held that if the plaintiff files the complaint within the limitations period and exercises due diligence in serving the summons, then, if otherwise appropriate, paragraph 2-401(b) can be applied to cure the misnomer and salvage the claim.¹³

*Thielke v. Osman Construction Corp.*¹⁴ is a classic example of the proper application of the misnomer statute. The plaintiff was injured while working at a construction site. Nine days before the expiration of the statute of limitations, the plaintiff filed a complaint naming Osmond & Associates, Inc. as one of the defendants. After the statute expired, the plaintiff learned that the defendant's correct name was Osman & Associates, Inc. and moved to amend the complaint pursuant to paragraph 2-401(b). The defendant objected to the amendment, arguing that the plaintiff was really attempting to join a new party after the running of the statute of

misnomer was not proper when plaintiff served an improper defendant not involved in the original incident giving rise to the cause of action); *Kern v. Uregas Serv. of W. Frankfort, Inc.*, 90 Ill. App. 3d 182, 412 N.E.2d 1037 (5th Dist. 1980) (holding that an amendment correcting the name of a served defendant was proper in light of the plaintiff's efforts to locate the correct party). Of course, the question of how much diligence is due, or how much time a plaintiff has to serve beyond the expiration of the limitations period is determined on a case by case basis. In one case, for example, the court felt that given the circumstances, service coming *seven years* after the expiration of the limitations period was still acceptable. *Shiner v. Friedman*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (1st Dist. 1987) (allowing plaintiff to amend complaint to correct inadvertent error in naming proper parties).

12. What frequently happens is that a plaintiff, filing an eleventh hour claim, is operating under an erroneous belief as to the spelling of defendant's name and, thus, cannot locate the party in time to serve it within the statute of limitations. Subsequently the plaintiff learns of the error during discovery proceedings. The plaintiff seeks to amend its complaint and, at this point, the defendant makes a motion for summary judgment, arguing that a non-existent party had been served and that the amended complaint is now time-barred. *See, e.g., Barbour*, 208 Ill. App. 3d 644, 567 N.E.2d 509 (holding that misnomer was not applicable to complaint filed three days before the expiration of the statute of limitations that named wrong party at wrong address); *Turner v. Cosmopolitan Nat'l Bank*, 180 Ill. App. 3d 1022, 536 N.E.2d 806 (1st Dist. 1989) (stating that defendant, under normal circumstances, could invoke the statute of limitations defense where the trustee was served with the complaint five days after it was filed which was on the day the statute of limitations expired); *Thielke*, 129 Ill. App. 3d 948, 473 N.E.2d 574 (applying misnomer provision to correct a misspelling in a complaint filed nine days before the statute of limitations lapsed).

13. *See, e.g., Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991) (allowing use of misnomer after real party in interest was served under a wrong name and plaintiff promptly corrected the error); *Greil*, 186 Ill. App. 3d 1061, 541 N.E.2d 1288 (applying misnomer where plaintiff named a non-entity in the complaint but served an agent of the real party in interest and quickly amended the complaint after learning of the error). For a discussion of the role due diligence plays in the misnomer process, see *supra* note 11.

14. *Thielke*, 129 Ill. App. 3d 948, 473 N.E.2d 574.

limitations, pursuant to paragraph 2-616, rather than correcting the misnomer of an otherwise properly identified defendant, pursuant paragraph 2-401(b). To determine whether the plaintiff was seeking name correction or joinder, the court had to determine, first, who the plaintiff intended to sue and, second, whether the party sued was the real party in interest to the suit. As to the first question, the court found that the plaintiff intended to sue the general contractor and owner of the real estate where the injury occurred, and that this intent was borne out by the pleadings. As to the second question, the court found that service had been directed to Osman's proper address. Accordingly, the court held that misnomer applied and allowed the post-limitations amendment.¹⁵

By way of contrast, *Barbour v. Fred Berglund & Sons*¹⁶ is a well reasoned opinion which rejected a misnomer analysis in favor of misidentification and, in so doing, cost the plaintiff access to the court. The plaintiff filed a personal injury action within three days of the running of the statute of limitations naming Bergman Construction of 3116 River Road, River Grove, Illinois, as the only defendant. After the expiration of the statute of limitations, the plaintiff moved to quash the Bergman summons and amend the complaint to designate Fred Berglund & Sons, Inc. of 8410 South Chicago Avenue, Chicago, as the defendant. Fred Berglund & Sons, Inc. filed a motion to dismiss, arguing that the plaintiff's complaint did not misname the real party in interest, but rather, named the wrong party and, therefore, could not relate back to the date of the original complaint. The court noted that "[t]he intent of the plaintiff is a pivotal inquiry into the determination of whether a particular case involves misnomer or mistaken identity."¹⁷ The plaintiff

15. *Id.* Of note, there is at least one case which appears to run contrary to the majority's interpretation of the misnomer provision. The Illinois Appellate Court for the First District stated:

[M]isnomer is recognized where plaintiff sues and serves the right party but by the wrong name, as opposed to naming the wrong party [citations omitted]. The pivotal determination is whether plaintiff actually serves the real party in interest with a copy of the complaint and summons, *within the time limits allowed by law*, so that actual notice of the complaint that has been lodged against it and notice of the need to respond has been given to that party in interest, albeit incorrectly named [citations omitted].

Yedor v. Centre Properties, Inc., 173 Ill. App. 3d 132, 137-38, 527 N.E.2d 414, 417 (1st Dist. 1988) (emphasis added). While the facts in *Yedor* did not require the court to discuss its position in detail regarding service of summons, *Yedor* appears to hold that service must be had upon a party *within* the statute of limitations, even in a misnomer situation. *Yedor* is, however, in the minority. It appears that the court may have confused misnomer with the more stringent requirements of the misidentification provision. See 735 ILL. COMP. STAT. 5/2-616(d)(1) and (4) (ILL. REV. STAT. ch. 110, para. 2-616(d)(1) and (4)) (requiring that service be had upon the real party in interest, his or her agent, or partner, before the expiration of the limitations period).

16. *Barbour*, 208 Ill. App. 3d 644, 567 N.E.2d 509.

17. *Id.* at 648, 567 N.E.2d at 512.

insisted that logically he could not have intended to sue the wrong party and that he had always intended to sue the general contractor. Nevertheless, the court sided with the defendant, finding that Bergman Construction Company was not the real party in interest and that "the real party in interest was neither named nor served until approximately six months after the statute of limitations had run."¹⁸ The court concluded that the misnomer statute could not be invoked to cure the error and salvage the cause of action.¹⁹

A. The Liberal Trend

1. The Real Party In Interest Factor

Most misnomer cases address and split on the issue of the legal capacity of the defendant to be sued. In a prototypical situation such as the *Barbour* case, a plaintiff mistakenly designates a defendant by a name which is not a recognized legal entity but does not learn of the error until after the expiration of the statute of limitations. Since, under Illinois law, suits against non-entities are void *ab initio*,²⁰ the court will dismiss such complaints unless they can be saved by some countervailing factor.²¹ However, under a liberal line of cases starting in 1974 and continuing to the present, if the non-entity by one name is the real party in interest by another name, then the error can be characterized as misnomer and the cause of action saved.²² For example, in the seminal case of *Ingram v. MFA Insurance Co.*,²³ the plaintiff received a default judgment

18. *Id.* at 650, 567 N.E.2d at 513.

19. *Id.* at 652, 567 N.E.2d at 514.

20. In a case where the plaintiff brought suit against a non-existent entity, the Illinois Appellate Court for the First District stated:

Where a suit is brought against an entity which is legally non-existent, the proceedings are void *ab initio*, and its invalidity may be called to the court's attention at any stage of the proceedings. A complaint which does not name a party legally in existence is in reality a nullity as to that party [citations omitted].

Tyler v. J.C. Penney Co., 145 Ill. App. 3d 967, 972-73, 496 N.E.2d 323, 327 (4th Dist. 1986).

21. "These general jurisdictional rules are expressly excepted in the case of misnomer." *Cohen*, 197 Ill. App. 3d at 753, 555 N.E.2d at 62. See also 735 ILL. COMP. STAT. 5/2-401(b) (ILL. REV. STAT. ch. 110, para. 2-401(b)). The Illinois Appellate Court in *Cohen* further stated that "[a] judgment is valid where circumstances indicate the individual actually served notice is the person intended to be sued, even though the issued process does not refer to him by his correct name." *Cohen*, 197 Ill. App. 3d at 753, 555 N.E.2d at 62 (citing *Ingram v. MFA Ins. Co.*, 18 Ill. App. 3d 560, 566, 309 N.E.2d 690, 695 (2d Dist. 1974)).

22. See *infra* notes 23-35 and accompanying text for a discussion of this line of cases: *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991); *Greil v. Travelodge Int'l, Inc.*, 186 Ill. App. 3d 1061, 541 N.E.2d 1288 (1st Dist. 1989); *Hatcher v. Kentner*, 120 Ill. App. 3d 571, 458 N.E.2d 131 (3d Dist. 1983); *Borkoski v. Tumilty*, 52 Ill. App. 3d 839, 368 N.E.2d 136 (3d Dist. 1977).

23. *Ingram v. MFA*, 18 Ill. App. 3d 560, 309 N.E.2d 690 (2d Dist. 1974).

against an insurance company sued in its trade name. The insurance company attempted to vacate the default judgment by arguing that since the plaintiff had sued a nonexistent legal entity, the judgment was void *ab initio*. The court rejected the defendant's argument, stating: "[w]here summons is served upon a party and the circumstances are such as to indicate that he is the person intended to be sued, he is subject to the judgment even though the process and judgment do not refer to him by his correct name."²⁴

To determine if the defendant was, indeed, the party the plaintiff had intended to sue, the court found that: (i) the person served was the agent of the real party in interest; (ii) the real party in interest itself used its trade name in the regular course of business; and, (iii) the real party in interest had participated in the litigation under its trade name, thereby depriving the plaintiff of notice that it had sued the defendant in the wrong name. Finding the plaintiff's use of and reliance upon the defendant's trade name to be reasonable, the court invoked its appellate authority to treat the error as a misnomer.²⁵

The *Ingram* analysis and holding were applied in *Borkoski v. Tumilty*,²⁶ *Hatcher v. Kentner*,²⁷ *Greil v. Travelodge International, Inc.*,²⁸ and *Ellis v. Borisek*.²⁹ In each of these cases, the complaints initially named defendants who lacked capacity to be sued. After the expiration of the statute of limitations the complaints were amended pursuant to the minomer provision because the real party in interest had been sued within the limitations' period. Each case found that the plaintiff had intended to sue the real party in interest;³⁰ the party served was either an agent of the real party in interest³¹ or an identity of interest existed between the party served and the real party in interest such that the plaintiff's error was reason-

24. *Id.* at 566, 309 N.E.2d at 695.

25. *Id.* at 566-67, 309 N.E.2d at 696 (Illinois Appellate Court using the authority granted it by ILL. S. CT. RULE 362(f) (ILL. REV. STAT. ch. 110A, para. 362(f) (1991))).

26. *Borkoski*, 52 Ill. App. 3d 839, 368 N.E.2d 136. See *infra* notes 27-35. While estoppel may not specifically have been argued or addressed in the following cases, the authors believe that estoppel influences underly each of these cases.

27. 120 Ill. App. 3d 571, 458 N.E.2d 131 (3d Dist. 1983).

28. 186 Ill. App. 3d 1061, 541 N.E.2d 1288 (1st Dist. 1989).

29. 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991).

30. *Id.* at 52, 580 N.E.2d at 902; *Greil*, 186 Ill. App. 3d at 1066, 541 N.E.2d at 1291; *Hatcher*, 120 Ill. App. 3d at 575, 458 N.E.2d at 133-34; *Borkoski*, 52 Ill. App. 3d at 842, 368 N.E.2d at 138.

31. *Ellis*, 220 Ill. App. 3d at 52, 580 N.E.2d at 902; *Greil*, 186 Ill. App. 3d at 1066, 541 N.E.2d at 1291; *Hatcher*, 120 Ill. App. 3d at 575, 458 N.E.2d at 133-34; *Borkoski*, 52 Ill. App. 3d at 842, 368 N.E.2d at 138.

able;³² and, the plaintiff had sought to correct the error with due diligence.³³

2. The Estoppel Factor

*Hatcher v. Kentner*³⁴ and *Ellis v. Borisek*³⁵ present an interesting variation of the prototypical case. In these two cases, the third district recognized the plaintiffs' arguments that the defendants should be estopped to assert a statute of limitations defense since the defendants had participated in the litigation under the incorrect name until after the statute had run.

Hatcher was the first case to recognize the estoppel exception to the statute of limitations defense. In *Hatcher*, the plaintiff was injured by a car driven by Earline Kentner but owned by her husband, Daniel. Two days before the running of the statute of limitations, the plaintiff filed a complaint naming "Danelle" Kentner as the defendant. The answer admitted that "Danelle" Kentner was the owner and operator of the vehicle. The defendant also responded to a document production request and interrogatories under the name Danelle Kentner. Once the error was discovered, the plaintiff filed a motion to amend her complaint to change the defendant's name from Danelle to Earline. The trial court denied this motion and, instead, permitted the defendant to amend her answer to deny that Danelle Kentner was the owner and operator of the vehicle. Thereafter, the defendant prevailed on a motion for summary judgment.³⁶

On appeal, the plaintiff argued that the defendant should have been estopped to deny that the error was a misnomer rather than a misidentification because she had "participated in the error itself."³⁷ The court found that, although never served, the complaint had been directed to a female whose last name was Kentner, who resided at the designated address, and who drove the designated car on the designated day and time.³⁸ The court found that there could be no reasonable confusion that the complaint had designated Mrs. rather than Mr. Kentner as the defendant. Accordingly, the court

32. *Ellis*, 220 Ill. App. 3d at 52, 580 N.E.2d at 902; *Greil*, 186 Ill. App. 3d at 1065-66, 541 N.E.2d at 1290-91; *Hatcher*, 120 Ill. App. 3d at 575, 458 N.E.2d at 133-34; *Borkoski*, 52 Ill. App. 3d at 842, 368 N.E.2d at 138.

33. *Ellis*, 220 Ill. App. 3d at 53, 580 N.E.2d at 902; *Greil*, 186 Ill. App. 3d at 1066, 541 N.E.2d at 1291.

34. *Hatcher*, 120 Ill. App. 3d 571, 458 N.E.2d 131.

35. *Ellis*, 220 Ill. App. 3d 48, 580 N.E.2d 899.

36. *Hatcher*, 120 Ill. App. 3d at 573, 458 N.E.2d at 132.

