

Spring 1988

## Voluntary Dismissals - From Shield to Sword by the Convergence of Improvident Actions, 21 J. Marshall L. Rev. 549 (1988)

James T. Ferrini

Richard R. Winter

Follow this and additional works at: <http://repository.jmls.edu/lawreview>

 Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Litigation Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

James T. Ferrini & Richard R. Winter, Voluntary Dismissals - From Shield to Sword by the Convergence of Improvident Actions, 21 J. Marshall L. Rev. 549 (1988)

<http://repository.jmls.edu/lawreview/vol21/iss3/5>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

# VOLUNTARY DISMISSALS—FROM SHIELD TO SWORD BY THE CONVERGENCE OF IMPROVIDENT ACTIONS

JAMES T. FERRINI\* AND RICHARD R. WINTER\*\*

## PREFATORY NOTE

This article suggests an appropriate legislative response to several recent Illinois Appellate Court decisions that have examined the right of voluntary dismissal and found it inviolable— notwithstanding that it was exercised transparently to evade previously entered discovery sanctions or pending defense motions. The proposals set forth in this article are made after consideration of the common law and statutory developments of the plaintiff's right to voluntarily dismiss his case and to refile. This historical review suggests that the sources of this "absolute" right are recent and improvident events. Those events have transformed the right into an offensive weapon that effectively frustrates the prompt and effective administration of justice.

## PRE-1976 BACKGROUND

Although the right of voluntary dismissal—which permits a plaintiff to discontinue an action at his pleasure, with no corresponding right to the defendant—has been judicially construed as "absolute,"<sup>1</sup> that right was restricted prior to 1976 in one significant respect: the right to refile was limited. At common law, the plaintiff could not refile where the dismissal amounted to a *retraxit* (an open and voluntary renunciation of the action in court).<sup>2</sup> If the dismissal

---

\* Partner, Clausen, Miller, Gorman, Caffrey & Witous, P.C., Chicago, Illinois. B.S., Loyola University; J.D., *cum laude*, Loyola University Law School.

\*\* Associate, Clausen, Miller, Gorman, Caffrey & Witous, P.C., Chicago, Illinois. B.S., University of Illinois; M.B.A., DePaul University; J.D., Chicago-Kent College of Law.

The authors have filed an *amicus curiae* brief on behalf of the petitioners in the case of *Gibellina v. Handley*, 158 Ill. App. 3d 866, 511 N.E.2d 884 (1987).

1. See, e.g., *Gibellina v. Handley*, 158 Ill. App. 3d 866, 511 N.E.2d 884 (1987), *leave to appeal granted*, Dec. 22, 1987; *Schmidt v. Motorola, Inc.*, 160 Ill. App. 3d 1059, 513 N.E.2d 1069 (1987).

2. As Blackstone explained:

If the plaintiff neglects to deliver a declaration for two terms after defendant

did not constitute such a renunciation of the right of action, the plaintiff could refile, but only within the original period of limitations. Illinois Revised Statute Chapter 110, paragraph 13-217, which provides a one-year saving exception to the statute of limitations, historically had no application to what is presently referred to as "voluntary dismissals." The statute, in its pre-1976 form, was judicially viewed as applying to *involuntary*, rather than to *voluntary* nonsuits.<sup>3</sup> As a result, where a plaintiff had taken a voluntary dismissal (nonsuit), the plaintiff could burden the defendant with further suit only if the plaintiff refiled within the original period of limitations.<sup>4</sup> The courts consistently so construed the statute, notwithstanding the fact that the term "nonsuit" might, under the common law, be viewed as referring to either or both voluntary or involuntary dismissals.<sup>5</sup>

This view endured until 1976. Prior to that time, the several legislative enactments which affected the right of voluntary dismissal did not enlarge that right but rather imposed restrictions. At common law, the right could be exercised up to the return of the verdict.<sup>6</sup> In 1819, a statute was enacted which provided that "every person desirous of suffering a nonsuit on trial, shall be barred therefrom, unless he does so before the jury returns from the bar."<sup>7</sup> In 1907, the Illinois Practice Act, originally enacted in 1845, was revised to provide that where the case was tried before the court without a jury, the plaintiff could take a nonsuit only if he did so before the case was submitted for final decision.<sup>8</sup>

Illinois' current statutory scheme on the subject of voluntary dismissals was enacted in substance in 1933. Significantly, an earlier draft of the 1933 statute imposed substantial limitations upon the right of voluntary dismissal, providing that the plaintiff could dis-

---

appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do, and there upon a nonsuit or *non prosequitur* is entered, and he is said to be on pros'd. A *retraxit* differs from a nonsuit, in that one is negative and the other positive: the nonsuit is a mere default and neglect of the plaintiff, and therefore, he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action.

