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THE ILLINOIS SAVINGS STATUTE: AN ANALYSIS OF SECTION 24a OF CHAPTER 83

INTRODUCTION

Illinois law provides a plaintiff with a limited opportunity to refile his complaint, after his first action has been dismissed, even if the original limitations period has expired.[1] This limited opportunity to refile under section 24a of chapter 83 is available in any one of the following circumstances: when plaintiff has been nonsuited; when plaintiff's action has been dismissed for want of prosecution; when plaintiff's judgment has been reversed on appeal; or when judgment is entered against plaintiff upon a matter alleged in arrest of judgment.[2] If plaintiff chooses to refile under section 24a, he must file his second complaint within one year of the date of dismissal or within the time remaining in the statute of limitations, whichever period is greater.

The "savings statute"[3] is supported by key equitable considerations. Foremost, the statute precludes what would otherwise

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1. ILL. REV. STAT. ch. 83, § 24a (1973).

Commencement of new action upon reversal or nonsuit.

In the actions specified in this Act or any other act or contract where the time for commencing an action is limited, if judgment is given for the plaintiff but reversed on appeal; or if there is a verdict for the plaintiff and, upon a matter alleged in arrest of judgment, the judgment is given against the plaintiff; or if the plaintiff is nonsuited, or the action is dismissed for want of prosecution then, whether or not the time limitation for bringing such action expires during the pendency of such suit, the plaintiff, his heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or given against the plaintiff, or after the plaintiff is nonsuited or the action is dismissed for want of prosecution.

2. Of the four categories listed in section 24a, litigants rely primarily upon nonsuits and dismissals for want of prosecution in alleging the applicability of the savings statute. While the category of "judgment for the plaintiff and reversed on appeal" may apppear to be quite broad, it is in fact confined to the limited situation where the reversal is made without any consideration of the merits. *See* Larkins v. Terminal R.R. Ass'n, 122 Ill. App. 246, *aff'd* 221 Ill. 428, 77 N.E. 678 (1906). *See also* Carboni v. Bartlett, 290 Ill. App. 351, 8 N.E.2d 722 (1937); Rice v. Dougherty, 194 Ill. App. 462 (1915). In these instances the cause must also be reversed without being remanded for trial. *See* Huttler v. Paige Iron Works, 127 Ill. App. 177 (1906). The necessity of fulfilling both of these requirements all but eliminates the category of "reversed on appeal" from practical usage.

Nc authority is available which has discussed the category "in arrest of judgment." This may result from the fact that to qualify for section 24a, a judgment *n.o.v.* would have to be based solely on a procedural defect, hence removing the typical judgment *n.o.v.* from within the scope of this category of the savings statute.

3. Due to its remedial effect upon lost causes of action, section 24a

be an inequitable and final resolution of plaintiff's suit, since actions brought under section 24a have not, in the usual instance, been accorded a full common law adjudication on the merits. Of perhaps equal importance is the fact that the opportunity to refile under section 24a involves little or no prejudice to defendant's defense. A prerequisite to filing under section 24a is that the action has been previously filed within the original limitations period. Therefore, in any action filed under the statute, the defendant has already been alerted to the prospect of civil liability within the original statute of limitations. Indeed, in those cases where the purpose of the statute of limitations has been satisfied[4] and where plaintiff has not received a plenary adjudication, few valid reasons exist to deny the filing of the second suit under section 24a.[5]

The earliest version of the savings statute was enacted in 1872 to provide relief for the unwary practitioner who fell prey to the detailed formalities of common law pleading and practice. At that time, if plaintiff's suit was dismissed for a procedural defect, he normally sought to file a second complaint. The doctrine of res judicata posed no bar to this second suit, since res judicata, as it existed then, precluded a second suit only in those instances where plaintiff had received an actual adjudication on the merits. Unfortunately, there were many instances where the statute of limitations operated to prevent the commencement of this second action. As a result, the statute of limitations had the inequitable result of preventing plaintiff from receiving a full hearing on the merits when his suit had been dismissed for a procedural defect. The legislature took cognizance of this effect and enacted the earliest version of section 24a to avoid the harshness which would result from a strict application of the limitations statute.

For over a century, the doctrine of res judicata posed no significant threat to the operation of the savings statute. Actions dismissed for procedural defects, which otherwise fell within the purview of the savings statute, could be refiled, the doctrine of res judicata notwithstanding. The purpose of section 24a, to

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can be called a "savings statute" and will be referred to as such throughout this commentary.

4. Mr. Justice Holmes has stated: "[W]hen a defendant has had notice from the beginning that plaintiff sets up and is trying to enforce a claim . . . the reasons for the statute of limitations do not exist . . . ." New York Cent. R.R. v. Kinney, 260 U.S. 340, 346 (1922).