37. *Id.*

38. *Id.* The court listed these factors to demonstrate that defendant had notice of the suit and was able to defend against it. *Id.*

deemed the error a misnomer rather than a misidentification.³⁹ Furthermore, the court noted that the defendant had participated in and perpetuated the error by filing a responsive pleading "which failed to take issue with the alleged identity of the defendant."⁴⁰ Although never specifically referring to "estoppel," the *Hatcher* court utilized the estoppel concept to salvage a misnomer action in which the error was the naming of a non-existent person rather than the misspelling of the correctly identified defendant.⁴¹

In *Ellis v. Borisek*,⁴² a dram shop case, the complaint originally named a tavern called Friday's of Peru, Ltd. as the defendant. The complaint was served upon Alan Borisek, the owner of the tavern and liquor license. Unknown to the plaintiff, Friday's of Peru, Ltd. had undergone involuntary dissolution several years earlier but was still operated by Borisek under its former corporate name. After the expiration of the statute of limitations, the plaintiff amended the complaint to designate "Alan Borisek d/b/a Friday's of Peru, Ltd." as the proper defendant. As in *Hatcher*, although the plaintiff had sued a non-entity, the court characterized the error as misnomer rather than misidentification, based in part on its findings that the defendant had participated in the litigation under the name "Friday's of Peru, Ltd.," failed to raise the identity issue in its answer, and made no attempt to correct the error for another six months thereafter. The court also took into account the plaintiff's diligence in correcting the error and the fact that, as the real party in interest, Alan Borisek obviously had been aware that the action was pending and that there was no legal entity named Friday's of Peru, Ltd.⁴³

Sandwiched between *Hatcher* and *Ellis*, but recognized by neither, was the Illinois Supreme Court case of *Vaughn v. Speaker*,⁴⁴ which expressly condoned the offensive use of estoppel

39. *Id.* at 575, 458 N.E.2d at 133-34. In further support of her position, plaintiff argued that she used female gender pronouns (she, her), evidencing an intent to sue the female Kentner, Earline, rather than the male Kentner, Daniel. *Id.* at 575, 458 N.E.2d at 133. In addition, the court held that plaintiff's actual intent was clear from the pleadings and, thus, controlling. Plaintiff had, in fact, named the proper party merely under a wrong name. The court reasoned "[t]o hold otherwise would . . . clearly exalt form over substance and allow defendant to deprive plaintiff of her day in court and frustrate on a minor technicality the resolution of the litigation on the merits." *Id.* at 575, 458 N.E.2d at 133-34.

40. *Id.* at 573, 458 N.E.2d at 132.

41. While the court failed to elaborate on the estoppel idea or reference it specifically in the holding, it should be noted that plaintiff had set forth an estoppel argument in her pleading: "defendant should be estopped from denying . . . misnomer since she participated in the error itself." *Hatcher*, 120 Ill. App. 3d at 573, 458 N.E.2d at 132.

42. 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991).

43. *Id.* at 53, 580 N.E.2d at 902.

44. 126 Ill. 2d 150, 533 N.E.2d 885 (1988).

in the misnomer/misidentification context. In *Vaughn*, the court found that the designation error failed to qualify as either misnomer⁴⁵ or misidentification,⁴⁶ but nonetheless, remanded the case for a determination of whether the defendant had engaged in such conduct that it should be estopped to assert a statute of limitations defense.⁴⁷

45. *Id.* In finding that the facts presented did not constitute misnomer, the court stated:

We cannot conclude that changing the name of the defendant from decedent to his executors is simply the correction of a misnomer. This is not a situation where, for example, a plaintiff merely misspelled a defendant's surname or used an incorrect common name. Instead, plaintiffs here intentionally sued Wilber P. Speaker when they should have sued his estate . . . [A]n individual and his estate exist contemporaneously and are wholly distinct legal entities. Accordingly, substitution of the estate for the decedent was not merely the correction of a misnomer . . .

Id. at 158-59, 533 N.E.2d at 888-89.

46. In deciding that the misidentification provision was inapplicable, the court stated: "Section 2-616(d) provides no relief to plaintiffs because the fourth requirement of that provision was not met: there is no indication or assertion that either co-executor knew prior to the running of the statute of limitations that a complaint had been filed." *Vaughn*, 126 Ill. 2d at 160, 533 N.E.2d at 889. For a detailed discussion of the misidentification provision and its requirement that service be within the limitations period, see text accompanying notes 93-187.

47. *Vaughn*, 126 Ill. 2d at 167, 533 N.E.2d at 892. The court noted that equitable estoppel may arise even though there was no intention on the part of the party estopped to relinquish any existing right. *Id.* at 161, 533 N.E.2d at 890. Further, prejudice to the other party is one of the essential elements of an equitable estoppel. *Id.* at 161-62, 533 N.E.2d at 890. In this case, it was asserted that defendants' conduct so misled plaintiffs that defendants were estopped to assert a statute of limitations defense, whether in the misnomer or misidentification context. *Id.* at 155, 533 N.E.2d at 887. In reaching its decision, the court reiterated the six elements required for equitable estoppel:

[1] . . . [W]ords or conduct by the party against whom the estoppel is alleged amounting to a misrepresentation or concealment of material facts.

[2] . . . [T]he party against whom the estoppel is alleged must have had knowledge at the time the representations were made that the representations were untrue. This knowledge need not be actual but may be implied; misrepresentations made with gross negligence can form a basis for equitable estoppel.

[3] . . . [T]he truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time that the representations were made and at the time that they were acted on by him.

[4] . . . [T]he party estopped must intend or reasonably expect that his conduct or representations will be acted upon by the party asserting the estoppel or the public generally; the conduct and representations must be such as would ordinarily lead to the results complained of.

[5] . . . [T]he party claiming the benefit of the estoppel must have in good faith relied upon the misrepresentation to his detriment . . . [T]his reliance must be reasonable, and a party claiming estoppel cannot have acted imprudently . . . [I]t is also true that if the party alleged to be estopped is guilty of actual intentional deceit and he reasonably expected his deceptive statements or conduct to be relied upon, he is in no position to contend that the party acting upon his deception was negligent in doing so. This is consistent with the principle that one guilty of fraudulent misrepre-

The *Vaughn* opinion has double significance. First, and most obvious, it is important because it places the court's imprimatur on the estoppel argument. Second, and less obvious, in recognizing the estoppel argument, the court has blurred the distinction between misnomer and misidentification by allowing both concepts to be overridden in circumstances giving rise to estoppel. The estoppel argument thus provides a potential safe-haven for actions which otherwise may be lost to the distinction between misnomer and misidentification and, in so doing, renders their individual characterizations less likely, and, less necessary.

B. The Contra-Liberal Trend

The liberal trend is rivaled by a contemporaneous line of cases from the first and fourth districts which reject or ignore the policies and equitable principles factored into the liberal trend cases. In the prototypical contra-liberal case, the plaintiff files an eleventh hour action against a defendant who not only lacks capacity to be sued, but also, is not the real party in interest to the suit.⁴⁸ Typically, the court holds that the suit is void *ab initio* because it was brought against a non-entity.⁴⁹ Unlike the liberal trend, which tries to salvage some of these actions by factoring in estoppel,⁵⁰ due dili-

sentation cannot assert that the person defrauded was negligent in failing to discover the truth.

[6] . . . [T]he party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party is permitted to deny the truth thereof.

Id. at 162-63, 533 N.E.2d at 890 (citing *Lowenberg v. Booth*, 330 Ill. 548, 555-56, 162 N.E.2d 91, 93 (1928)). For further proceedings on these facts, see *In re Speaker*, 236 Ill. App. 3d 954, 603 N.E.2d 1194 (3d Dist. 1992) (holding that claimants were not entitled to personal notice as "known creditors" and that failure to inventory insurance policy among estate assets did not extend time period for filing a claim).

48. See, e.g., *Thompson v. Ware*, 210 Ill. App. 3d 16, 568 N.E.2d 500 (4th Dist. 1991) (holding that service on "Lynette Marie Ware", the identical twin sister of the real party in interest, "Lynette Marie Owens", did not meet the requirements of misnomer); *Cohen Furniture Co. v. Sumpter*, 197 Ill. App. 3d 751, 555 N.E.2d 60 (4th Dist. 1990) (holding that naming a sole proprietorship as a corporate entity constitutes naming the wrong party, not misnomer); *Hoppa v. Schermerhorn*, 192 Ill. App. 3d 832, 549 N.E.2d 667 (1st Dist. 1989) (holding that plaintiff's failure to properly serve defendant as an officer of the corporation or an individual voided judgment and refused to allow application of misnomer); *Tyler v. J.C. Penney Co.*, 145 Ill. App. 3d 967, 496 N.E.2d 323 (4th Dist. 1986) (holding that a suit brought against a non-existent party is void *ab initio* and a nullity); *Griffith v. Pincham*, 67 Ill. App. 3d 316, 384 N.E.2d 870 (1st Dist. 1978) (holding that plaintiff's inability to effect service on an agent or representative of the real party in interest voided the claim).

49. *Kappel v. Errera*, 164 Ill. App. 3d 673, 677, 518 N.E.2d 226, 229 (1st Dist. 1987).

50. *Vaughn*, 126 Ill. 2d 150, 533 N.E.2d 885; *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991). For a discussion on the role of estoppel in cases of erroneously named parties, see *supra* notes 34-47 and accompanying text.

gence,⁵¹ intent,⁵² or actual notice to the real party in interest,⁵³ the contra-liberal trend restricts its analysis to strict application of black letter principles without the benefit of contemporary inquiries or analyses. As a result, the decisions in this line of cases are predicated upon legal concepts which, when viewed in a contemporary context, are either partially correct or wholly incorrect, and result in analyses which are dated and lack resilience.

For example, in *Griffith v. Pincham*,⁵⁴ the first in this line of cases, the plaintiff filed an eleventh hour personal injury action against "Sherry" Pincham, the driver of the automobile involved in a personal injury action, and Eugene Pincham, its owner. Shortly after the statute of limitations had run, Alzata Pincham (Eugene's wife) was erroneously served with the summons intended for Sherry. Alzata filed a special appearance and motion to quash on the grounds of mistaken identity. Shortly thereafter, the plaintiff served on Eugene Pincham a request to admit "that on December 23, 1974, he had a daughter named either 'Sandy' or 'Sherry' Pincham who was a member of his household."⁵⁵ Eugene Pincham objected to the request as "irrelevant and immaterial."⁵⁶ Subsequently, in his deposition, "Eugene Pincham stated that he was a judge of the circuit court of Cook County, criminal division; . . . his daughter's [Andrea] nickname was Sandy; . . . on December 23, 1974, his daughter [had been] a member of his household and [had] told him [of her involvement in an automobile accident]; and . . . his wife was probably present during th[at] conversation."⁵⁷ Based on this information, the plaintiff served summons personally on Andrea Pincham. Andrea moved to dismiss on the grounds that the

51. *Ellis*, 220 Ill. App. 3d 48, 580 N.E.2d 899; *Greil v. Travelodge Int'l, Inc.*, 186 Ill. App. 3d 1061, 541 N.E.2d 1288 (1st Dist. 1989). For a discussion of the role of due diligence in cases of wrongly named parties, see *supra* note 11.

52. *Ellis*, 220 Ill. App. 3d at 52, 580 N.E.2d at 902 (plaintiff intended to sue owner of tavern); *Greil*, 186 Ill. App. 3d at 1066, 541 N.E.2d at 1291 (plaintiff intended to sue company operating as "Travelodge in the Heart of Chicago"); *Hatcher v. Kentner*, 120 Ill. App. 3d 571, 575, 458 N.E.2d 131, 133 (3d Dist. 1983) (plaintiff's intent was clear despite the fact the two first names did not "sound" alike). For a discussion of intent see *supra* note 39 and accompanying text.

53. *Ellis*, 220 Ill. App. 3d at 51, 580 N.E.2d at 901; *Hatcher*, 120 Ill. App. 3d at 573, 458 N.E.2d at 132; *Ingram v. MFA Ins. Co.*, 18 Ill. App. 3d 560, 566, 309 N.E.2d 690, 696 (2d Dist. 1974); see *supra* note 38 (actual notice). "The party in interest envisioned by the misnomer provisions of ¶ 2-401(b) of the Code refers to whether the parties were before the court, whether they had notice of the proceedings, and whether they had an opportunity to defend." *Thompson v. Ware*, 210 Ill. App. 3d 16, 18, 568 N.E.2d 500, 502 (4th Dist. 1991).

54. 67 Ill. App. 3d 316, 384 N.E.2d 870 (1st Dist. 1978).

55. *Id.*

56. *Id.*

57. *Id.* at 317, 384 N.E.2d at 871-72.

action against her was barred by the statute of limitations.⁵⁸ Attached to the motion was an affidavit in which Andrea denied knowledge of the action prior to the date on which she was served. The trial court granted Andrea's motion to dismiss on the grounds that the real party in interest had not been served within the limitations period and that the error of naming "Sherry" instead of "Sandy" or "Andrea" could not be characterized as a misnomer.⁵⁹

The court of appeals affirmed the rejection of misnomer on two grounds. First, since Andrea and Alzata were separate individuals, service upon one could not constitute service upon the other, nor could the parent-child relationship be treated as an agency relationship for service of process purposes.⁶⁰ Second, the plaintiff had notice of her mistake before the expiration of the statute of limitations by virtue of the answers of Eugene and Alzata, stating that proper service had not been effected, and the investigative police report which indicated that the driver had been "Sandy" Pincham. The court concluded that the plaintiff's untimely service could not be excused as inadvertent.⁶¹

The appellate court was correct in its statement and application of the first principle: suing the mother is not the same, for misnomer purposes, as suing the daughter. The second part of its opinion, however, was incorrect. First, inadvertence is not a condition of misnomer. It is a condition of misidentification,⁶² and, as a matter of precedent or policy, had not previously been factored into a mis-

58. *Id.* at 318, 384 N.E.2d at 872. "The original complaint . . . was filed approximately six weeks before the statute of limitations expired incorrectly naming 'Sherry' Pincham as a defendant. It was not until after the limitations period expired that the complaint was amended to correctly name 'Andrea' Pincham as the defendant." *Id.* at 318, 384 N.E.2d at 872.

59. The appellate court would later express its displeasure with the plaintiff:

In the instant case an investigative police report clearly indicated the party was "Sandy" Pincham [Andrea's nickname was Sandy]. There is nothing in the record to indicate why plaintiff did not rely on or use that information prior to the filing of the complaint. Likewise the affidavits of Eugene and Alzata Pincham, filed in court before the two year period expired, advised plaintiff that proper service had not been effected.

Griffith, 67 Ill. App. 3d at 320-21, 384 N.E.2d at 874.

60. *Id.* at 319-20, 384 N.E.2d at 872; *but see* 735 ILL. COMP. STAT. 5/2-203(a) (1992) (ILL. REV. STAT. ch. 110, para. 2-203(a) (1991)) (permitting abode service on one other than the real party in interest).

61. Although the court stated that it did not reach the issue of inadvertence, the analysis of the agency relationship of the parties was, in fact, discussed in terms of the parties' inadvertence. *Griffith*, 67 Ill. App. 3d at 321, 384 N.E.2d at 874. See *supra* note 59 for the court's rationale in finding that plaintiff's actions were not inadvertent.

62. "[F]ailure to join the person as a defendant was inadvertent." 735 ILL. COMP. STAT. 5/2-616(d)(2) (ILL. REV. STAT. ch. 110, para. 2-616(d)(2)). For a detailed discussion of inadvertence, see *infra* notes 119-39 and accompanying text.

nomer analysis. Second, the court faulted the plaintiff for failing to serve Andrea within the statute of limitations. Service within the statute of limitations is a condition of misidentification,⁶³ not misnomer.⁶⁴ By confusing the requirements of these two statutes, the court twice evaluated the plaintiff's conduct by the wrong standard.