3 Com. 296, quoted in *Herring v. Poritz*, 6 Ill. App. 208 (1880) (emphasis added).

3. *Baird & Warner, Inc. v. Addison Indus. Pk.*, 70 Ill. App. 3d 59, 387 N.E.2d 831 (1979).

4. See, e.g., *Hupp v. Gray*, 73 Ill. 2d 78, 382 N.E.2d 1211 (1978); *Heimberger v. Elliot Frog & Switch Co.*, 245 Ill. 448 (1910); *Baird & Warner, Inc.*, 70 Ill. App. 3d 59, 387 N.E.2d 831.

5. *Sachs v. Ohio Nat'l Life Ins. Co.*, 131 F.2d 134 (7th Cir. 1942).

6. *Berry v. Savage*, 25 Cam. 261 (1940).

7. *Id.*

8. *Daube v. Kuppenheimer*, 272 Ill. 350 (1916); see also *Fleischer, The Vanishing Right of a Plaintiff to Voluntarily Dismiss His Action*, 9 J. MAR. J. PRAC. & PROC. 853 (1976); *McCaskill, ILLINOIS CIVIL PRACTICE ACT ANNOTATED* 129 (1933).

miss the action as of right only if he did so before the defendant filed an answer or a motion attacking the complaint.<sup>9</sup> Although the Illinois Senate approved this version,<sup>10</sup> the House effected an amendment which set forth the statute as it exists today and which requires that the motion for nonsuit be brought “before trial or hearing begins.”<sup>11</sup>

### THE “ABSOLUTE” RIGHT OF VOLUNTARY DISMISSAL

As previously noted, the right of voluntary dismissal has been, within the context of the foregoing limitations, judicially deemed to be “absolute.” Indeed, Illinois Supreme Court decisions make plain that the right is in fact very broad. For example, in *Barry v. Savage*,<sup>12</sup> the plaintiff was permitted to take a nonsuit when the jury, which had previously retired, returned to question the judge as to the manner in which they were to interpret a particular piece of evidence. In *Howe v. Harroun*,<sup>13</sup> the plaintiff was permitted to take a nonsuit after the plaintiff and defendant had concluded their arguments and indeed after the judge had hinted as to the way in which he was going to decide the case. Affirming the plaintiff’s right of voluntary dismissal, the Illinois Supreme Court explained that the right existed to enable the plaintiff to be aware of the facts and law of the case prior to being bound by a jury verdict.<sup>14</sup> It should be noted that the broad view expressed by the supreme court may no longer be supportable. The function to which the court alluded is now provided by existing discovery mechanisms.

One point is clear. The right of voluntary dismissal—despite its “absolute” nature—historically has not been an offensive weapon. In most instances, a plaintiff was, because of the statute of limitations’ bar, merely afforded a vehicle to graciously terminate the needless

---

9. The federal courts have adopted such a rule. See FED. R. CIV. P. 41, 28 U.S.C.A. (Supp. 1988).

10. See Fleischer, *supra* note 8, at 855.

11. ILL. REV. STAT. ch. 110, ¶ 2-1009 (1985).

12. 2 Scam. 261 (1840).

13. 17 Ill. 494 (1856).

14. The court explained:

Both by the common law and by our statute, when the case is tried by a jury, the plaintiff, before he determines whether he will take a nonsuit, not only has an opportunity of knowing precisely what the testimony is upon which his rights depend and upon which the jury are to act, but he also hears the charge of the court to the jury, so that he knows by what rules of law the jury are to be governed in deciding upon those facts. And all know, who have carefully observed the course in *nisi prius* trials, it is as necessary to understand how the law is to be laid down to the jury as to know what are the facts, to enable a party judiciously to determine whether or not to take a nonsuit; while it may be conceded, with equal propriety, that the parties should not know what is the opinion of the jury.

*Howe*, 17 Ill. at 497.

further expenditure of time, money, and effort.

THE CONVERGENCE OF TWO IMPROVIDENT ACTIONS: TWO  
"ABSOLUTE" RIGHTS MERGED TO CREATE AN OFFENSIVE WEAPON

In 1976, the Illinois Law Revision Commission effected a statutory change which arguably exceeded the scope of that commission's authority.<sup>15</sup> The commission suggested a change in chapter 83, section 24(a) that was to be of dramatic import. The proposed amendment placed voluntary dismissals within the purview of that statute's saving provision. A plaintiff who exercised his "absolute" right of voluntary dismissal, and who formerly would have been barred from further litigation because of the expiration of the applicable period of limitations, now had a one-year grace period within which to refile.