5. There are cases where a strong countervailing interest may override the applicability of section 24a. For example, when an action could possibly come within the scope of section 24a, a court may seek to preserve its pretrial sanction of dismissal by declaring section 24a unavailable. *See* ILL. REV. STAT. ch. 110A, § 219(c)(v) (1973) and Keilholz v. Chicago & North Western Ry., 59 Ill. 2d 34, 319 N.E.2d 46 (1974).

facilitate the disposition of litigation on the merits and to avoid frustration of litigation on grounds unrelated to the merits,[6] could be realized easily. Unfortunately, with the enactment of Illinois Supreme Court Rule 273,[7] the savings statute no longer operates free of frustration from the effects of res judicata.

Illinois Supreme Court Rule 273 provides that an involuntary dismissal, unless otherwise specified, operates as an adjudication on the merits.[8] Actions subject to dismissals specified under Rule 273 become res judicata via the operation of the statute, and not by virtue of the fact that there has been a common law adjudication on the merits. It is now possible that actions dismissed for procedural defects are barred from refiling under the savings statute, due to the res judicata effect of Rule 273. The result is that res judicata, albeit by virtue of Rule 273, now frustrates the operation of section 24a by precluding plaintiff from receiving the full hearing on the merits which the savings statute might otherwise provide.

It is suggested that this inequitable effect of Rule 273 might be avoided if actions eligible for filing under section 24a could be exempted from the operation of Rule 273. This result could be achieved by a novel construction of the introductory phrase of Rule 273. Rule 273 is qualified by the introductory phrase, "[u]nless . . . a statute of this state otherwise specifies . . . ." If section 24a can be construed to be a statute of this state which otherwise specifies, then Rule 273 need not, in the future, pose any significant threat to the operation of the savings statute.

Apart from the doctrine of res judicata, the availability of the Illinois savings statute depends to a great extent upon considerations which are not revealed in the precise language of section 24a. This comment will provide an insight into the use and application of section 24a, and will consider the unresolved question of the effect of Illinois Supreme Court Rule 273 on the savings statute. First, an examination of the prerequisites to the operation of the statute is warranted.

Prerequisites to the Operation of Section 24a

While section 24a applies to any cause of action where the time for filing is limited,[9] Illinois courts have established other

6. Roth v. Northern Assurance Co., 32 Ill. 2d 40, 203 N.E.2d 415 (1964).

7. Ill. Rev. Stat. ch. 110A, § 273 (1973), which provides:
Unless the order of dismissal or a statute of this state otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, for failure to join an indispensable party, operates as an adjudication upon the merits.

8. *Id.*

9. Prior to the 1959 amendment to section 24a, there existed a sub-

prerequisites to the operation of the statute. These case law requirements were propounded in an attempt to ensure that the defendants named in the second action were on adequate notice of the existence and nature of plaintiff's action, within the original limitations period. These requirements may be viewed as outgrowths of the theory underlying the savings statute, established to assure that the defendants will not be prejudiced if plaintiff is allowed to refile his suit at a time when the initial limitations period may have expired.

The Illinois savings statute is available only in those instances where the complaint filed under section 24a is identical to the complaint initially filed. Although not explicitly enunciated in the language of section 24a, both Illinois courts and federal courts applying Illinois law have announced and adhered to this identity requirement.[10] This requirement was announced in *Butterman v. Steiner*,[11] where plaintiff brought an action against a stockbroker in state court, which was later dismissed for want of prosecution. Plaintiff sought to refile his suit in federal court for damages arising out of the same transaction at a time when the original limitations period had expired. The federal court held that the subsequent suit was barred, stating that section 24a was inapplicable in a situation where plaintiff bases his second suit on a different legal theory.[12]

This requirement is supported by equitable considerations and has a number of important effects. It affords the defendant an opportunity, within the initial limitations period, to preserve all the evidence necessary to his defense. The requirement assures the defendant that the time, effort and resources placed in formulating a defense to the theories presented in plaintiff's

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stantial body of case law which precluded the application of section 24a to certain statutorily-created causes of action, each of which contained its own particular limitations period. The courts reasoned that, due in part to the specific nature of these causes of action, the time for filing these suits was substantive and could not be extended by a general limitations statute such as section 24a. *See* Thompson v. Capasso, 21 Ill. App. 2d 1, 157 N.E.2d 75 (1959) (an action under the Dram Shop Act held not within the scope of the savings statute); Bishop v. Chicago Ry., 303 Ill. 273, 135 N.E. 439 (1922) (a similar result where death section of injuries act had its own time requirement provision); People *ex rel.* Sides v. Johnson, 220 Ill. App. 212 (1920) (dealing with bastardy proceedings); Rabig v. Cleveland, Cinn., Chgo. & St. Lo. R.R., 204 Ill. App. 493 (1917) (wrongful death action). The 1959 amendment, Act of June 17th, 1959, § 1 [1959] Ill. Laws 1460, *amending* ILL. REV. STAT. ch. 83, § 24a (1957), swept away these unjust, if not illogical, exceptions to the savings statute and allowed section 24a to be applied to any controversy where the time for filing a suit is limited.