The opinion's most significant analytical shortcoming, however, lies not in what it said but in what it failed to say. Specifically, it failed to recognize an estoppel objection to Eugene Pincham's repeated efforts to thwart the plaintiff's attempts to determine the driver's name.⁶⁵ The court failed to mitigate the agency defense by ignoring Andrea's residence in her parents' home at the time of the accident, her parents' awareness of the accident and the subsequent lawsuit, and Andrea's continued residence in Chicago.⁶⁶ Further, it failed to credit the plaintiff with exercising due diligence in her efforts to ascertain the true identity of the driver once she had been informed of her error by Alzata's motion to quash summons.⁶⁷ Had the first district included in its analysis either the estoppel or due diligence cures, the plaintiff's action would have survived the motion to dismiss.

Along a similar vein, in *Tyler v. J.C. Penney Co.*,⁶⁸ the fourth district rejected an estoppel defense to an eleventh hour personal injury action filed against Market Place Shopping Center ("Market Place") on the grounds that the defendant, as so designated, was a non-entity and, therefore, the suit was void *ab initio*.⁶⁹ Market

63. 735 ILL. COMP. STAT. 5/2-616(d)(1), (4) (ILL. REV. STAT. ch. 110, para. 2-616(d)(1), (4)). "The time prescribed or limited had not expired when the original action was commenced," and "(4) the person, within the time that the action might have been brought or the right asserted against him or her, knew that the original action was pending and that it grew out of a transaction or occurrence involving or concerning him or her." *Id.* See *infra* notes 152-63 and accompany text for a discussion of the role of knowledge with regard to misidentification.

64. See *supra* note 12 for cases discussing service in the context of misnomer.

65. *Griffith*, 67 Ill. App. 3d at 317-18, 384 N.E.2d at 871-72.

66. *Id.* at 317-18, 384 N.E.2d at 871-72.

67. Alzata's motion to quash was brought on December 8, 1976. *Id.* at 317, 384 N.E.2d at 871. On January 13, 1977, plaintiff filed a request to admit facts that Eugene had a daughter named either "Sandy" or "Sherry" Pincham who was a member of his household. *Id.* at 317, 384 N.E.2d at 871. The court characterized this conduct as "lacking inadvertence." As will be shown, however, inadvertence is an improper element in a misnomer situation. Rather, it is an element reserved for misidentification situations. See 735 ILL. COMP. STAT. 5/2-616(d)(2) (ILL. REV. STAT. ch. 110, para. 2-616(d)(2)) ("failure to join the person as a defendant was inadvertent").

68. 145 Ill. App. 3d 967, 496 N.E.2d 323 (4th Dist. 1986).

69. *Id.* at 972-73, 496 N.E.2d at 327. "Where a suit is brought against an entity which is legally nonexistent, the proceedings are void *ab initio*, and its invalidity may be called to the court's attention at any stage of the proceedings [citations omitted]. A complaint which does not name a party legally in existence is in reality a nullity as to that party." *Id.*

Place was, in fact, the common name of a mall comprised of several separate businesses.⁷⁰ The plaintiff did not learn of his error until after the defendant had appeared, answered, participated in discovery, filed a third-party complaint, and participated in settlement negotiations through its insurance company for a period in excess of two years.⁷¹ Although *Tyler* predates *Vaughn v. Speaker*,⁷² and, therefore, is not clearly wrong on the estoppel issue, it did fail to address such liberal trend issues as notice to the real party in interest,⁷³ and the underlying purpose of paragraph 2-401(b), to encourage resolution of disputes on the merits.⁷⁴

*Thompson v. Ware*⁷⁵ posed a fact situation strikingly similar to *Griffith*.⁷⁶ In *Thompson*, the plaintiff was involved in an automobile accident with a vehicle owned by Lynetta Marie Ware ("Ware"), but which was driven by Ware's identical twin sister, Lynette Marie Ware Owens ("Owens"). The police report listed the driver as "Lunite M. Owens" of 110 West Jefferson, Springfield, Illinois. The plaintiff filed a personal injury action against Ware shortly before the running of the statute of limitations and served summons on Ware shortly after its expiration.⁷⁷ The plaintiff subsequently learned that she had confused the identity of the two sisters when, during their depositions, it became clear that Owens had driven the car owned by Ware. The plaintiff immediately moved to correct the error under paragraph 2-401(b). This motion was denied, and summary judgment was entered for the defendant. The

70. The development firm of Landau-Heyman, Inc., through its vice president, submitted an affidavit stating that the Market Place Shopping Center was not a legal entity and that the "denotation represent[ed] the 'common description of the diverse, independent, [sic] businesses which comprise the entire shopping mall.'" *Tyler*, 145 Ill. App. 3d at 969, 496 N.E.2d at 325. "The affidavit further recounted that Market Place is not a corporation, partnership, sole proprietorship, joint venture, or other such entity recognized in law." *Id.*

71. *Id.* at 968-69, 496 N.E.2d at 324-25. These events gave rise to plaintiff's argument that Market Place's conduct estopped it to deny that it had a legal capacity to be sued and that Market Place waived its argument that it could not be a proper party defendant. *Id.* at 971, 496 N.E.2d at 326. Plaintiffs further contended that "dismissal of their complaint based upon lack of legal capacity, after Market Place had engaged in litigation over a two-year period, would allow defendant to 'perpetrate a fraud on the court.'" *Id.*

72. 126 Ill. 2d 150, 533 N.E.2d 885 (1988).

73. See *supra* notes 20-47 and accompanying text for cases discussing the liberal trend elements, including notice, estoppel, due diligence, and intent.

74. See *supra* note 39 for the court's *Hatcher* opinion on resolving a case on the merits.

75. 210 Ill. App. 3d 16, 568 N.E.2d 500 (4th Dist. 1991).

76. *Griffith v. Pincham*, 67 Ill. App. 3d 316, 384 N.E.2d 870 (1st Dist. 1978).

77. The accident occurred on January 12, 1987. The action was filed on December 28, 1988, against Lynetta Marie Ware, and she was served with summons on February 1, 1989. *Thompson*, 210 Ill. App. 3d at 17, 568 N.E.2d at 501. Of note, plaintiff clearly failed to serve the original summons within the expiration of the statute of limitations. This may have prompted the court's strict application of both ¶ 2-401(b) and 2-616(d).

court rejected misnomer based on its finding that the plaintiff had not sued the real party in interest under the wrong name, but rather, had sued the wrong party.⁷⁸ The court rejected misidentification because the real party in interest had not been served within the statute of limitations period.⁷⁹

Although paragraphs 2-401(b) and 2-616(d) were correctly applied to the facts, the court was unnecessarily penurious in limiting the scope of its analysis to those particular facts. For example, the court omitted from its analysis the plaintiff's intent to sue the driver of the car; the deposition of Owens, the real party in interest, which clearly put her on notice of the proceedings; plaintiff's diligence in seeking correction of the error; and, the uniqueness of the facts causing the confusion.⁸⁰ As in *Griffith*, the *Thompson* court confused the paragraph 2-401(b) analysis with the paragraph 2-616(d) analysis by failing to apply misnomer when the real party in interest was not served with summons until after the expiration of the statute of limitations. Paragraph 2-616 requires service within the statute of limitations. Paragraph 2-401(b) does not. Once again, the court evaluated the plaintiff's conduct by an incorrect legal standard thus allowing the cause of action to slip between the crevices of misnomer and misidentification.

In *Cohen Furniture Co. v. Sumpter*,⁸¹ the fourth district affirmed the trial court's vacation of a default judgment entered against Farmer's Market, Inc. as the employer of Bryan Sumpter, the driver of an automobile involved in a personal injury action. The court found that Farmer's Market had been served in its corporate capacity through its assistant manager, Tim Tyson, but that its owner, Paul Edwards, had not been served. The court rejected the plaintiff's misnomer argument on the grounds that Edwards, the real party in interest, had not been served.⁸² The decision, how-

78. *Thompson*, 210 Ill. App. 3d at 18, 568 N.E.2d at 502. "In the present case, it is obvious the plaintiff intended to sue the person driving the vehicle at the time of the accident. However, the service was on one other than the driver, and no misnomer took place as to the person served." *Id.*

79. In addition, the court held that since the real party in interest had not been served originally, the requirement of ¶ 2-616(d)(3) had not been met. *Id.* at 19, 568 N.E.2d at 502-03. Paragraph 2-616(d)(3) reads: "service of summons was in fact had upon the person, his or her agent or partner, as the nature of the defendant made appropriate, even though he or she was served in the wrong capacity or as agent of another, or upon a trustee . . ." 735 ILL. COMP. STAT. 5/2-616(d)(3) (ILL. REV. STAT. ch. 110, para. 2-616(d)(3)). For a detailed discussion of the agency requirement, see *infra* text accompanying notes 140-51.

80. *Thompson*, 210 Ill. App. 3d at 18, 568 N.E.2d at 502. "Regardless of the peculiar fact situation with which we are now concerned, we conclude that this case did not involve misnomer as envisioned in paragraph 2-401(b) of the Code." *Id.* at 19, 568 N.E.2d at 503.

81. 197 Ill. App. 3d 751, 555 N.E.2d 60 (4th Dist. 1990).

82. *Id.* at 752, 555 N.E.2d at 62. Plaintiff contended that "Edwards was provided with adequate notice of the action, despite any misnomer in summons,

ever, was reached without inquiry into the existence of an agency relationship among Sumpter, Farmer's Market, Tyson, or Edwards. Without resolution of this issue, it would be impossible to determine if the court had properly applied the real party in interest test. The mere recitation of the fact that Farmer's Market, Inc. was not a legal entity and thus, the suit was void and was too conclusory to be a meaningful application of the law.

Finally, the case of *Hoppa v. Schermerhorn*⁸³ renders the most inscrutable contribution to this line of cases. The plaintiff originally brought a personal injury action against undisclosed defendants.⁸⁴ One year later, the plaintiff sought leave to amend his complaint to "implead" J.P. Schermerhorn & Co. ("Company") and J.P. Schermerhorn, individually.⁸⁵ Company was served, appeared, and answered and then, on the same day, was dissolved and reincorporated as Schermerhorn & Co. ("Schermerhorn"). J.P. Schermerhorn, the individual ("J.P."), was never served. Nevertheless, the court entered a default judgment against Company and J.P. Then, based on misnomer, the court allowed the plaintiff to amend the judgment in order to add Schermerhorn.⁸⁶

The first district reversed on the grounds that the trial court lacked jurisdiction over J.P. and Schermerhorn since neither had been served. The court rejected the plaintiff's argument that J.P.'s continuous personal participation in the action constituted a general appearance and a waiver of the personal jurisdiction issue.⁸⁷ The court rejected the application of misnomer to the addition and/or substitution of Schermerhorn for Company in the judgment order on the grounds that the latter had dissolved and the former had never been served.

Both the trial and appellate court opinions indulged a discomforting tolerance for procedural irregularities. The trial court's entry of a default judgment against a party who had never been served

through corporate service upon his management agents at Farmers Market." *Id.*

83. 192 Ill. App. 3d 832, 549 N.E.2d 667 (1st Dist. 1989).

84. Authors' note—neither the facts nor the caption of this opinion reveal the identity of the original defendants.

85. *Hoppa*, 192 Ill. App. 3d at 833, 549 N.E.2d at 669.

86. *Id.* at 833, 549 N.E.2d at 670.

87. *Id.* at 832, 549 N.E.2d at 669-70. An inspection of the cited authority reveals that the legal assertions put forth by the *Hoppa* court are probably true. *Id.* However, the propositions are valid only as singular principles; the cases themselves do not actually support the court's reasoning or conclusion. In fact, it appears that the plaintiff's argument is the one consistent with cited authority. Thus, the court dismissed plaintiff's arguments with no real basis for its decision. It is interesting to speculate whether the outcome would have differed had the plaintiff put forth a "misidentification" ¶ 2-616(d) argument, or had the court applied a more liberal treatment of ¶ 2-1008, in keeping with the legislature's intent. See *infra* note 88 for a discussion of substitution of parties.

may be forgiven as an oversight except for its allowance of the plaintiff's peculiar use of "impleader" to bring in two additional defendants.⁸⁸ Equally baffling was the appellate court's rejection of misnomer as between Company and Schermerhorn. Although it is correct as a general matter that separate corporate entities cannot be treated interchangeably,⁸⁹ here we have what appears to be successive corporate entities.⁹⁰ Allowing the substitution of the latter

88. According to the limited facts of *Hoppa*, plaintiff sustained injuries in a traffic accident (occurrence date unknown). *Hoppa*, 192 Ill. App. 3d at 833, 549 N.E.2d at 669. At the time of initial filing in February 1984, plaintiff did not name J.P. Schermerhorn & Co. (neither the facts nor the caption reveal the original defendant's identity). It was not until one year later, in February of 1985, that plaintiff "impleaded" J.P. Schermerhorn & Co. as a defendant and served process upon the company. *Id.* at 833, 549 N.E.2d at 669.

The court's use of the term "implead" is probably incorrect since defendants, rather than plaintiffs, typically implead third parties. 735 ILL. COMP. STAT. 5/2-406 (1992) (ILL. REV. STAT. ch. 110, para. 2-406(b) (1991)). Further the Illinois statute speaks of *defendants*, rather than plaintiffs, bringing third-party complaints. *Id.* Finally, the term "implead" is never actually used in the Illinois statute. *Id.*

The authors suggest that what really occurred procedurally was a ¶ 2-1008 substitution of parties. 735 ILL. COMP. STAT. 5/2-1008(a), (e) (1992) (ILL. REV. STAT. ch. 110, para. 2-1008(a), (e) (1991)). 2-1008, entitled, "Abatement—Change of Interest or Liability—Substitution of parties," provides:

- (A) CHANGE OF INTEREST OR LIABILITY. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party before the court, or that any person already a party be made a party in another capacity, the action does not abate, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without a change in the title of the cause
- (E) SERVICE OF PROCESS. Parties against whom relief is sought, substituted under subsection (a) hereof, shall be brought in by service of process

Id. A ¶ 2-1008 scenario would explain why the original defendant is not found in the caption and why J.P. Schermerhorn & Co. was added/substituted a year after filing. Also, it might correspond to plaintiff's later reliance on ¶ 2-1008 when attempting to add J.P. Schermerhorn, individually.

Of course, ¶ 2-1008 raises an interesting point: given its very liberal nature, might ¶ 2-1008 be used as a "loophole" out of a ¶ 2-616(d) problem? Specifically, ¶ 2-1008 appears to do away with any statute of limitations problem ("coming before or after judgment . . ."), and second, has a very broad reach ("marriage, bankruptcy, . . . or any other event . . ."). *Id.*

89. It is an established principle of corporate law that separate corporate entities cannot be treated interchangeably. *Hoppa*, 192 Ill. App. 3d at 836, 549 N.E.2d at 671.