The following excerpt from Fins, *The Illinois Law Revision Commission*, suggests that the commission believed it was effecting a mere cosmetic change in the statute:

In 1976, the Law Revision Commission alerted the legislature to the possibly conflicting terminology in Section 24 of the Limitations Act. Prior to 1976, Section 24 employed the term "nonsuit" while Section 52 of the Civil Practice Act used the term "voluntary dismissal." Section 24 was thereafter amended by deleting the words "nonsuit" and incorporating the words "voluntary dismissal."<sup>16</sup>

In other words, the commission substituted the terms "voluntary dismissal" for "nonsuit" upon the apparent belief that the term "nonsuit" necessarily referred to voluntary dismissals. As previously noted, however, the statute had not been so interpreted.<sup>17</sup> This legislative *faux pas* would have been relatively harmless were it not for another force which was conterminously at work.

Historically, the legislatively conferred right to refile within a year of a dismissal was not deemed to be an absolute right. The case of *Brown v. Burdick*<sup>18</sup> is illustrative. In *Brown*, the Illinois Appellate Court, in an opinion written by Mr. Justice Thomas Moran (now Chief Justice of the Illinois Supreme Court), refused to apply the statute to a claim that had been dismissed for want of prosecution. The appellate court specifically noted that the statute "has never been interpreted as an absolute right." The court limited the stat-

---

15. The commission's legislatively prescribed function was to make a thorough study of Illinois statutory law and determine which laws were obsolete and should, therefore, be repealed. Fins, *The Illinois Law Revision Commission*, 29 DEPAUL L. REV. 443, 444 (1980).

16. *Id.* at 460.

17. See *supra* notes 1-4 and accompanying text.

18. 16 Ill. App. 3d 1071, 307 N.E.2d 409 (1974).

ute's application to those plaintiffs who bring an action but cannot proceed because of procedural defects. Stated another way and according to the court, the plaintiff's claim came within the letter, but not within the spirit of the statute. The limitation thus imposed by *Brown v. Burdick* and several other appellate court decisions<sup>19</sup> was explained in other terms in *Tidwell v. Smith*.<sup>20</sup> In *Tidwell*, the statute was viewed as a defensive device only. It was not designed to give "litigation everlasting life."<sup>21</sup>

The Illinois Supreme Court judicially vitiated this view in *Franzese v. Trinko*.<sup>22</sup> In *Franzese*, the court held that the statute provided the plaintiff with an "absolute" right to refile.<sup>23</sup> The court refused to read a "due diligence" or "good faith" requirement into the statute.<sup>24</sup> Ironically, the court thereby substantially affected the right of voluntary dismissal, notwithstanding that the *Franzese* case *did not* involve a voluntary dismissal and notwithstanding that the supreme court may have been unaware of the legislature's very recent enlargement of the refiling provision to encompass voluntary dismissals.<sup>25</sup>

Accordingly, two distinct forces fortuitously converged to effect the merger of two "absolute" rights, *i.e.*, the right of voluntary dismissal and the right to refile within a year of that dismissal. The result thereby spawned is an offensive weapon that impairs the efficient administration of the judicial process.

### THE IMPACT

The consequences of an absolute right of voluntary dismissal—particularly when that right is combined with an absolute right to refile—are a matter of record.

---

19. See *Quirino v. Chicago Tribune-New York News Syndicate, Inc.*, 10 Ill. App. 3d 148, 294 N.E.2d 29 (1973); *Ray v. Bokorney*, 133 Ill. App. 2d 141, 272 N.E.2d 836 (1971).

20. 57 Ill. App. 2d 271, 205 N.E.2d 484 (1965).

21. *Id.* at 275, 205 N.E.2d at 486.

22. 66 Ill. 2d 136, 361 N.E.2d 585 (1977).

23. *Id.* at 140, 361 N.E.2d at 587.

24. *Id.*

25. It should be noted that a recent Illinois Supreme Court decision indicates that the court may be willing to take a realistic view of the right to refile within a year of a dismissal. In *Gendek v. Jehangir*, 119 Ill. 2d 338, 518 N.E.2d 1051 (1988), a decision rendered in the January 1988 term, the court signalled its willingness to resurrect some of the restrictions which *Tidwell v. Smith* had imposed upon chapter 110, paragraph 13-217. Specifically citing that case, the court held that a plaintiff who has voluntarily dismissed his action is entitled to only one refiling pursuant to that saving provision. The court reasoned that if it were to permit multiple refilings following voluntary dismissals of an action for which the original statute of limitations had expired, that would permit a non-diligent plaintiff to abuse the judicial system.