10. *See* Butterman v. Steiner, 343 F.2d 519 (7th Cir. 1965) and Gibbs v. Crane Elevator Co., 180 Ill. 191, 54 N.E. 200 (1899), both of which espouse this requirement.

11. 343 F.2d 519 (7th Cir. 1965).

12. *Id.* at 520, wherein the court stated that "[t]hese are not identical causes of action although both actions did arise out of the sale of plaintiff's stock by defendants in October, 1957."

original action were not wasted. The requirement also has the effect of precluding plaintiff from adding new legal theories to any action filed under section 24a. As a result, in filing his original action the plaintiff must plead all plausible theories available to him in order to preserve them for any possible filing under section 24a.

While it is established law that a plaintiff cannot add new legal theories when refiling under section 24a, it is suggested that plaintiff should be allowed to omit certain causes of action that were contained in the first complaint. Such omissions can only work to the detriment of the plaintiff. If plaintiff has originally pleaded several causes of action, his use of section 24a should not be predicated upon repleading every original cause of action. Rather, plaintiff should be allowed to select from his first complaint those causes of action which are still viable. For example, the demise of a key witness may prevent plaintiff from succeeding in some of the actions he originally pleaded. It cannot be advantageous to either party to require plaintiff to plead such actions in his second complaint. Furthermore, the use of section 24a should not turn upon a requirement of frivolous pleading.

While section 24a clearly requires an identity in the causes of action pleaded, no Illinois decision has expressly held that section 24a is available only if the parties to each of the suits are the same.[13] However, the identity of parties requirement is common to many jurisdictions with savings statutes comparable to section 24a.[14] In a case of first impression, *Vari v. Food Fair Stores*,[15] the Delaware Supreme Court recognized the validity of this requirement and found that the Delaware savings

13. In Bavel v. Cavaness, 12 Ill. App. 3d 633, 299 N.E.2d 435 (1973), the plaintiff filed suit in Indiana against the representatives of the deceased defendant. The suit was dismissed for failure to name a proper party defendant. Plaintiff sought, and was granted, the appointment of an Illinois public administrator. Thereafter, a second action was commenced against this administrator in the Illinois courts, based on section 24a. The appellate court determined that the defendants in the first suit were not proper parties and that therefore the suit was a complete nullity. The court held that section 24a did not apply when the first suit was a nullity. This theory, that the suit was a nullity, overlooks an important fact. Section 24a has been held to apply to cases which have been dismissed for lack of jurisdiction. A suit dismissed for lack of jurisdiction is *void ab initio*. *See* Wayne County Securities Co. v. Hughitt, 228 F. 816 (7th Cir. 1915). If a dismissal for lack of jurisdiction is *void ab initio*, it must stand on the same plane as a dismissal for failure to name a proper party defendant. In both instances the suit has never legally existed. Yet, section 24a applies to dismissals for lack of jurisdiction. Hence, the *Bavel* court's theory that section 24a does not apply to a suit that is a nullity appears to be incorrect. While the court's ultimate decision that section 24a was inapplicable may be correct, the decision more properly rests upon the lack of identity of parties, since the defendants in each of the two suits were different.

14. *See generally* 54 C.J.S. *Limitations of Actions* §§ 289 *et seq.* (1948, Supp. 1975).

15. 58 Del. 145, 205 A.2d 529 (1964).

statute was unavailable when the parties to the two actions were not identical. The original action in *Vari v. Food Fair Stores*[16] had been commenced against the wrong corporation and plaintiff's complaint was therefore dismissed. Plaintiff filed a second action against the correct corporation, relying upon the Delaware savings statute.[17] While plaintiff admitted to the existence of the identity of parties requirement, he contended that the two corporations should be treated as one, since both corporations had the same registered agent and at least two officers in common.[18] The Delaware Supreme Court first considered the requirement of identity of parties and found it to be sound and "supported by overwhelming authority."[19] The court then rejected plaintiff's contention that the two corporations were actually one, and affirmed the trial court decision that the Delaware savings statute is "applicable only in instances where the second suit is against the same party defendant."[20]