90. The plaintiff argued that "the two companies were 'one and the same' because they conducted business from the same address, had the same telephone number, and in nearly all other respects were identical." *Id.* at 836, 549 N.E.2d at 670. Equally compelling, the corporations' respective dissolution and formation occurred on the same day. *Id.* at 833, 549 N.E.2d at 669. The court

for the former enabled the first corporation to avoid legal liability by dissolving and then reincorporating as a purported separate entity. The court could have neutralized this maneuver by allowing the complaint to be amended to substitute Schermerhorn for Company. Even if the corporations had been separately incorporated, i.e., were separate legal entities, the first district still failed to address the real party in interest question: was suit against one corporation in fact suit against both? Similarly curious was the appellate court's failure to impute a finding of general appearance to J.P.'s participation in the proceedings as against a long line of Illinois case law to the contrary.⁹¹

C. Summary

Clearly, confusion exists within the Illinois judiciary regarding the construction and application of the misnomer provision. Fortunately, the opinions rely on basic principles and repeated themes which have been applied with some consistency. For the defendant, the misnomer provision's overriding principle is one of protection from undue surprise. Specifically, the courts want to be certain that the action is filed before the expiration of the statute of limitations and that the real party in interest is before them, has notice of the proceedings, and an adequate opportunity to defend.⁹² This goal requires that the plaintiff properly identify and intend to sue the real party in interest at an early stage of the lawsuit. The plaintiff must also exercise due diligence in locating and serving that party.

For the plaintiff, the overriding principle is one of litigation on the merits rather than dismissal based on procedural technicalities. To achieve this goal, the misnomer provision should be liberally construed to avoid exalting form over substance. In practical application, the plaintiff may invoke misnomer to cure only two mistakes: (1) the misspelling or the transposition of common or surname, or insertion of an erroneous common name; or (2) the naming of a non-entity, but with such participation in the lawsuit by the real party in interest as to estop that party from raising the statute of limitations defense. If the plaintiff uses due diligence, the correction may be made at any time before or after judgment. Any

countered, however, that plaintiff failed to offer sufficient grounds for a finding that the two companies were one and the same. *Id.* at 836, 549 N.E.2d at 671.

91. For cases finding that litigant's participation in the proceedings constitutes a general appearance, see *The People ex rel. Edward Kazubowski v. Loy E. Ray*, 48 Ill. 2d 413, 272 N.E.2d 225 (Ill. 1971); *Margaret B. Lau v. West Towns Bus Co.*, 16 Ill. 2d 442, 158 N.E.2d 63 (Ill. 1959); *In re Estate of Hertha Zoglaver*, 229 Ill. App. 3d 394, 593 N.E.2d 93 (2d Dist. 1992); *Antonio Padilla v. Eladio E. Vazquez*, 223 Ill. App. 3d 1018, 586 N.E.2d 309 (1st. Dist. 1991).

92. See *supra* note 8 for a sampling of "misnomer" cases.

other error exceeds the scope of the misnomer provision and is subject to the stricter requirements of paragraph 2-616(d).

II. MISIDENTIFICATION

A. *The Statute*

Unlike paragraph 2-401(b), which vests the court with broad and largely unguided discretion, paragraph 2-616(d) limits the court's discretion with five conditions, all of which must be met before the court may allow a post-limitations amendment to relate back to the filing of the initial complaint. These conditions are:

- (1) [T]he time prescribed or limited had not expired when the original action was commenced;
- (2) failure to join the person as a defendant was inadvertent;
- (3) service of summons was in fact had upon the person, his or her agent or partner, as the nature of the defendant made appropriate, even though he or she was served in the wrong capacity or as agent of another, or upon a trustee who has title to but no power of management or control over real property constituting a trust of which the person is a beneficiary;
- (4) the person, within the time that the action might have been brought or the right asserted against him or her, knew that the original action was pending and that it grew out of a transaction or occurrence involving or concerning him or her; and
- (5) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery when the condition precedent has in fact been performed, and even though the person was not named originally as a defendant. For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended.⁹³

Like misnomer, in misidentification cases the complaint must be filed within the limitations period under condition (1). Unlike misnomer, the proper defendant also must learn of the action within the limitations period under condition (2). Under condition (3), although service is not delimited by the statute of limitations, it must be achieved on the proper defendant albeit in the wrong capacity, or on his or her agent or partner or upon a trustee.⁹⁴ The only cure for failing to meet conditions (3) and (4) is inadvertence

93. 735 ILL. COMP. STAT. 5/2-616(d)(1)-(5) (ILL. REV. STAT. ch. 110, para. 2-616(d)(1)-(5)).

94. For a detailed discussion of the agency requirement see *infra* text accompanying notes 140-51 and note 195.

under condition (2). If conditions (1) through (4) are met, then condition (5) will allow the amended pleading to relate back to the date of the filing of the original pleading if the amendment grew out of the same transaction or occurrence as the original pleading. Thus, misidentification contemplates the post-limitations joinder of an additional defendant if the timing, effort (inadvertence), service, knowledge and transactional requirements of paragraph 2-616(d) are met.

Failure to satisfy any of these conditions will meet with one of three fates. First, if the statute is strictly construed, the error may be fatal and the cause of action lost, notwithstanding the specific behavior of either party.⁹⁵ Second, if the untimely service is primarily caused by the plaintiff and is deemed "inadvertent," then the action will survive and the proper party retroactively added to the complaint.⁹⁶ Finally, if the untimely service is primarily caused by the defendant, either because of name confusion⁹⁷ or litigation tactics,⁹⁸ then an estoppel argument can be asserted to prevent the defendant from benefiting from its misconduct.⁹⁹

The purpose of the "who knew what, when, and where" inquiry of the misidentification provision is to provide a remedy for plaintiffs who mistakenly sue the wrong defendant because of the confusion and/or fusion of the identities that frequently occur in contemporary personal and business relationships, while at the same time providing safeguards against undermining the statute of limitations:

95. See, e.g., *Thompson v. Ware*, 210 Ill. App. 3d 16, 568 N.E.2d 500 (4th Dist. 1991) (plaintiff served summons on defendant's twin sister and failed to serve real party in interest before the statute of limitations); *Tyler v. J.C. Penney Co.*, 145 Ill. App. 3d 967, 496 N.E.2d 323 (4th Dist. 1986) (plaintiff served the business under its common name and did not learn of the error until two years after the defendant filed its appearance).

96. See, e.g., *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991) (plaintiff served the owner as an agent of a restaurant which had no legal existence, but failed to serve the owner individually); *Shiner v. Friedman*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (1st Dist. 1987) (plaintiff served one partner in a business and failed to serve his brother, another partner).

97. See, e.g., *Bates v. The Wagon Wheel Country Club, Inc.*, 132 Ill. App. 2d 161, 266 N.E.2d 343 (2d Dist. 1971) (defendant operated under the names "Wagon Wheel Country Club, Inc." and "Wagon Wheel Enterprises, Inc."; plaintiff had service on both, but not on "Henry G. Wilson, d/b/a Wagon Wheel Stables").

98. See, e.g., *Vaughn v. Speaker*, 126 Ill. 2d 150, 533 N.E.2d 885 (1988) (plaintiff's summons returned by decedent's estate where plaintiff sued the deceased); *Evans v. Graber, Inc.*, 115 Ill. App. 3d 532, 450 N.E.2d 482 (4th Dist. 1983) (plaintiff failed to join a corporation which was separate from defendant corporation with a similar name).

99. See, e.g., *Ingram v. MFA Ins. Co.*, 18 Ill. App. 3d 560, 309 N.E.2d 690 (2d Dist. 1974) (defendant objected to service under a trade name even though he was served as an agent under that name).

When the defendant has notice from the beginning of the suit of the claim against it, the reason for statutes of limitations is not as important. Such statutes must be construed in light of their objectives. Their basic policy is to afford a defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are still accessible [citation omitted]. Statutes of limitations are for preventing delays in asserting claims and to prevent the asserting of stale claims. It was never intended that such statutes would be the means by which a corporation could escape liability of a tort claim against it by confusing its identity through a complex intermingling of its corporation names and structure with that of other similar corporations.¹⁰⁰

Misidentification most typically occurs when the wrong business entity is served within the statute of limitations but the right business is not identified until after the statute of limitations has run. Service on the correct defendant may then be frustrated by a variety of circumstances, such as: related businesses having confusingly similar names;¹⁰¹ unrelated businesses having confusingly similar names;¹⁰² an individual engaging in business under both his or her own name and a different business name;¹⁰³ the proper defendant's identity is masked by its licensor's or franchisor's name;¹⁰⁴ a business is in dissolution,¹⁰⁵ or has been succeeded by another business;¹⁰⁶ multiple business entities own or control other

100. *Bates*, 132 Ill. App. 2d at 167, 266 N.E.2d at 348.

101. *See, e.g., Behr v. Club Med, Inc.*, 190 Ill. App. 3d 396, 546 N.E.2d 751 (1st Dist. 1989) (plaintiff sued "Club Med, Inc." when the proper party was "Club Mediterranean, S.A.," although both organizations were called Club Med); *Evans*, 115 Ill. App. 3d 532, 450 N.E.2d 482 (plaintiff failed to join a corporation which was separate from defendant corporation with a similar name); *Bates*, 132 Ill. App. 2d 161, 266 N.E.2d 343 (defendant operated under the names "Wagon Wheel Country Club, Inc." and "Wagon Wheel Enterprises, Inc."; plaintiff had service on both, but not on "Henry G. Wilson, d/b/a Wagon Wheel Stables").

102. *See, e.g., Behr*, 190 Ill. App. 3d 396, 546 N.E.2d 751 (plaintiff sued "Club Med, Inc." where the proper party was "Club Mediterranean, S.A.," although both organizations were called Club Med).

103. *See, e.g., Hoving v. Davies*, 159 Ill. App. 3d 106, 512 N.E.2d 729 (1st Dist. 1987) (defendant was listed as Davies (owner of business) but in fact the business was incorporated as "John A. Davies, Inc." when the cause of action accrued); *Campbell v. Feuquay*, 140 Ill. App. 3d 584, 488 N.E.2d 1111 (5th Dist. 1986) (defendant was sued as "South Roxana Market" and not as "Edith Feuquay d/b/a South Roxana Market" where plaintiff was under the misconception that the market had a separate legal identity).

104. *See, e.g., Greil v. Travelodge Int'l, Inc.*, 186 Ill. App. 3d 1061, 541 N.E.2d 1288 (1st Dist. 1989) (finding misnomer of franchise when plaintiff served actual operator but sued operator under advertised name rather than actual name); *Thomson v. McDonald's, Inc.*, 180 Ill. App. 3d 984, 536 N.E.2d 760 (1st Dist. 1989) (finding service on franchisor did not constitute service against franchisee).

105. *See, e.g., Suste v. Sterr*, 135 Ill. App. 3d 652, 482 N.E.2d 184 (3d Dist. 1985) (finding service on proper defendant in individual capacity was sufficient service on corporation in dissolution of which defendant was sole proprietor).

106. *See, e.g., People's Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 497 N.E.2d 790 (1st Dist. 1986) (finding that service on agent of prior corporation was sufficient service on successor corporation when agent and successor corpo-

businesses,¹⁰⁷ or the suit is filed against a non-entity.¹⁰⁸

1. *Related Businesses*

*Suste v. Sterr*¹⁰⁹ presents a straightforward application of a misidentification error caused by a confusing business relationship. The plaintiff filed an eleventh hour complaint for personal injuries against Sterr, the driver of the car in which the plaintiff was a passenger, Sterr's employer, Keith Clark d/b/a The House of Fine Design, and the driver of the truck that collided with Sterr's automobile. Seven months later, during discovery, the plaintiff learned that Clark was the president and sole owner of a corporation named The House of Fine Design, Inc. Three days later, the plaintiff moved to add this corporation as a defendant although the actual amended complaint was not filed for seven months after the statute of limitations had run. Summons was then served on the corporation's agent, but the court dismissed the corporation because the amendment had not been filed within the limitations period.

The appellate court reversed, finding that all five conditions of paragraph 2-616(d) had been satisfied. Condition (1) was satisfied because the original action had been commenced within the limitations period. Condition (2) was satisfied because the seven month delay in filing the amended complaint after finding out the true facts was deemed "reasonable" and "inadvertent" as against the defendant's argument that the plaintiff had not been diligent in confirming the identification of the proper defendant.¹¹⁰ Condition (3) was satisfied because Clark originally had been served d/b/a The House of Fine Design which, at that time, was in dissolution. Hence, the court found that service had been made on the right person, albeit in the wrong capacity. Condition (4) was satisfied because Clark had been served and, thus, received notice within the limitations period. Condition (5) was satisfied because the cause of action against the misidentified defendant arose out of the same transaction as the cause of action against the properly identified de-

ration misled plaintiff regarding current ownership of property for which gas service was provided).

107. See, e.g., *Behr v. Club Med, Inc.*, 190 Ill. App. 3d 396, 546 N.E.2d 751 (1st Dist. 1989) (holding that service on similarly named subsidiary's promoter did not constitute service on resort operator when plaintiff delayed serving operator); *Shiner v. Friedman*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (1st Dist. 1987) (finding proper service on corporation, rather than on partnership, which related back for purposes of the statute of limitations when same principals were involved in both partnership and corporation).

108. See, e.g., *Campbell v. Feuquay*, 140 Ill. App. 3d 584, 488 N.E.2d 1111 (5th Dist. 1986) (finding that shopper's act in naming grocery store rather than individual owner was inadvertent).

109. 135 Ill. App. 3d 652, 482 N.E.2d 184 (3d Dist. 1985).

110. This may be done by referring to the State's Annual Registry of Corporations. See *Suste*, 135 Ill. App. 3d at 654, 482 N.E.2d at 184.

fendant. Thus, the court concluded that the amendment adding the proper defendant could relate back to the filing of the original action.¹¹¹

2. Representative Actions

Another major area under which misidentification issues arise is the representative action.¹¹² Typically, a suit will be filed against a person who, unknown to the plaintiff, has died. If the plaintiff does not know of the decedent's death and, thus, fails to serve the decedent's representative before the statute of limitations runs, the amendment will fail based on the principles that: (i) suit against a non-entity is void *ab initio* and, therefore, any amendments would have nothing to which to relate back,¹¹³ and/or (ii) representatives cannot be substituted for previously named parties, but rather, are treated as entirely new and different parties whose joinder must independently comport with the five misidentification conditions.¹¹⁴

Several courts have attempted to mitigate the harsh results attendant the strict dichotomy between decedent and representative by employing such equitable concepts as estoppel¹¹⁵ and waiver¹¹⁶ in order to allow the action to proceed despite untimely service upon the representative. The Illinois Supreme Court case of *Vaughn v. Speaker*¹¹⁷ presents an illustration of this current trend. The plaintiff sued a defendant who had died a few months before the complaint was filed. The plaintiff did not become aware of the decedent's death and, hence, did not move to amend the complaint

111. For similar results see *Yedor v. Centre Properties, Inc.*, 173 Ill. App. 3d 132, 527 N.E.2d 414 (1st Dist. 1988).

112. See, e.g., *Vaughn v. Speaker*, 126 Ill. 2d 150, 533 N.E.2d 885 (1988) (refusing to allow substitution of executor for defendant who died a few months prior to institution of suit, but remanding for a determination of whether executor should be estopped to assert statute of limitations as a bar); *Newey v. Newey*, 215 Ill. App. 3d 993, 576 N.E.2d 137 (1st Dist. 1991) (holding that failure to name representative was not inadvertent when son knew his father was the beneficiary); *McCammant v. McCarthy*, 202 Ill. App. 3d 812, 560 N.E.2d 432 (3d Dist. 1990) (dismissing executor from suit where plaintiff sought to amend after statute of limitations when defendant died prior to plaintiff filing suit); *Turner v. Cosmopolitan Nat'l Bank*, 180 Ill. App. 3d 1022, 536 N.E.2d 806 (1st Dist. 1989) (finding that plaintiff failed to serve trustee within statute of limitations and, accordingly, the beneficiary did not have notice, but also finding that defendant waived the statute of limitations defense by failing to assert it for more than three and one-half years); *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. App. 3d 792, 480 N.E.2d 1312 (1st Dist. 1985) (finding no service on corporation when individual officer was named and served in his individual capacity).