The case of *Kendle v. Village of Downers Grove*<sup>26</sup> is illustrative. In late 1985, plaintiffs filed their complaint against a village, a developer, and the individual owners of property located within a residential development requesting, *inter alia*, a declaration invalidating the ordinances annexing and changing the zoning of the site and requesting an injunction restraining completion of the development. On January 24, 1986, the developer promptly filed a motion for trial setting, asserting that no party defendant had been served with process, that the suit created a cloud on the title to the individual properties, thus preventing their acquisition and forestalling construction, and that substantial damage would accrue to the defendants. On June 24, 1986, subsequent to the conduct of substantial discovery and several continuances of trial dates at the insistence of the plaintiffs, the plaintiffs moved to voluntarily dismiss the case. In response, defendants presented evidence of the far-reaching economic consequences of the litigation and of the hardship and stress that the individual property owners were consequently experiencing. The trial court denied the plaintiffs' motion and dismissed the suit with prejudice.

Upon appeal, the defendants argued, *inter alia*, that the filing of the lawsuit constituted a "*de facto* injunction" and that the lawsuit was causing "huge financial losses [as well as] the disruption of the lives of the property owner[s]." Responding with the comment that defendants' inconvenience was "unfortunate," the appellate court reversed, holding that the plaintiffs' right of voluntary dismissal was absolute and the trial court had no discretion to deny that motion. With obvious reference to the plaintiffs' right to refile, the appellate court additionally noted that its opinion precluded the language in the trial court's order purporting to deny the plaintiffs the right to reinstate their cause of action.

Although *Kendle* is a unique example of extreme hardship, the situation is no less deplorable in those instances where a plaintiff elects to exercise his right of voluntary dismissal after the case has been pending for several years and both sides have invested considerable effort, time, and money. In most instances, the plaintiff exercises his right in response to a pending defense motion that would be dispositive of the case. In some of those cases, the pending defense motion is predicated upon the plaintiff's failure to comply with court-ordered discovery and the court's consequent imposition of discovery sanctions. Thereafter, the plaintiff will usually exercise his "absolute" right to refile within a year, free of the consequences of the sanctions.

---

26. 156 Ill. App. 3d 545, 509 N.E.2d 723, *appeal denied*, 515 N.E.2d 109 (1987).

27. *Id.* at 551, 509 N.E.2d at 726.

The frequency of this experience is documented by the several appellate court decisions, discussed later, which have considered these very circumstances. As a consequence of those decisions that have invariably upheld the plaintiff's right to voluntary dismissal and that have further denied the trial court any discretion in the matter, the affected defendants have no positive results to show for their conduction of the defense over the course of several years.

The question of whether the foregoing represents a proper and acceptable exercise of the right of voluntary dismissal was cogently answered by Judge William R. Todd of Marion County, who made the following statement on the record in *Russ v. Gandhi*:<sup>28</sup>

[V]oluntary nonsuits are being used for purposes other than what . . . they ought to be used for and the . . . appellate court or Supreme Court [should] take some definitive action in resolving . . . a practice which is not good for the administration of justice and that is to allow, without any limitation . . . . [T]he practice of dismissing a suit at will, simply to avoid, blatantly in some cases, the denial or anticipated denial of a motion to continue [a case] which has been set for trial for a considerable period of time or as alleged in this case, where the plaintiff has failed to come up with an adequate answer to certain discovery and . . . identification of experts.<sup>29</sup>

Significantly, others concur. In his concurring opinion in *Kahle v. John Deere Co.*,<sup>30</sup> Justice Ryan of the Illinois Supreme Court expressed the view that a legislative solution is required: "I suggest that the General Assembly consider limiting the right to refile after a voluntary dismissal under Section 13-217 to prevent the abuse apparent in this case."<sup>31</sup> Several panels of the appellate court have likewise acknowledged the existence of the potential for abuse and have suggested that either the supreme court or the General Assembly deal with the problem.<sup>32</sup>

A cogent argument, supportive of this plea, was set forth by Justice Dom Rizzi in his concurring opinion in *Lafin v. Allstate Insurance Co.*,<sup>33</sup> a decision issued by the Illinois Appellate Court, First

28. 149 Ill. App. 3d 660, 500 N.E.2d 1032 (1986).

29. Record on Appeal, Trial Transcript, at 9-10, *Russ v. Gandhi*, 149 Ill. App. 3d 660, 500 N.E.2d 1032 (1986).

30. 104 Ill. 2d 302, 472 N.E.2d 787 (1984).

31. *Id.* at 311, 472 N.E.2d at 791.

32. See, e.g., *Kendle v. Village of Downers Grove*, 156 Ill. App. 3d 545, 509 N.E.2d 732 (1987); *Rohr v. Inaus*, 153 Ill. App. 3d 1013, 506 N.E.2d 634 (1987).