113. See *supra* note 112 for cases which discuss non-entity and dismissal.

114. See *supra* note 112 for cases which discuss substitution of parties.

115. *Marcus*, 224 Ill. App. 3d 464, 586 N.E.2d 694.

116. *Turner*, 180 Ill. App. 3d 1022, 536 N.E.2d 806.

117. 126 Ill. 2d 150, 533 N.E.2d 885 (1988).

to name the decedent's estate as the defendant, until after the statute of limitations had run. The defendant then moved for summary judgment pursuant to paragraph 2-616(d). The plaintiff argued that the error was a misnomer and that the court should allow the decedent's estate to be substituted for the decedent. The Illinois Supreme Court disagreed, holding that even though the estate was the legal successor to certain rights and liabilities of the decedent, the decedent and his estate were wholly distinct legal entities. As a result, the substitution of the estate for the decedent was not the correction of a misnomer, but rather, was a post-limitations joinder in violation of 2-616(d). Since the plaintiff had not complied with the conditions of paragraph 2-616(d), the estate could not be joined. However, the court remanded the case for a determination of whether the defendant had engaged in such conduct during the litigation that it should be estopped to assert the statute of limitations bar.¹¹⁸

B. Case Controversy

Case controversy arises in two contexts: the construction of the inadvertence, agency, and knowledge and the judicial infusion of estoppel as a common law cure for plaintiff's failure strictly to meet these statutory requirements.

1. Inadvertence

Condition (2) of paragraph 2-616(d) requires that the plaintiff's failure to join the proper defendant be inadvertent.¹¹⁹ Courts have variously construed inadvertence to mean "not turning the mind to a matter, heedless, negligent, inattentive,"¹²⁰ as opposed to purposeful conduct intended to strike a strategic advantage¹²¹ but which results in a legal or factual miscalculation.¹²² Assertions of inadvertence have prevailed where the plaintiff's ignorance was deemed reasonable,¹²³ or negligent,¹²⁴ or where the plaintiff did not

118. *Id.* at 167, 533 N.E.2d at 892. For a detailed discussion of estoppel, see *infra* notes 164-87 and accompanying text.

119. 735 ILL. COMP. STAT. 5/2-616(d)(2) (ILL. REV. STAT. ch. 110, para. 2-616(d)(2)).

120. *Evans v. Graber, Inc.*, 115 Ill. App. 3d 532, 535, 450 N.E.2d 482, 484 (4th Dist. 1983).

121. See, e.g., *Behr v. Club Med, Inc.*, 190 Ill. App. 3d 396, 403-04, 546 N.E.2d 751, 756-57 (1st Dist. 1989) (refusing to allow amendment after statute of limitations when plaintiff reasonably should have known, 17 months earlier, that resort owner was proper defendant).

122. See, e.g., *Newey v. Newey*, 215 Ill. App. 3d 993, 998, 576 N.E.2d 137, 141 (1st Dist. 1991) (refusing to allow amendment to name trustee after statute of limitations ran when son knew father was beneficiary under trust).

123. See, e.g., *Yedor v. Centre Properties, Inc.*, 173 Ill. App. 3d 132, 527 N.E.2d 414 (1st Dist. 1988) (allowing amendment when real party in interest was actu-

learn the identification of the proper defendant until after the statute of limitations had lapsed¹²⁵ but acted with due diligence in filing the corrective amendment.¹²⁶ Conversely, courts agree that if the plaintiff had timely knowledge of the defendant's identity and still failed to amend the complaint, then such inaction would not qualify as inadvertence.¹²⁷

Inadvertence issues arise primarily where a defendant's business relationships and identities are so intermingled and fused that the plaintiff cannot reasonably determine the appropriate defendant until discovery has revealed the confusion. Because of the eleventh hour nature of many cases, discovery frequently does not commence until after the statute of limitations has run. Delayed service of process may then be further exacerbated when the improper defendant perpetuates the error by failing to raise the misidentification issue in its answer and, instead, appears and defends under the wrong name or in the wrong capacity.¹²⁸ Where such defensive conduct is itself inadvertent or a strategic ploy to delay the plaintiff's identification of the appropriate defendant until after

ally served); *Evans*, 115 Ill. App. 3d 532, 450 N.E.2d 482 (allowing amendment when plaintiff named Graber, Inc., instead of Graber Construction Company where Sam Graber, who owned both corporations, misled plaintiff about identity of proper defendant).

124. See, e.g., *Shiner v. Friedman*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (1st Dist. 1987) (allowing amendment when plaintiff named corporation instead of partnership where same brothers owned both corporations); *Suste v. Sterr*, 135 Ill. App. 3d 652, 482 N.E.2d 184 (3d Dist. 1985) (allowing amendment when plaintiff was named sole proprietor instead of corporation which had same individual as its sole shareholder).

125. See, e.g., *Shiner*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (allowing amendment when plaintiff named corporation instead of partnership where same brothers owned both entities); *Suste*, 135 Ill. App. 3d 652, 482 N.E.2d 184 (allowing amendment when plaintiff named sole proprietor instead of corporation); *Evans*, 115 Ill. App. 3d 532, 450 N.E.2d 482 (allowing amendment when plaintiff promptly moved to amend upon discovering proper defendant).

126. See, e.g., *Campbell v. Feuquay*, 140 Ill. App. 3d 584, 488 N.E.2d 1111 (5th Dist. 1986) (allowing amendment when plaintiff named grocery store as a defendant and served Feuquay instead of naming Feuquay "doing business as" the grocery store).

127. *Behr v. Club Med, Inc.*, 190 Ill. App. 3d 396, 546 N.E.2d 751 (1st Dist. 1989). As a corollary, courts generally agree that inadvertence will not serve as a cure where "defendant's true identity is known to plaintiff prior to the expiration of the limitations period and plaintiff fails to act appropriately," *Yedor*, 173 Ill. App. 3d at 139, 527 N.E.2d at 419, or where plaintiff's delay in moving to correct the pleadings is unreasonable. *Behr*, 190 Ill. App. 3d at 402-03, 546 N.E.2d at 756 (17 month delay from date plaintiff knew proper defendant, three year delay from date of accident). But see *Anane v. Pettibone Corp.*, 203 Ill. App. 3d 121, 560 N.E.2d 1088 (1st Dist. 1990) (timely notice but plaintiff failed to amend because of defendant's concealment).

128. See, e.g., *Campbell*, 140 Ill. App. 3d 584, 488 N.E.2d 1111 (allowing plaintiff to amend complaint when plaintiff served defendant in wrong capacity; defendant failed to raise misidentification and actually confirmed plaintiff's belief that right party was named by the way defendant answered discovery questions).

the statute of limitations has run,¹²⁹ most courts have permitted the post-limitations joinder of the appropriate defendant.¹³⁰

The first case to address misidentification problems attendant complex business relationships was *Bates v. The Wagon Wheel Country Club, Inc.*¹³¹ The plaintiff was injured on the premises of the Wagon Wheel Lodge Hotel in Rockton, Illinois. Shortly before the running of the statute of limitations, the plaintiff commenced an action against the Wagon Wheel Lodge Hotel and served summons upon Maurice S. Hannon as its agent. When no responsive pleading was filed by the defendant, the plaintiff obtained a default judgment. On the same day, the plaintiff was informed by the attorney for Wagon Wheel Country Club, Inc., and Wagon Wheel Enterprises, Inc., that the wrong defendant (Wagon Wheel Lodge Hotel) had been sued. The plaintiff then sought to amend the complaint to add Wagon Wheel Country Club, Inc., and Wagon Wheel Enterprises, Inc. The new defendants objected to the amendment on the grounds that they had not been added until after the statute of limitations had run. The appellate court upheld the amendment primarily because it was so impressed with the impenetrability of the corporate morass behind which the true defendants' identity had been concealed:

[T]he corporate complexities that evolve around the Wagon Wheel Lodge are, to say the least, unusual . . . [T]he operation at the Wagon Wheel Lodge Hotel was conducted by nine different corporations: The Wagon Wheel Lodge, Inc.; Wagon Wheel Country Club, Inc.; Wagon Wheel Enterprises, Inc.; Walter Williamson's Wagon Wheel, Inc.; Williamson's Wagon Wheel Theater, Inc.; Williamson's Wagon Wheel Resort, Inc.; Williamson's Inn, Inc.; W.W., Inc.; and F.N.I. Corp. Six of the corporations even used the name "Wagon Wheel" in their corporate title. It is understandable that plaintiff might have difficulty in determining who was the proper party defendant. Had the difference in the names of the corporations been more apparent, and their corporate structure more distinct so their identity could be readily ascertained, the diligence of the plaintiff in ascertaining such identity would have more import. However, under the circumstances, it was no doubt difficult for the plaintiff to properly identify the correct corporation. This court feels that the mistake as to the identify [sic] of the correct defendants was caused or inducted [sic] more by the actions of their agent and officers than by any lack of diligence on the part of the plaintiff.¹³²

129. See, e.g., *Evans v. Graber, Inc.*, 115 Ill. App. 3d 532, 450 N.E.2d 482 (4th Dist. 1983) (allowing amendment when defendant refused to answer plaintiff's questions regarding proper defendant).

130. *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991) (allowing amendment to name individual who was served as agent for corporation in dissolution); *Shiner v. Friedman*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (1st Dist. 1987) (allowing amendment to name partnership in place of corporation); but see *Behr*, 190 Ill. App. 3d 396, 546 N.E.2d 751 (disallowing plaintiff's post-limitations joinder of the proper defendant).

131. 132 Ill. App. 2d 161, 266 N.E.2d 343 (2d Dist. 1971).

132. *Id.* at 166, 266 N.E.2d at 347.

The *Bates* court concluded that statutes of limitation were never intended to be a means by which a corporation could escape liability of a tort claim against it.¹³³

Similarly, in *Evans v. Graber, Inc.*,¹³⁴ the plaintiff sued Graber, Inc., for negligence and served summons on its president, Sam Graber. In response to an interrogatory asking if the defendant was correctly named in the lawsuit and, if not, to name the correct defendant, Graber, Inc., answered, "[t]here is a corporation named Graber, Inc. Whether the above is correctly named as a defendant in this lawsuit is a matter for the Plaintiff's determination."¹³⁵ Thereafter, the defendant repeatedly refused to comply with discovery requests seeking to determine the identification of the proper defendant. It was not until Sam Graber's deposition that the plaintiff was able to elicit the fact that the proper defendant was actually Graber Construction Company. The court allowed the post-limitations amendment in part because of Graber, Inc.'s refusal to identify Graber Construction Company.

In *Campbell v. Feuquay*,¹³⁶ the plaintiff sued South Roxana Market, a grocery store, in a personal injury suit. The defendant appeared and answered as South Roxana Market and used that name throughout the pleadings and discovery. After the statute of limitations had run, the plaintiff learned that the South Roxana Market was actually an assumed name used by its owner, Edith Feuquay, and that it did not have a separate legal identity. The plaintiff then amended the complaint to name Edith Feuquay d/b/a South Roxana Market who, in turn, moved to dismiss. In holding for the plaintiff, the court pointed out that the defendant never submitted deposition testimony, interrogatory answers, documents, affidavits, or other evidence that firmly established the proper identification or actual status of South Roxana Market. The court stated that "[w]hile defendant may have had no duty to do so, we observe that it is common practice for defendants to disclose the proper parties defendant in their answers or in response to discovery requests comparable to those propounded in this case."¹³⁷

This line of cases¹³⁸ demonstrates that related commercial en-

133. *Id.* at 166-67, 266 N.E.2d at 347-48. See *supra* text accompanying note 100 for the court's quoted opinion.

134. 115 Ill. App. 3d 532, 450 N.E.2d 482 (4th Dist. 1983).

135. *Id.* at 533, 450 N.E.2d at 483.

136. 140 Ill. App. 3d 584, 488 N.E.2d 1111 (5th Dist. 1986).

137. *Id.* at 589, 488 N.E.2d at 1114. The defendant was additionally chastised for failing to comply with the requirement to file a certificate with the county clerk disclosing the names of the person or persons owning, conducting, or transacting business under an assumed name. *Id.*

138. *Yedor v. Centre Properties, Inc.*, 173 Ill. App. 3d 132, 527 N.E.2d 414 (1st Dist. 1988); *Shiner v. Friedman*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (1st Dist. 1987); *Campbell*, 140 Ill. App. 3d 584, 488 N.E.2d 1111; *Suste v. Sterr*, 135 Ill.

terprises will not be able to insulate themselves from lawsuits by adopting evasive hide-and-seek litigation tactics to outrun the statute of limitations, nor will such defendants be able to benefit from material omissions in pleadings and discovery. Rather, the burden of timely disclosure of a known misidentification error clearly shifts to the defendant. Further, the plaintiff's reliance on the defendant's omission will be protected as "excusable ignorance."¹³⁹

2. Agency

Condition (3) of paragraph 2-616(d) requires, in part, that service be obtained "upon the person, his or her agent or partner . . . even though . . . served in the wrong capacity or as agent of another" ¹⁴⁰ The finding of an agency relationship between the person served and the proper defendant is the most frequently litigated issue under condition (3).¹⁴¹ Generally, if an appropriately designated agent is served and the proper party defendant had knowledge of the suit before the expiration of the statute of limitations,¹⁴² then the post-limitations amendment will be allowed. If, however, an agency relationship is not found,¹⁴³ then the post-limitations amendment will not be allowed notwithstanding the proper defendant's actual knowledge of the suit.¹⁴⁴

*Suste v. Sterr*¹⁴⁵ illustrates a straightforward treatment of agency under condition (3). The plaintiff filed an eleventh hour

App. 3d 652, 482 N.E.2d 184 (3d Dist. 1985); *Evans*, 115 Ill. App. 3d 532, 450 N.E.2d 482; *Bates v. The Wagon Wheel Country Club, Inc.*, 132 Ill. App. 2d 161, 266 N.E.2d 343 (2d Dist. 1971).

139. See *supra* note 138 for cases discussing defendant's burden and plaintiff's excusable ignorance.

140. 735 ILL. COMP. STAT. 5/2-616(d)(3) (ILL. REV. STAT. ch. 110, para. 2-616(d)(3)).