33. *Lafin v. Allstate Ins. Co.*, No. 86-1411, Slip op. (Ill. App. April 13, 1988). Listing twenty-eight appellate decisions which demonstrate the extent of the problem which chapter 110, paragraph 2-1009 and chapter 110, paragraph 13-217 have created, Justice Rizzi concluded:

[I]t appears to me that the General Assembly should consider limiting a plaintiff's right to take a voluntary dismissal under Section 2-1009, or limiting the right to refile after a voluntary dismissal under Section 13-217, to prevent the unfairness and abuse apparent in this case from re-occurring and the unfair-

District, on April 13, 1988. The trial court granted plaintiff's motion for voluntary dismissal in the face of defendant's pending motion to dismiss because of plaintiff's failure to comply with discovery. Although Justice Rizzi agreed with the court's rejection of defendant's argument that the applicable provisions of the Code of Civil Procedure were an unconstitutional infringement upon the Supreme Court's supervisory authority, his Honor noted that the ruling "once again demonstrates the unfairness and abuses that are created by Section 2-1009."

#### O'CONNELL AND DILLIE

In *Dillie v. Bisby*,<sup>34</sup> the Illinois Supreme Court made a significant inroad into the "absolute" nature of involuntary dismissals. In *Dillie*, the defendants had moved to dismiss because of the plaintiff's failure to exercise due diligence in effecting service of process. The plaintiff responded by moving for voluntary dismissal, and the trial court granted that motion. On appeal, the supreme court held that the order of voluntary dismissal was appealable and subject to review.

On remand, the Illinois Appellate Court for the Third District made an additional ruling of significance relative to voluntary dismissals. The court stated that "the trial court should have discretion to consider any defense motion which might result in dismissal with prejudice prior to ruling on a plaintiff's voluntary dismissal motion."<sup>35</sup> This language, which was approved in *Penrod v. Sears Roebuck & Co.*,<sup>36</sup> is consistent with the appellate court's earlier analysis in *Bernick v. Chicago Title & Trust Co.*<sup>37</sup> where the court held that the trial court has discretion to proceed with the resolution of a pending defense motion which was bottomed upon a plea of *res judicata*, prior to addressing plaintiff's motion for voluntary dismissal.

In *O'Connell v. St. Francis Hospital*,<sup>38</sup> the plaintiff obtained an order of voluntary dismissal in the face of a pending defense motion in which the defendant, pursuant to chapter 110A, paragraph 103(b),<sup>39</sup> had cited plaintiff's lack of diligence in serving process. The plaintiff refiled and the defendant again moved to dismiss, cit-

---

ness and abuses created in similar cases.

*Id.*

34. 106 Ill. 2d 487, 478 N.E.2d 1338 (1985).

35. 136 Ill. App. 3d 170, 172, 483 N.E.2d 307, 308 (1985).

36. 150 Ill. App. 3d 125, 501 N.E.2d 367 (1987).

37. 325 Ill. App. 495, 60 N.E.2d 442 (1945).

38. 112 Ill. 2d 273, 492 N.E.2d 1322 (1986).

39. ILL. REV. STAT. ch. 110A, ¶ 103(b) (1985) (requires timely service upon defendants).

ing plaintiff's lack of diligence in the original action.

The supreme court held that those statutes which purport to provide a claimant with an absolute right to voluntarily dismiss and refile conflict with the supreme court's constitutional authority to promulgate procedural rules necessary to the fair and prompt administration of justice. Therefore, the statutes could not be enforced in derogation of the defendant's right to a hearing upon its rule 103(b) motion. The court additionally approved of the defendant's contention that the trial court's failure to consider and rule upon the defendant's prior pending motion to dismiss before ruling upon the plaintiff's motion for voluntary dismissal would improperly reward a plaintiff who had unjustifiably delayed effecting service in derogation of Supreme Court Rule 103(b).

#### O'CONNELL'S PROGENY

Without exception, the Illinois Appellate Court has repeatedly declined to apply *O'Connell* to any case other than those in which the pending defense motion is predicated upon Supreme Court Rule 103(b). The appellate court has also declined to adopt the *Dillie* approach, which would afford the trial court the discretion, if not the obligation, to consider a prior-pending defense motion. The appellate court has held that the plaintiff's right to voluntary dismissal is absolute and has based that ruling upon the view that rule 103(b), upon which the defense motion considered in *O'Connell* was based, mandates dismissal. According to the appellate court, the conflict that *O'Connell* found between the legislation and the right of the supreme court to conduct and control court administration is not present where the supreme court rule affected by the plaintiff's motion for voluntary dismissal merely permits rather than requires dismissal.<sup>40</sup>

The appellate court has repeatedly so ruled in cases where the plaintiff moved for voluntary dismissal for the purpose of evading court-ordered sanctions. For example, in *Estate of Jackson v. Smith*,<sup>41</sup> *Hartung v. Joseph Sheeham, M.D.*,<sup>42</sup> *Schmitt v. Motorola, Inc.*,<sup>43</sup> and *Gibellina v. Handley*,<sup>44</sup> the defendants had moved for

---

40. The authors respectfully submit that the conflict between section 2-1009 and Supreme Court Rules 219 and 220 is apparent when considering the number of cases in which voluntary dismissals have been used to circumvent such rules. Indeed, the supreme court itself has recognized such a conflict because rule 219(c) provides that the trial court will retain jurisdiction even after a voluntary dismissal, to enforce monetary sanctions imposed while the case was pending.

41. No. 86-3532 (1st Dist., Dec. 31, 1987).

42. No. 87-0084 (1st Dist., Dec. 31, 1987).

43. 160 Ill. App. 3d 1059, 513 N.E.2d 1069 (1987).

44. 158 Ill. App. 3d 866, 511 N.E.2d 884 (1987).

summary judgment in reliance upon an order barring presentation of expert testimony at trial. *Highland v. Stevenson*<sup>45</sup> differed in that the defense motion for summary judgment was based on the plaintiff's voluntary election on the record and in response to a court order to proceed without calling an expert witness. In *Russ v. Gandhi*,<sup>46</sup> *Rohr v. Kraus*,<sup>47</sup> *Mancuso v. Alda Blanche*,<sup>48</sup> and *Kendle v. Village of Downers Grove*,<sup>49</sup> the plaintiff's motion for voluntary dismissal was likewise presented to permit the plaintiff to evade court actions or a pending defense motion that would have been dispositive of the case. The defense motion was not, however, predicated upon court-ordered sanctions.

#### A CRISIS OF CONFIDENCE—THE NEED FOR LEGISLATIVE RESPONSE

A crisis of confidence exists in Illinois. The fact is that litigants are frequently denied fair and prompt administration of justice. The denial can be traced in substantial part to the reluctance of our courts to infringe upon the "absolute" right of voluntary dismissal. This crisis affects all aspects of the administration of justice, although it is particularly evident in those situations where a party is unable to secure enforcement of the supreme court rules governing the discovery process.

The supreme court noted the import of a moribund discovery procedure in *Buehler v. Whalen*,<sup>50</sup> in which the court stated:

Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances . . . . Disclosure is the object of all our discovery procedures. It is the opinion of this court that trial courts should make disclosure a reality.<sup>51</sup>

The consequences of the failure to follow the dictate of *Buehler* were described in *Williams v. A.E. Staley Manufacturing Co.*<sup>52</sup> The result is a "not insignificant waste of time, effort, and money."<sup>53</sup> When parties are permitted to violate the discovery rules with impu-

---

45. 153 Ill. App. 3d 390, 505 N.E.2d 776 (1987). Defendant moved for summary judgment based on plaintiff's voluntary election to proceed to trial without calling any expert witnesses. Plaintiff, faced with this motion, moved for and was granted a voluntary dismissal prior to the hearing on summary judgment.

46. 149 Ill. App. 3d 660, 500 N.E.2d 1032 (1986).

47. 153 Ill. App. 3d 1013, 506 N.E.2d 634 (1987).

48. 149 Ill. App. 3d 188, 500 N.E.2d 589 (1986).

49. 156 Ill. App. 3d 545, 509 N.E.2d 723 (1987).

50. 70 Ill. 2d 51, 374 N.E.2d 460 (1977).

51. *Id.* at 467.

52. 83 Ill. 2d 559, 416 N.E.2d 252 (1981).

53. *Id.* at 562, 416 N.E.2d at 254.

nity, the result is a war of inconvenience that disrupts the truth-seeking purposes of litigation and provides a disservice to the court and the profession, as well as the client of the offending attorney because he makes a realistic review of the merits of his client's case more difficult to achieve.<sup>54</sup>

On December 22, 1987, the Illinois Supreme Court allowed the defendant's petition for leave to appeal in *Gibellina v. Handley*<sup>55</sup> and *Schmidt v. Motorola*.<sup>56</sup> In these cases the court may well provide an appropriate response—although the circumstances of the case may necessarily limit any such response. The court may determine that a realistic view of the effect of a plaintiff's voluntary dismissal of this action in the face of discovery sanctions is that he has thereby infringed upon and obstructed the supreme court's enforcement of its constitutional right and obligation to provide by rule for the orderly and efficient administration of judicial proceedings.

Even if the rule of *O'Connell* was thus expanded to encompass prior pending defense motions that are founded upon the court's entry of discovery sanctions, such a response would not obviate the total fallout that would result from the offensive right created by the merger of the absolute right to voluntarily dismiss and the absolute right to refile. Such a holding in *Gibellina* would not provide a judicial remedy for those instances of abuse where discovery is not involved nor relief for those circumstances where the plaintiff's motion, although presented after years of delay, recalcitrance and disregard of court orders, is presented prior to the filing of defendant's motion for enforcement.