141. A sampling of agency based cases would include: *Cohen Furniture Co. v. Sumpter*, 197 Ill. App. 3d 751, 555 N.E.2d 60 (4th Dist. 1990) (vacating a default judgment against employer named as corporation but which was actually sole proprietorship); *Thomson v. McDonald's, Inc.*, 180 Ill. App. 3d 984, 536 N.E.2d 760 (1st Dist. 1989) (finding franchisor was not the agent of franchisee for service); *Gibson v. Russann, Ltd.*, 179 Ill. App. 3d 208, 534 N.E.2d 449 (1st Dist. 1989) (finding franchisor was not the agent of franchisee for service); and *Suste*, 135 Ill. App. 3d 652, 482 N.E.2d 184 (allowing amendment from individual defendant to corporate defendant).

142. See, e.g., *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991) (allowing amendment naming individual who was served as agent of corporation in dissolution); *Shiner*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (allowing amendment naming partnership instead of corporation where real party in interest was served with summons).

143. *Gibson*, 179 Ill. App. 3d 208, 534 N.E.2d 449 (finding no agency relationship between franchisor and franchisee); *Thomson*, 180 Ill. App. 3d 984, 536 N.E.2d 760 (finding no agency relationship between franchisor and franchisee).

144. See *supra* note 143 for cases discussing defendant's knowledge and dismissal.

145. *Suste*, 135 Ill. App. 3d 652, 482 N.E.2d 184.

suit for injuries arising from a car accident against Sterr, the driver, and Clark, d/b/a The House of Fine Design, as Sterr's employer. During discovery, plaintiff learned that Clark was the president and sole owner of a business named "House of Fine Design, Inc." which was also Sterr's actual employer. Seven months later, the plaintiff amended the complaint to name "House of Fine Design, Inc." as a defendant. However, the court dismissed the amendment because it was not filed within the limitations period. The appellate court reversed the dismissal, in part, because at the time of service "House of Fine Design, Inc." was in dissolution. Since corporate officers have the authority to wind up the affairs of a corporation in dissolution,¹⁴⁶ and since Clark was the corporation's president, the court held that service had been obtained on the right person, Clark d/b/a House of Design, even though Clark had been served in the wrong capacity.¹⁴⁷

On the other hand, the first district rejected agency arguments in *Gibson v. Russann, Ltd.*¹⁴⁸ and *Thomson v. McDonald's, Inc.*¹⁴⁹ In both cases, the plaintiffs filed personal injury actions naming and serving the franchisors rather than the franchisees of the premises on which they were injured. In both cases, the plaintiffs attempted to amend their complaints based on the argument that service upon the franchisor should constitute service upon the franchisee. The courts rejected these arguments finding, instead, that absent evidence of common ownership or operation, or fraudulent concealment,¹⁵⁰ the franchisor could not be deemed the franchisee's agent for service of process purposes.¹⁵¹

3. Knowledge

Condition (4) requires that the proper defendant "within the time that the action might have been brought or the right asserted against him or her, knew that the original action was pending."¹⁵² The decisions in the pertinent case law hinge on the application of the real party in interest test. Specifically, if the real party in interest was sued within but served after the statute of limitations, then

146. See The Illinois Business Corporation Act, 805 ILL. COMP. STAT. 5/1.01-5/17.05 (1992) (ILL. REV. STAT. ch. 32, paras. 1.01-17.05 (1991)).

147. *Suste*, 135 Ill. App. 3d 652, 482 N.E.2d 184.

148. 179 Ill. App. 3d 208, 534 N.E.2d 449 (1st Dist. 1989).

149. 180 Ill. App. 3d 984, 536 N.E.2d 760 (1st Dist. 1989).

150. See *supra* notes 148-49 for cases which held that service on franchisor is not service on franchisee.

151. *Id.*

152. 735 ILL. COMP. STAT. 5/2-616(d)(4) (ILL. REV. STAT. ch. 110, para. 2-616(d)(4)).

the amendment will be characterized as misnomer and allowed.¹⁵³ If, however, the complaint originally named the wrong defendant but subsequently was amended and served on the real party in interest after the statute of limitations, then the error will be characterized as misidentification and result in the amendment's dismissal. This line of cases equates knowledge of the action with service, and requires that service take place within the statute of limitations.¹⁵⁴

For example, in *Thielke v. Osman Construction Co.*,¹⁵⁵ the complaint was filed within but served after the limitations period. The court found that the real party in interest had been sued within the statute of limitations, even though its name had been misspelled and, therefore, the post-limitations service was permissible under paragraph 2-401(b).¹⁵⁶ Conversely, in *Leonard v. City of Streator*¹⁵⁷ and *Hoving v. Davies*,¹⁵⁸ the plaintiffs filed eleventh hour dram-shop actions against taverns. In both cases, the taverns had been owned as unincorporated entities during the statute of limitations period, but process had been served upon their respective agents after the statute expired. The courts held that because the defendants had been sued in their individual rather than corporate capacities, the wrong defendants had been sued and, therefore, the real defendants had not received knowledge of the suit within the limitations period. These cases did not apply the real party in interest test which would have treated these errors as misnomers and permitted the amendments. Rather, the courts characterized the errors as misidentifications and dismissed the actions because service and, therefore, knowledge, had not occurred within the limitations period.

This restriction on the timing of service to the limitations period has been upheld even where the plaintiff proceeded with due diligence to amend and serve the complaint and even where the other criteria of paragraph 2-616(d) have been satisfied. Although Illinois law requires filing of the complaint within the limitations period,¹⁵⁹ the timeliness of service traditionally has been defined by

153. *Thielke v. Osman Constr. Co.*, 129 Ill. App. 3d 948, 473 N.E.2d 574 (1st Dist. 1985). For a further discussion of the *Thielke* case, see *supra* notes 14-15 and accompanying text.

154. *Hoving v. Davies*, 159 Ill. App. 3d 106, 512 N.E.2d 729 (1st Dist. 1987); *Leonard v. City of Streator*, 113 Ill. App. 3d 404, 447 N.E.2d 489 (3d Dist. 1983).

155. *Thielke*, 129 Ill. App. 3d 948, 473 N.E.2d 574.

156. *Id.* at 952, 473 N.E.2d at 577.

157. *Leonard*, 113 Ill. App. 3d 404, 447 N.E.2d 489.

158. *Hoving*, 159 Ill. App. 3d 106, 512 N.E.2d 729.

159. 735 ILL. COMP. STAT. 5/2-616(d)(2) (ILL. REV. STAT. ch. 110, para. 2-616(d)(2)).

due diligence, not the statute of limitations.¹⁶⁰ Thus, courts which have required knowledge within the statute of limitations have effectively eliminated due diligence as the measure of the timeliness of service. In effect, these courts have engrafted the timing provisions of condition (4) onto condition (3) and, in doing so, have merged the two provisions as if they addressed the same conduct of the plaintiff.

This unusual limitation on the timeliness of service raises three questions about condition (4)'s construction. First, is it borne out on the face of the statute? The answer to this question is an indisputable no. Condition (4) calls for knowledge within the statute of limitations. Condition (3) calls for service, but does not delimit it by any period of time. Therefore, the current construction of condition (4) cannot be justified as being facially required, nor is it consistent with the ordinary meaning of the statute's language that knowledge must be defined exclusively by service, since knowledge can be obtained by means other than service.

Second, is this limiting construction rational, i.e., does it serve the purpose for which the statute was enacted? The misidentification statute was enacted to provide relief for plaintiffs who sued the real party in interest and to protect defendants who were not sued within the statute of limitations. Too broad a construction of this statutory plan provides a windfall for plaintiffs who invoke it as a cure-all for a variety of errors not contemplated by the statutory scheme. Too narrow a construction provides a windfall for defendants who assert it as a defense to procedural infractions intended to deprive a plaintiff of his or her day in court. Clearly, the current construction of condition (4) benefits defendants because it restricts service to the statute of limitations period. This construction is particularly punitive in light of the fact that many of the misidentification cases are eleventh hour filings.¹⁶¹

Is there any reason why this category of plaintiff should be singled out to comply with a shorter service period than any other group of plaintiffs under Illinois law? The purpose of measuring

160. See ILL. S. CT. RULE 103(b) (1984) (ILL. REV. STAT. ch. 110A, para. 103(b) (1991)). See *supra* note 11 for a discussion of Rule 103(b).

161. See, e.g., *Knowles v. Mid-West Automation Sys., Inc.*, 211 Ill. App. 3d 682, 570 N.E.2d 484 (1st Dist. 1991) (complaint filed six days before expiration of the statute of limitations); *Barbour v. Fred Berglund & Sons, Inc.*, 208 Ill. App. 3d 644, 567 N.E.2d 509 (1st Dist. 1990) (complaint filed three days before expiration of the statute of limitations); *Greil v. Travelodge Int'l, Inc.*, 186 Ill. App. 3d 1061, 541 N.E.2d 1288 (1st Dist. 1989) (complaint filed six days before expiration of the statute of limitations); *Turner v. Cosmopolitan Nat'l Bank*, 180 Ill. App. 3d 1022, 536 N.E.2d 806 (1st Dist. 1989) (complaint filed on the expiration day); *Yedor v. Centre Properties, Inc.*, 173 Ill. App. 3d 132, 527 N.E.2d 414 (1st Dist. 1988) (complaint filed eight days before expiration of the statute of limitations); *Thielke v. Osman Constr. Co.*, 129 Ill. App. 3d 948, 473 N.E.2d 574 (1st Dist. 1985) (complaint filed nine days before expiration of the statute of limitations).

the timeliness of service by due diligence is to require a plaintiff to prosecute the suit actively, whereas the statute of limitations is intended to bar a plaintiff's access to judicial redress if the complaint is not timely filed. It is well established that procedural rules are supposed to assist in the prosecution of substantive rights, not abridge, modify or enlarge them.¹⁶² A rule which extinguishes a plaintiff's access to judicial recourse when the complaint otherwise qualifies, not only raises equal protection questions, but also, is arguably an invalid exercise of legislative authority to promulgate rules of procedure. This dilemma can easily be avoided by broadening the circumstances that give rise to "knowledge," and/or by allowing "knowledge" to occur subject to due diligence, rather than solely as a consequence of service.

Third, is there any other justification for delimiting service to the statute of limitations period? Other than the efficiencies offered by a clear rule cutting off plaintiff's judicial recourse, this construction flies in the face of paragraph 1-106 of the Illinois Code of Civil Procedure which provides that its rules "shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties."¹⁶³ The principle encompassed in this provision is based on the value judgment that procedural rules should serve as instruments for the implementation of substantive rights and should not otherwise modify or extinguish such rights. Hence, a strong argument can be made that the current construction of condition (4) violates the equal protection clauses of the Illinois and federal constitutions, exceeds legislative authority to promulgate rules of procedure, and violates the policies underlying all of paragraph 2-616(d).¹⁶⁴

162. See Rules Enabling Act, 28 U.S.C. 2072 (1988); see also *Hanna v. Plummer*, 380 U.S. 460 (1965).

163. 735 ILL. COMP. STAT. 5/1-106 (ILL. REV. STAT. ch. 110, para. 1-106). "Code pleading was adopted in this state because procedural pitfalls of common law pleading often denied litigants an opportunity to have their differences determined on the merits." *Greil*, 186 Ill. App. 3d at 1065, 541 N.E.2d at 1291.

164. Although not expressly stated, this line of cases seems to derive from the United States Supreme Court case of *Time v. Schiavone*, 477 U.S. 30 (1987). In *Schiavone*, the Supreme Court held in favor of strict application of Rule 15(c)'s elements. Specifically, (1) the amended complaint had to arise out of the same conduct set forth in the original complaint, (2) the newly added party had to be the proper party, and (3) the newly added party had to receive actual notice of the action before the expiration of the statute of limitations. 477 U.S. at 30-31; see also *Worthington v. Wilson*, 790 F. Supp. 829, 835 (N.D. Ill. 1992) (holding relation back does not apply where plaintiff attempted to add three defendants described only as "three unknown police officers"). Simply put, failure to satisfy any one of these elements in a misidentification claim would result in a dismissal of the amended complaint.

After *Schiavone*, numerous commentators and Advisory Committee members of Rule 15 criticized the decision, arguing that its strict construction and application clearly went against FED. R. CIV. P. 8's "liberalized pleading" objective. Consequently, in 1991, under the authority of the Advisory Committee,

4. Estoppel

In the last twenty years, a number of cases have invoked equitable estoppel to either confirm or defeat a misidentification case.¹⁶⁵ This line of cases breaks down into three categories: (1) cases which use estoppel to cure a misidentification defect;¹⁶⁶ (2) cases which use estoppel to demonstrate plaintiff's compliance with paragraph 2-616(d);¹⁶⁷ and (3) cases which reject the use of estoppel as a cure for a misidentification defect.¹⁶⁸

a. Use of Estoppel to Cure Misidentification Defects

The Illinois Supreme Court endorsed the estoppel argument in *Vaughn v. Speaker*.¹⁶⁹ *Vaughn* was a representative action in which the plaintiffs did not learn that they had sued a deceased person until after the running of the statute of limitations at which time they attempted to substitute the executor for the deceased. The trial court dismissed the case on the grounds that the deceased and the executor were separate legal entities since they could not exist simultaneously. Hence, the complaint was a nullity since it was filed against a decedent, leaving the untimely filed amendment

Rule 15(c) was amended to counteract the ruling in *Schiavone*. See Lawrence A. Epter, *An Un-Fortune-Ate Decision: The Aftermath of the Supreme Court's Eradication of the Relation-Back Doctrine*, 17 FLA. ST. U.L. REV. 713 (1990); Nathan M. Gundy, II, *Schiavone v. Fortune: A Clarification of the Relation Back Doctrine*, 36 CATH. U.L. REV. 499 (1987). For an example of a federal court applying the more liberal version of 15(c), see *Hensley v. Soo-Line R.R. Co.*, 777 F. Supp. 1421, 1424 (N.D. Ill. 1991) (if an added party did not receive notice within the statute, relation back may still occur if a "sufficient identity of interest exists between the new and original defendants"). See also *Foley v. Chicago, Cent. & Pac. R.R.*, No. 90 C 20187, 1992 U.S. Dist. LEXIS 4683 (N.D. Ill. Feb. 27, 1992); *Freeman v. Chicago Police*, No. 90 C 3101, 1991 U.S. Dist. LEXIS 7347 (N.D. Ill. May 31, 1991).

165. See *Vaughn v. Speaker*, 126 Ill. 2d 150, 533 N.E.2d 885 (1988); *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991); *Anane v. Pettibone Corp.*, 203 Ill. App. 3d 121, 560 N.E.2d 1088 (1st Dist. 1990); *McCamant v. McCarthy*, 202 Ill. App. 3d 812, 560 N.E.2d 432 (3d Dist. 1990); *Thomson v. McDonald's, Inc.*, 180 Ill. App. 3d 984, 536 N.E.2d 760 (1st Dist. 1989); *Shiner v. Friedman*, 161 Ill. App. 3d 73, 513 N.E.2d 862 (1st Dist. 1987); *Campbell v. Feunquay*, 140 Ill. App. 3d 584, 488 N.E.2d 1111 (5th Dist. 1986); *Evans v. Graber, Inc.*, 115 Ill. App. 3d 532, 450 N.E.2d 482 (4th Dist. 1983); *Ingram v. MFA Ins. Co.*, 18 Ill. App. 3d 560, 309 N.E.2d 690 (2d Dist. 1974); *Bates v. The Wagon Wheel Country Club, Inc.*, 132 Ill. App. 2d 161, 266 N.E.2d 343 (2d Dist. 1971).