In a nutshell, any judicial remedy will be of limited import and application. Accordingly, only the legislature, which created the problem in the first instance, can provide the appropriate response.

#### A LEGISLATIVE PROPOSAL

The federal voluntary dismissal provision, enacted in 1937, departs from the Illinois approach. Drawing upon the fact that the right to voluntarily dismiss a cause of action was qualified in certain circumstances, the federal rule provides that the plaintiff may dismiss an action without order of court only prior to service by the adverse party of an answer or a motion for summary judgment. The pertinent provision provides:

- a. Voluntary dismissal: effect thereof.

---

54. *Id.* at 565, 416 N.E.2d 255.

55. 158 Ill. App. 3d 866, 511 N.E.2d 884 (1987), *leave to appeal granted*, Dec. 22, 1987.

56. 160 Ill. App. 3d 1059, 513 N.E.2d 1069 (1987), *leave to appeal granted*, Dec. 22, 1987.

1. By plaintiff; by stipulation. Subject to the provision of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.<sup>57</sup>

*Trammell v. Eastern Airlines*<sup>58</sup> illustrates the application of this rule. In *Trammell*, the defendant moved for summary judgment and the plaintiff responded by moving for a voluntary dismissal.<sup>59</sup> The court examined the record and determined that the defendant's attorneys had consumed considerable time and expense in preparing the case for trial and further determined that the plaintiff had not made himself available for oral examination as required by the Federal Rules of Civil Procedure.<sup>60</sup> The court looked to the realities of the situation: if the plaintiff's motion was granted, he would simply bring a new action in the state court that would place the burden of a second litigation upon the defendant thus depriving him of a substantial right acquired as a result of the plaintiff's failure to comply with discovery.<sup>61</sup> The court denied the plaintiff's motion, stating that "no good reason exists for a delay in determining [the defense raised by the defendant] which would be applicable irrespective of the jurisdiction in which this case is tried."<sup>62</sup>

Thirty-one states follow the federal rule or a more restrictive variation of it.<sup>63</sup> The balance of the states take a varied, albeit more

57. FED. R. CIV. P. 41, 28 U.S.C.A. (Supp. 1988).

58. 136 F. Supp. 75 (W.D. S.C. 1955).

59. *Id.*

60. *Id.* at 83.

61. *Id.*

62. *Id.* at 53.

63. States following the federal rule include: Alabama, ALA. CODE vol. 23, rule 41(a) (rules of civil procedure 1983); Alaska, ALASKA R. CIV. P. 41(a) (1969); Arizona, ARIZ. REV. STAT. ANN. vol. 16, rule 41(a) (1987); Colorado, COLO. REV. STAT. vol. 7A, rule 41(a) (1987); DEL. CODE ANN. SUP. CT. CIV. R. 41(a) (1986); HAW. P.R. 41(a)(1); IDAHO CT. R., R. CIV. P. 41(a) (1987); Indiana, IND. CODE ANN. tit. 34 App., rule 41 (West 1987); Kansas, KAN. CIV. PROC. CODE ANN. § 60-241 (Vernon 1984); Kentucky, KY. RULES ANN. rule 41.01 (1988); Maryland, MD. RULES CODE ANN. rule 3-506 (1988); Massachusetts, MASS. ANN. LAWS, R. CIV. P. 41(a) (1988); Michigan, MICH. STAT. ANN. § 2-504(a) (Callaghan 1986); Mississippi, MISS. RULES OF COURT rule 41(a) (rules of civil procedure 1988); Montana, MONT. CODE ANN. ch. 20, rule 41(a) (1985); Nevada, NEV. REV. STAT. ANN. rule 41 (Michie court rules annotated 1988); New Jersey, N.J. REV. STAT. rule 4:37(1) (1988); North Dakota, N.D. CENT. CODE ANN. vol. 5B, rule 41(a) (1987); Rhode Island, R.I. CT. R. ANN. rule 41(a) (1988); South Carolina, S.C. CODE OF LAWS rule 41(a) (rules of civil procedure (1976)); South Dakota, S.D. CODIFIED LAWS vol. 6, § 15-6-41(a) (1984); Utah, UTAH CODE vol. 4, tit. 78, rule 41 (1987);

liberal, approach.<sup>64</sup> These states' statutes provide a framework for the following alternative proposed statutes which the General Assembly might consider. One point should be noted at the outset. In the case of each proposal, the plaintiff retains the right to dismiss. The absolute nature of the right, however, gives way to a more pragmatic approach: the plaintiff may voluntarily dismiss only under terms set by the court.

From a defense standpoint, the federal approach is the most advantageous. Incorporation of the federal rule into the Illinois statute would yield the following provision:

Section 2-1009. Voluntary Dismissal. (a) The plaintiff may, at any time before *service by the adverse party of an answer or of a motion for summary judgment, whichever occurs first*, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the case. Thereafter, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motions specifying on the ground for dismissal, which shall be supported by affidavit or other proof. After a counterclaim has been pleaded by a defendant, no dismissal may be had as to the defendant except by the defendant's consent.

Another alternative is to have the discovery sanctions survive the voluntary dismissal. This approach parallels that of Supreme Court Rule 219(c):

Section 2-1009. Voluntary Dismissal. (a) The plaintiff may, before trial or hearing begins, upon notice to each party who has appeared or each party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause. *Such dismissal shall not affect the enforcement of previous court ordered discovery sanctions pursuant to Supreme Court Rule 219 and 220.* Thereafter the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof. Af-

---

Vermont, VT. STAT. ANN. rule 41(a) (rules of civil procedure 1973); West Virginia, W. VA. CODE rule 41(a) (court rules 1988); Wyoming, WYO. CT. RULES ANN. rule 41 (1979).

Other jurisdictions with a similar statute include: Florida, FLA. STAT. ANN. rule 1.420(a) (West rules of civil procedure 1985) ("any time prior to hearing on summary judgment. . ."); Louisiana, LA. CODE CIV. PROC. ANN. art. 167 (West 1986) ("prior to a general appearance . . ."); New Mexico, N.M. SUP. CT. R. ANN. rule 2-305 (1986) ("any time before filing of the answer"); New York, N.Y. CIV. PRAC. L. & R. 3217(b) (1987) ("any time before a responsive pleading . . . or within 20 days after service of pleading asserting the claim"); Oklahoma, OKLA. STAT. ANN. tit. 12, § 684 (1987) ("any time before petition of intervention or answer praying for affirmative relief . . ."); Wisconsin, WIS. STAT. ANN. § 805.04 (West 1986) (any time before responsive pleading).

64. See, e.g., ANN. MO. RULES rule 67.01 (Vernon 1987) (Missouri) (prior to the introduction of evidence at trial); NEB. REV. STAT. vol. 2, § 25-601 (1985) (Nebraska) (before final submission of the case to the jury); N.C. GEN. STAT. ch. 1A, rule 41 (rules of civil procedure 1983) (North Carolina) (before plaintiff rests his case).

ter a counterclaim has been pleaded by a defendant, no dismissal may be had as to the defendant except via the defendant's consent.

The following alternative adopts the suggestion of Justice Simon in *Kiven v. Mercedes-Benz of North America, Inc.*,<sup>65</sup> that the defendant's prior filed motion should take precedence over the plaintiff's subsequent motion for voluntary dismissal:

Section 2-1009. Voluntary dismissal. (a) The plaintiff may before trial or hearing begins, upon notice to each party who has appeared or each party's attorney, and upon payment of costs, dismiss his or her actions or any part thereof as to any defendant, without prejudice, by order filed in the cause. *Any motion presented pursuant to this section will not be heard until prior pending motions for sanctions or otherwise are heard.* Thereafter, the plaintiff may dismiss, only upon terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) a motion specifying the ground for dismissal, which shall be supported by affidavit or other proof. After a counterclaim has been pleaded by a defendant, no dismissal may be had as to the defendant except by the defendant's consent.

The following proposal is a hybrid of the two preceding proposals:

Section 2-1009. Voluntary Dismissal. (a) The plaintiff may at any time before trial or hearing begins, *or before service by an adverse party of a motion for summary judgment*, upon notice to each party who has appeared or each such party's attorneys, and upon payment of costs, dismiss his or her action or any part thereof, as to any defendant, without prejudice, by order filed in the cause. *Such dismissal shall not affect the enforcement of previous court ordered discovery sanctions imposed pursuant to Supreme Court Rule.* Thereafter, the plaintiff may dismiss only on terms fixed by the court (1) upon filing a stipulation to that effect filed by the defendant, and (2) on motions specifying the ground for dismissal, which shall be supported by affidavit or other proof. After a counterclaim has been pleaded by a defendant, no dismissal may be had as to the defendant except by defendant's consent.

Perhaps the simplest and most appropriate response would be a legislative enactment that goes directly to the source: the improvident amendment of the statutory right to refile at the insistence of the Law Revision Commission. Perhaps the remedy is to simply amend that statute to again remove dismissals from its ambit.

#### CONCLUSION

The improvident convergence in 1976 and 1977 of two distinct forces have transformed a limited privilege—indeed, one with questionable value today—into an offensive weapon. It is a weapon that

---

65. 111 Ill.2d 585, 491 N.E.2d 1167 (1986).

unduly taxes the efficient administration of the judicial process. The time is ripe to remedy this unintended result through judicial or legislative action.