166. *Vaughn*, 126 Ill. 2d 150, 533 N.E.2d 885; *Ellis*, 220 Ill. App. 3d 48, 580 N.E.2d 899; *Shiner*, 161 Ill. App. 3d 73, 513 N.E.2d 862; *Ingram*, 18 Ill. App. 3d 560, 309 N.E.2d 690.

167. *Anane*, 203 Ill. App. 3d 121, 560 N.E.2d 1088; *Campbell*, 140 Ill. App. 3d 584, 488 N.E.2d 1111; *Evans*, 115 Ill. App. 3d 532, 450 N.E.2d 482; *Bates*, 132 Ill. App. 2d 161, 266 N.E.2d 343.

168. *McCamant*, 202 Ill. App. 3d 812, 560 N.E.2d 432; *Thomson*, 180 Ill. App. 3d 984, 536 N.E.2d 760.

169. *Vaughn*, 126 Ill. 2d 150, 533 N.E.2d 885.

nothing to which to relate back.¹⁷⁰ The Illinois Supreme Court agreed with the district and appellate courts' findings that the case failed both the misnomer and misidentification tests. However, it found that an issue of fact existed as to whether the defendants had "lulled plaintiffs into a false sense of security, thereby causing them to delay the assertion of their rights,"¹⁷¹ and, thus, were estopped to assert the statute of limitations as a defense.¹⁷² The court found that the combination of the insurer's concession of liability, payment of the property damage claim, offer of \$15,000 to settle the personal injury claim, and extensive negotiations with the plaintiffs could have induced the plaintiffs to delay filing suit. Accordingly, the court remanded the case with instructions that the trier of fact apply a substantial factor test to determine if the plaintiffs' reliance had been detrimental.¹⁷³

b. Use of Estoppel to Demonstrate Compliance with Paragraph 2-616(d)

In *Anane v. Pettibone Corp*¹⁷⁴ the plaintiff had originally filed a products liability action against Pettibone Corporation alleging that a machine bearing the Pettibone name was responsible for her husband's death in a factory accident. The plaintiff did not learn, until two years into discovery and after the defendant's ultimate filing for bankruptcy, that the real manufacturer of the machine had been American Process Systems Corp. ("American"), with which Pettibone had entered into an indemnification agreement. This agreement included notification and cooperation clauses between the companies in the event of a lawsuit.¹⁷⁵ In accordance with the agreement, Pettibone provided American with notice and a copy of the plaintiff's complaint. Thereafter, counsel for both companies met to discuss the suit. Between the filing of the complaint and Pettibone's filing for bankruptcy, Pettibone appeared, answered, participated in discovery, refused to correct or disclose that the name of the machine's real manufacturer was American, or to implead American as a third party defendant, or to implicate American in any way. Upon learning of American's role in the manufacture of the machine, the plaintiff filed a fourth amended complaint

170. *Id.* at 155, 533 N.E.2d at 887. For the lower court decision, see *Vaughn v. Speaker*, 156 Ill. App. 3d 962, 509 N.E.2d 1084 (3d Dist. 1987).

171. *Vaughn*, 126 Ill. 2d at 156, 533 N.E.2d at 887.

172. See *supra* note 47 for the Illinois Supreme Court's articulation of the six elements of estoppel; see also ILLINOIS LAW & PRACTICE, Estoppel 22, at 83 (1956) (outlining the elements of estoppel).

173. *Vaughn*, 126 Ill. 2d at 167, 533 N.E.2d at 892.

174. 203 Ill. App. 3d 121, 560 N.E.2d 1088 (1st Dist. 1990).

175. Although this agreement was subsequently terminated, the opinion did not discuss the effect of the termination on this case. *Id.* at 124, 560 N.E.2d at 1090.

naming American as an additional defendant. That complaint was dismissed as time-barred. On appeal, the plaintiff argued that in combination with Pettibone as its agent, American had engaged in conduct sufficient to estop it to assert the statute of limitations bar. The court agreed:

In the present case, (1) the Pettibone nameplate concealed that American was the machine's manufacturer; (2) American knew that the representation of Pettibone as the manufacturer was untrue; (3) plaintiff did not know that Pettibone was not the manufacturer; (4) American should have expected that the nameplate would have been relied upon by the plaintiff; (5) plaintiff relied upon the nameplate and diligently pursued discovery; and (6) plaintiff would be prejudiced if American is permitted to deny that it manufactured the product. Accordingly, we find that American is estopped from asserting the defense of the statute of limitations as a bar to plaintiff's cause of action . . . [g]iven the parties' contractual agreement, we conclude that Pettibone was an agent for the purpose of service of process upon American [citation omitted]. Pettibone was held out to the public as manufacturer of the machine. Defendant never submitted sufficient answers to interrogatories, an affidavit, or documents in responses to plaintiff's requests. Plaintiff's efforts to ascertain the identity of the manufacturer were reasonable [citation omitted]. Any mistake as to the identity of the person who should have been named as the proper party defendant was induced, if not caused, by the representations of Pettibone [citation omitted].¹⁷⁶

Finally, and almost as an afterthought, the court found that the plaintiff had otherwise complied with all five elements of paragraph 2-616(d).¹⁷⁷

Two additional cases, *Evans v. Graber, Inc.*¹⁷⁸ and *Campbell v. Feuquay*¹⁷⁹ implicitly utilized the estoppel concept to support the plaintiffs' misidentification defenses without expressly referring to estoppel as an independent basis for their holdings. In *Evans*, the improperly designated defendant, Graber, Inc., participated in discovery under that incorrect designation and repeatedly refused to answer interrogatories requesting the identification of the correct defendant or other persons who would have knowledge of the accident. Graber, Inc.'s president, Sam Graber, did not disclose this information until two years later when faced with direct and persistent questioning at his deposition. Immediately thereafter, the plaintiff moved to amend the complaint to name the appropriate defendant, Graber Construction Company. Graber Construction Company opposed the amendment as time-barred.¹⁸⁰

176. *Id.* at 127-28, 560 N.E.2d at 1092-93.

177. *Id.* at 128, 560 N.E.2d at 1093.

178. 115 Ill. App. 3d 532, 450 N.E.2d 482 (4th Dist. 1983).

179. 140 Ill. App. 3d 584, 488 N.E.2d 1111 (5th Dist. 1986).

180. *Evans*, 115 Ill. App. 3d at 535, 450 N.E.2d at 484.

In *Campbell v. Feuquay*,¹⁸¹ the plaintiff sued South Roxana Market and served its owner, Edith Feuquay. The defendant filed a general denial but otherwise participated in the pleadings and discovery as South Roxana Market. During discovery, the plaintiff learned that South Roxana Market was merely an assumed name used by its sole proprietor, Edith Feuquay. By this time, however, the statute of limitations had expired. The plaintiff then moved to amend the complaint to add Edith Feuquay, d/b/a South Roxana Market, Inc., and the newly named defendant objected on the grounds that the amendment exceeded the limitations period. The court found that the general denial was too ambiguous a response to forewarn the plaintiff of his mistake before the running of the statute, and that Feuquay should have been more forthcoming in identifying the proper defendant when specifically asked to do so in discovery. The court also found that since Edith Feuquay was operating a business under an assumed name, she should have registered that name with the Secretary of State pursuant to the Assumed Name Statute.¹⁸² The court concluded that the plaintiff's error had been inadvertent in light of the defendant's conduct.

The *Evans* and *Campbell* cases were given remarkably similar treatment by their respective courts. Both cases identified the critical issue as inadvertence, which typically allows post-limitations service if due diligence is exercised after the plaintiff learns of the error giving rise to the amendment. However, in determining inadvertence, the *Campbell* and *Evans* courts looked not to the plaintiffs' behavior, but rather, to the defendants' ability to mitigate or correct plaintiff's error and the reasonableness of plaintiff's conduct in light of the defendants' failure to proceed forthrightly to make the correction. Both cases placed heavy reliance on defendants' participation in the litigation under the incorrect name, and failure to correct the improper name or identify the proper defendant, despite knowledge of such. Each finding of inadvertence was based on the conclusion that the plaintiffs' reliance on the defendants' misleading conduct was reasonable and the error, therefore, unavoidable. Hence, even though these cases were cast in terms of inadvertence, by shifting the inquiry from the plaintiffs' conduct to the defendants' conduct, these holdings were actually based on estoppel: the defendants were foreclosed from raising the statute of limitations defense since they knowingly participated in the confusion that gave rise to the untimely amendment. In both *Campbell* and *Evans*, the defendants were particularly culpable because they

181. *Campbell*, 140 Ill. App. 3d 584, 488 N.E.2d 1111.

182. *Id.* at 589, 488 N.E.2d at 1114. The purpose of the Assumed Name Statute is to forewarn the public of a business' multiple identities. 805 ILL. COMP. STAT. 405/1-4 (1992) (ILL. REV. STAT. ch. 96, para. 4 (1991)).

knowingly concealed the real defendants' identity.¹⁸³

c. Cases Which Reject Estoppel as a Cure for Misidentification Defects

The estoppel argument has not been universally accepted by the lower courts in spite of its recognition in *Vaughn*.¹⁸⁴ Two recent appellate court decisions have refused to allow estoppel to cure misidentification errors. In *Thomson v. McDonald's, Inc.*,¹⁸⁵ filed just two months after *Vaughn*, the first district decided a case which was virtually the reverse image of *Evans* and *Campbell*. In *Thomson*, the plaintiff filed a personal injury complaint against McDonald's, Inc. McDonald's filed a general denial to the complaint, investigated the claim, and engaged in discovery. Eventually, the plaintiff learned that the action should have been brought against Harry and Theodore Theodore, the owners of the McDonald's franchise. Because the statute of limitations had run, the plaintiff argued that the amended complaint should relate back to the filing of the original complaint since, by its participation in the litigation, McDonald's had fraudulently concealed the plaintiff's cause of action against the Theodores. Further, the plaintiff added that the Theodores would not be prejudiced by the out-of-time amendment since both they and McDonald's were represented by the same counsel. The court, however, found that the plaintiff was solely responsible for her predicament since she had been given timely notice that she sued the wrong party by virtue of McDonald's general denial. Further, she had not diligently moved to compel answers to discovery, and had also failed to verify the identification of the proper defendant by investigating public records. The court regarded McDonald's silence, in light of the plaintiff's misimpression, as inconsequential. Finally, the court found that the lack of an express agency provision in the franchise agreement absolved McDonald's of any responsibility for its franchisee's liabilities.

Perhaps both the plaintiff and the court missed the point in this case. Clearly, the plaintiff could not have met her burden of proving fraudulent concealment against McDonald's. However, the plaintiff might have prevailed had she argued that the Theodores were estopped to assert the statute of limitations defense by virtue of McDonald's litigation conduct and its concurrent representation

183. *Campbell*, 140 Ill. App. 3d at 590, 488 N.E.2d at 1115; *Evans*, 115 Ill. App. 3d at 533-35, 450 N.E.2d at 483-84. It is unclear if the results of these cases would have differed if the defendants had been innocent or had the improper defendants been more forthcoming in identifying the proper defendants. See *Campbell*, 140 Ill. App. 3d 584, 488 N.E.2d 1111; *Evans*, 115 Ill. App. 3d 532, 450 N.E.2d 482.

184. *Vaughn v. Speaker*, 126 Ill. 2d 150, 533 N.E.2d 885 (1988).

185. 180 Ill. App. 3d 984, 536 N.E.2d 760 (1st Dist. 1989).

by the Theodores' attorneys, both of which inured to the Theodores' exclusive benefit and to the plaintiff's detriment. The court then could not have interposed the agency theory to defeat the estoppel argument since, in *Vaughn*, there was no agency relationship between the decedent and the executor nor was one found to be a prerequisite to a finding of estoppel.¹⁸⁶

A less questionable result occurred in the 1990 case of *McCammant v. McCarthy*¹⁸⁷ in which the third district acknowledged *Vaughn's* acceptance of estoppel in a similar context, but found the instant case distinguishable. After a car accident, the plaintiff entered into negotiations with the defendant's insurance company. During these negotiations, but unknown to the plaintiff, the defendant died. Before the running of the statute of limitations, the plaintiff filed a complaint designating the decedent as the defendant. The decedent's executor was served, but not until after the running of the statute. The court found that the insurance company's litigation conduct was not misleading and declined to impute the insurer's knowledge to the executor. Since the court could find no other basis for acceding to an estoppel argument, it dismissed the amended complaint. A concurrence, written by Justice Stouder, reluctantly agreed that the estoppel principle espoused in *Vaughn* could not save this case but still questioned the fairness of the result in light of the fact that the insurance company, the real party in interest, had knowledge of the action prior to the running of the statute of limitations. To this anomalous situation, Justice Stouder observed:

Either by statute or otherwise, plaintiffs in McCammant's position should be afforded some form of relief from the normal operations of the statute of limitations. In our mobile society, more often than not plaintiffs and defendants do not live in the same community. Hence, plaintiffs are unlikely to hear of a defendant's death. Also, since the insurance company is the real party in interest in these actions, if the action is filed within the statute of limitations, the insurance company's knowledge should be attributable to the executors of the decedent's estate. In this type of case neither the plaintiff nor his attorney have any reasonable or practical way of monitoring the defendant's life or death. Consequently the application of the statute of limitations, as in this case, produces an unfair result without any benefit to the legal system.¹⁸⁸

186. *Vaughn*, 126 Ill. 2d at 163, 533 N.E.2d at 891; see also *Thomson*, 180 Ill. App. 3d 984, 536 N.E.2d 760 (illustrating that an agency relationship is not an element of estoppel).

187. 202 Ill. App. 3d 812, 560 N.E.2d 432 (3d Dist. 1990).

188. *Id.* at 186, 560 N.E.2d at 434 (Stouder, J., concurring).

d. Summary

This line of cases demonstrates the application of the estoppel concept in the misidentification context. *Vaughn* used estoppel to override misidentification defects which otherwise would have been fatal to the plaintiff's case. So used, estoppel served as an alternative and independent ground to cure a paragraph 2-616(d) defect. This use of estoppel shifts the focus of the paragraph 2-616(d) inquiry from the plaintiff's conduct to the defendant's conduct. The cases of *Bates* and *Anane* also used the estoppel concept to shift the focus of the inquiry from the plaintiff's to the defendant's conduct, but only after the plaintiff had established compliance with paragraph 2-616(d). Thus, estoppel was actually unnecessary to the outcome of these cases but functioned as an additional basis for a paragraph 2-616(d) finding. However, by using estoppel to support compliance, the court broadened the application of estoppel to situations where a weak showing of compliance could be bolstered by a strong demonstration of the defendant's obstructionist conduct. *Thomson* and *McCammant* demonstrated that estoppel will not be given a wide berth short of a clear showing of misleading conduct by the defendant.

In summary, estoppel now serves two functions in the misidentification context: it can bolster a showing of compliance, or it can be a substitute for noncompliance with a statutory condition. Either way, use of estoppel shifts the issue from the plaintiff's behavior to the defendant's behavior. Importantly, only the plaintiff's behavior is addressed in the statute. Why, then, are some courts superimposing the estoppel device onto the misidentification statute? Perhaps the courts are reaching for estoppel because the requirement of inadvertence is too discretionary and open-ended to provide practical guidelines for the bench and bar. Perhaps, also, the problem lies with conditions (3) and (4) which work on an either/or basis rather than in the conjunctive. To avoid the inherent contradictions of the conjunctive use of conditions (3) and (4), the courts have fused them by equating service with knowledge and, in so doing, have eliminated condition (4) as an independent ground under paragraph 2-616(d). For the time being, the use of estoppel to cure defects in the statute may serve that intended purpose but, lest the exceptions swallow the rule, it is not an effective resolution of the problems caused by the statute.

III. CRITIQUE

A. Unresolved Issues for the Bench

As demonstrated throughout this study, the misnomer/misidentification scheme has been rendered unmanageable by

inconsistent or inappropriate treatment of certain elements, resulting in destabilization of the entire statutory scheme.

1. *State of Mind Requirements*

The most problematic of these elements are the multiple and ill-defined state of mind requirements. For example, when construed restrictively, courts hold that the plaintiff's "intent" to serve process on a particular party can be proven only by the designations set forth in the caption.¹⁸⁹ Such cases, however, often employ hyperformalistic solutions which terminate the plaintiff's judicial recourse.¹⁹⁰ The caption limitation is an irrational basis for determining intent since, as many plaintiffs frequently have argued, no plaintiff ever intends to sue the wrong defendant.¹⁹¹

Further, when construed broadly,¹⁹² intent can encompass behavior ranging from nonfeasance¹⁹³ to purposeful conduct.¹⁹⁴ Such overbroad construction renders the intent requirement meaningless. At this juncture, it is important to ask if the inclusion of intent in the statutory scheme is consistent with the scheme's goals. Given its inconsistent construction and application by the courts, the scheme may be better served by deleting the intent requirement.

Similarly, the courts must resolve the kinds of behavior that satisfy the "inadvertence" requirement and the proper function of inadvertence within the statute. For example, can inadvertence substitute for noncompliance with conditions (3) or (4)? Can a weak case of inadvertence be bolstered by an estoppel argument? Finally, should "knowledge" under paragraph 2-616(d) be broadened to include conduct other than service of process and be extended beyond to the statute of limitations to avoid imposing a shorter service period on misidentification cases than exists for any other Illinois actions?¹⁹⁵

189. See, e.g., *Thompson v. Ware*, 210 Ill. App. 3d 16, 568 N.E.2d 500 (4th Dist. 1991); *Griffith v. Pincham*, 67 Ill. App. 3d 316, 384 N.E.2d 870 (1st Dist. 1978).

190. See *supra* note 188 for relevant case law. See also *Behr v. Club Med, Inc.*, 190 Ill. App. 3d 396, 546 N.E.2d 751 (1st Dist. 1989) (interpreting state of mind requirements restrictively).

191. *Barbour v. Fred Berglund & Sons, Inc.*, 208 Ill. App. 3d 644, 651, 567 N.E.2d 509, 514 (1st Dist. 1990).

192. For a discussion of intent see *supra* notes 4-92 and accompanying text and notes 188-94 and accompanying text.

193. *Id.*

194. *Id.*

195. Obviously, the courts are torn between the clear objectivity of a statute of limitations on the one hand, and the equitable notion of a curative act on the other.

Essentially, statutes of limitations fix a time beyond which . . . disputes, claims and matters can no longer be brought forth for judicial determination. Simply by withdrawing the privilege to litigate and denying the aid of the courts in asserting claims and interests of ancient origin, they effect-

2. Agency

A second major weakness in the misnomer/misidentification scheme is the treatment of agency. Agency has received varied and inconsistent treatment in the estoppel, business names, individual names, and representative action contexts. Courts need to resolve the relationship between estoppel and agency, i.e., whether an agent's knowledge of the action, participation in the action, or receipt of service of process will estop the principal from invoking a statute of limitations defense? If so, what relationships or situations will constitute agency relationships for misnomer/misidentification purposes?¹⁹⁶ Further, if an incorrect business or individual is sued or served but has an affiliation with the proper defendant, should the burden of disclosure lie with the defendant or should the burden of discovery lie with the plaintiff? Finally, what kind of conduct will shift the burdens?

Last, per the *McCamant* dissent, in a representative action where the insurance company has prior knowledge of the action, should the insurance company's knowledge be imputed to the decedent and/or the executors even if they are not named and/or served within the time requirements of the statute? Similarly, when the plaintiff sues a dead person instead of the estate, the complaint is considered a nullity since the amendment has nothing to which to relate back. This conclusion is based on the principle that since the deceased and the estate cannot exist simultaneously, they are separate legal entities. Can the estate succeed to the deceased's interest as the real party in interest just as it does for winding up the dece-

ate a number of important public policies. Further, although the application of a rigidly fixed time limitation in a particular case may appear arbitrary, no one doubts that, in general, they tend to promote justice as between parties to controversies.

Lewis M. Simes, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* (1960) reprinted in Paul Goldstein, *REAL ESTATE TRANSACTIONS* 288 (1988).

On the other hand, since human nature is fallible, a rationale arises for a second device—one which counters the harsh results of a statute of limitations. This is the curative act.

A curative act is one which reaches back and corrects an error made in the past In general, curative statutes may be said to deal with matters of a formal character and to carry out the intentions of the parties which may otherwise have been frustrated by their failure to comply with formal requirements In spite of their limitations, curative acts have been in operation since colonial times. They have dealt with a variety of situations, such as the following: absence of a seal; defective acknowledgements; failure to include any acknowledgement; defective conveyances under powers of attorney; defective executed deeds of corporations; defective records of judicial sales.

Id. at 286-87.

196. See *Thompson v. Ware*, 210 Ill. App. 3d 16, 568 N.E.2d 500 (4th Dist. 1991); *Leonard v. City of Streator*, 113 Ill. App. 3d 404, 447 N.E.2d 489 (3d Dist. 1983).

dent's affairs? Such treatment would allow designation errors to be characterized as misnomers since the estate would be deemed the action's real party in interest.

B. Analytical Guidelines

1. Eleventh Hour Filings and Inadvertence

While complex corporate structures and strategic defense tactics account for some misnomer/misidentification errors, the majority of cases actually result from eleventh hour filings precipitating such errors. Where corporate defendants are involved, plaintiffs' attorneys are advised to consult the Secretary of State's corporate index *before* filing. If time does not permit, this search must be performed immediately after filing. Further, any needed amendments should be made as soon as possible, with an adequate work record to prove due diligence. However, given the current construction of paragraph 2-616(d), once the statute of limitations has run, there is little a plaintiff's attorney can do to save the action.

2. Decedents/Estates and Representative Actions

A decedent and his or her estate are not "one" for purposes of the relation back doctrine. The Illinois Supreme Court has held that, even though the estate is the legal successor to certain rights and liabilities of the decedent, the decedent and the estate are wholly distinct legal entities. As a result, the estate cannot be substituted for the decedent as a misnomer. Further, failure to meet the five elements of paragraph 2-616(d) as to the estate, even if satisfied for the decedent, will result in dismissal of the suit.¹⁹⁷

3. Dramshop Actions

The owner of the establishment may not necessarily be the owner of the liquor license and, thus, not the real party in interest. Also, the liquor license holder and the owner of the establishment, if different, are not "one" for purposes of the relation back doctrine under paragraph 2-616(d).¹⁹⁸

4. Franchisor/Franchisee

First, it is important to distinguish between the owner of the franchise and the name of the franchise. Incorrect designation may not be correctable as a misnomer. Second, franchisors and franchis-

197. See *Vaughn v. Speaker*, 126 Ill. 2d 150, 533 N.E.2d 885 (1988).

198. See, e.g., *Ellis v. Borisek*, 220 Ill. App. 3d 48, 580 N.E.2d 899 (3d Dist. 1991); *Hoving v. Davies*, 159 Ill. App. 3d 106, 512 N.E.2d 729 (1st Dist. 1987); *Leonard*, 113 Ill. App. 3d 404, 447 N.E.2d 489.

ees frequently enter into hold-harmless agreements which release the franchisor, corporate parent, or holding company from any liability in the event of a law suit. Unfortunately, information regarding the corporate structure may not be revealed until disclosed in discovery, often long after the expiration of the limitations period. Unless there is an agency relationship between franchisor and franchisee, or an estoppel argument can be put forth, the plaintiff's suit may well be lost.¹⁹⁹

5. *Businesses Conducted Under an Assumed Name*

A number of businesses operate under assumed names. Such assumed names, when captioned as defendants, are not considered legal entities for purposes of filing suit and are never considered a real party in interest. Unless the true owner or agent fortuitously is served within the statute of limitations, these suits are generally subject to dismissal.²⁰⁰

6. *Persons Sharing the Same or Similar Name*

Again, while a simple misspelling of the real party in interest's name will not disqualify a suit, service upon the wrong party—who may coincidentally share the same or similar name as the real party in interest—can be fatal to the plaintiff if amendment and service upon the real party in interest are not effected within the statute of limitations.²⁰¹

7. *Implied Estoppel: the General Denial and Defendant's Duty to Disclose*

Defendants are advised to be more forthcoming with accurate information if they know of the plaintiff's naming error. *Campbell* and *Evans* have started to erode the presumption, relied on so heavily in the *Griffith* case, that defendants may stand mute in light of a known erroneous designation made by plaintiff.²⁰² The case law, especially in the third district, suggests that defendants do indeed

199. See, e.g., *Thomson v. McDonald's, Inc.*, 180 Ill. App. 3d 984, 536 N.E.2d 760 (1st Dist. 1989) (dismissing suit when plaintiff attempted to sue franchise and did not obtain service on proper party).

200. See, e.g., *Campbell v. Feuquay*, 140 Ill. App. 3d 584, 488 N.E.2d 1111 (5th Dist. 1986) (showing a plaintiff's suit which failed due to the assumed name of the business defendant).

201. See, e.g., *Thompson v. Ware*, 210 Ill. App. 3d 16, 568 N.E.2d 500 (4th Dist. 1991) (demonstrating the effect of service upon the wrong party with a similar name as the real party in interest).

202. *Campbell*, 140 Ill. App. 3d 584, 488 N.E.2d 1111; *Evans v. Graber, Inc.*, 115 Ill. App. 3d 532, 450 N.E.2d 482 (4th Dist. 1983). But see *Thomson*, 180 Ill. App. 3d 984, 536 N.E.2d 760 (adhering more closely to the reasoning of the *Griffith* case).

have a duty of disclosure when they have knowledge of the real party in interest. Defense attorneys are also warned that the use of a general denial may be too ambiguous to alert a plaintiff to a designation error and, thus, may later provide the plaintiff with an effective estoppel argument.

IV. AFTERWORD—PROPOSED STATUTORY MODIFICATION

Any modifications of the current statutory scheme should take into account the problems arising in the case law. For example, the current legislative categories of misnomer and misidentification are not specific enough to address the multiple and overlapping categories of parties to which they have been applied. Thus, any legislative changes should reverse this trend by providing, instead, a more specific articulation of the two provisions. In addition, any proposed modifications should address the following basic principals: First, was the real party in interest served within the limitations period with due diligence? Second, did the real party in interest have actual notice and/or appear and defend? Third, did the real party in interest know, or should it have known, that but for the mistake concerning the identity of the proper party, the action would have been brought against it?²⁰³ With these concerns in mind, the following statutory scheme is proposed:

1. *Proposed Statute for Misnomer*

At any time, before or after judgment, and upon such terms and proof that the court requires, an amendment correcting the name of a current defendant, who is the real party in interest to the action, may relate back to the filing of the initial complaint. Misnomer is not a ground for dismissal.

2. *Proposed Statute for Misidentification*

A cause of action against a person not originally named as a defendant is not barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if all the following terms and conditions are met:

(1) the time prescribed or limited had not expired when the original action was commenced;

(2) service of summons was in fact had upon the person before or after the appropriate limitations period. The term person shall include (i) an agent, partner, as the nature of the defendant made appropriate, even though he or she was served in the wrong capacity or as agent of another; (ii) the real party in interest; (iii) a business conducted under an assumed name or such business' owner; (iv) a decedent whose death was unknown to the plaintiff at the time of filing of the action; (v) a decedent's insurance company, (vi) a trustee;

203. *Changes in Party After Statute of Limitations Has Run*, *supra* note 3, at 38 (citing *Rich's, Inc. v. Snyder*, 134 Ga. App. 889, 216 S.E.2d 648 (1975)).

(3) the person, within the time that the action might have been brought or the right asserted against him or her, knew that the original action was pending and that it grew out of a transaction or occurrence involving or concerning him or her; and

(4) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set forth in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery when the condition precedent has in fact been performed, and even though the person was not named originally as a defendant. For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of filing of the original pleading so amended.

CONCLUSION

When viewed in tandem, the misnomer/misidentification provisions do not serve the twofold purposes for which they were enacted—to resolve disputes on their merits and to distinguish misspellings from misjoinders. As to the first purpose, the Illinois Code of Civil Procedure is based on the premise that procedural issues are to be treated liberally, to “do justice,”²⁰⁴ rather than to narrow, restrict, or abolish substantive rights. Taken in isolation, the misnomer provision achieves this purpose. However, the misidentification provision is all too often subject to hyperformalistic resolutions that terminate a plaintiff’s recourse to the court before the case can ever be considered on its merits.

As to the second purpose, the courts have yet to come to terms with the critical distinction between misnomer and misidentification. Misnomer permits a name correction or change provided the real party in interest was designated in the original complaint. It does not entail joinder. Misidentification, on the other hand, permits the joinder of a new party who was not previously designated as a party to the action.

On its face, the highly discretionary language of paragraph 2-401(b) has given rise to a body of case law which easily breaks down in terms of analytical consistency and results, whereas the highly conditioned language of paragraph 2-616(d) has given rise to a hopelessly scrambled morass of cases which are analytically disjointed and inconsistent in result. Rather than unscramble the confusion, courts have superimposed “intent” and “estoppel” to rectify statutory infractions by plaintiffs or to punish obstructionist behavior by

204. *Shiner v. Friedman*, 161 Ill. App. 3d 73, 79, 513 N.E.2d 862, 865 (1st Dist. 1987); see also 735 ILL. COMP. STAT. 5/1-106 (1992) (ILL. REV. STAT. ch. 110, para. 1-106 (1991)) (stating its rules are to be construed liberally to determine the rights of the parties).

defendants. These self help judicial resolutions ultimately serve to further destabilize the already fragile and confused distinctions between misnomer and misidentification. Accordingly, the legislature should consider redrafting the statutory scheme to resolve the problems addressed in the substantial body of case law that has developed under these two provisions.