The purpose of the identity of parties requirement is clear. Only when the parties in each suit are the same will the defendant have an opportunity within the initial limitations period to preserve any evidence necessary to his defense. Such an opportunity would be denied if a plaintiff could refile his complaint, naming new party defendants. Presumably, the Illinois courts would agree and find section 24a applicable only in instances where identity of parties can be shown.[21]

While most jurisdictions recognize both of the identity requirements, two different constructions have emerged as to the degree of identity necessary to fulfill each identity requirement. Certain jurisdictions find that unless the second complaint is a virtual mirror image of the first complaint, the savings statute will not be applicable.[22] Illinois decisions interpreting the

16. *Id.*

17. 10 DEL. CODE § 8117(a) (1964), currently found at 10 DEL. CODE § 8118(a), which provides:

> If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.

18. 58 Del. at 148, 205 A.2d at 530.

19. 58 Del. at 147, 205 A.2d at 530.

20. *Id.*

21. *See* Bavel v. Cavaness, 12 Ill. App. 3d 633, 299 N.E.2d 435 (1973), discussed at note 13 *supra.*

22. *See* Hayden v. Ford Motor Co., 364 F. Supp. 398 (N.D. Ohio 1973), *rev'd* on other grounds, 497 F.2d 1292 (6th Cir. 1974); National

identity of causes of action requirement seem to adhere to this strict construction.[23] In contrast, other jurisdictions follow a more liberal interpretation. Recognizing that any remedial statute should be given as broad a scope as possible, these jurisdictions find that only a substantial identity of parties and causes of action is necessary to fulfill each requirement.[24] This standard appears to be more in keeping with the basic purpose of section 24a. Its adoption by the Illinois courts would allow the use of judicial discretion in situations where only minimal dissimilarities exist between the first and second actions.

There exist two other requirements, outside of the identity requirements, which are worthy of note. A further requirement of the savings statute is that the nonsuits referred to in section 24a must be involuntary nonsuits.[25] Apparently the theory is that if section 24a were to apply to voluntary nonsuits, the savings statute could become an offensive weapon to be used by a plaintiff to defer the trial until the most advantageous moment. If section 24a were applicable to voluntary nonsuits, a plaintiff would be accorded the opportunity to prolong unilaterally the litigation while the defendant had no corresponding opportunity. A final requirement is that the savings statute is available only once.[26] While the previous requirements are generally applicable to each of the four categories in section 24a, there exists one extremely important limitation that has been applied only to dismissals for want of prosecution—the self-initiated delay exception.

The Self-Initiated Delay Exception

The Illinois judiciary has recently created an exception

Fire Ins. Co. v. Joslyn Mfg. Co., 25 Ohio App. 2d 13, 265 N.E.2d 791 (1971); Gallo v. G. Fox & Co., 148 Conn. 327, 170 A.2d 724 (1961).

23. *See* Butterman v. Steiner, 343 F.2d 519 (7th Cir. 1965); Gibbs v. Crane Elevator Co., 180 Ill. 191, 54 N.E. 200 (1899).

24. *See* O'Brian v. M. & P. Theatres Corp., 72 R.I. 292, 296, 50 A.2d 781, 784 (1947), wherein the court stated that "[a]s long as plaintiff adheres to the . . . injury declared upon, an alteration of the modes in which the defendant has . . . caused the injury is not introducing a new cause of action." In Cox v. Strickland, 120 Ga. 104, 47 S.E. 912 (1904) the court stated that "[w]hile the second suit must be substantially the same cause of action, it does not have to be a literal copy of that dismissed." *Id.* *See also* Haught v. Continental Oil Co., 192 Okl. 345, 136 P.2d 691 (1943).

25. *E.g.*, Gibbs v. Crane Elevator Co., 180 Ill. 191, 54 N.E. 200 (1899); Holmes v. Chicago & Alton Ry., 94 Ill. 439 (1880); Boyce v. Snow, 88 Ill. App. 402, *aff'd*, 187 Ill. 181, 58 N.E. 403 (1900). Certain jurisdictions allow voluntary dismissals to be within their savings statute. *See* Tanner v. Presidents-First Lady Spa, Inc., 345 F. Supp. 950 (E.D. Mo. 1972); Haworth v. Ruckman, 249 Ore. 28, 436 P.2d 733 (1968).

26. Harrison v. Wyohan, 261 F.2d 412 (7th Cir. 1958). In *Harrison*, the plaintiff attempted to commence a *third* action using section 24a after a *second* action, also filed under section 24a, had been dismissed. The court held that section 24a was available only once for every complaint.

which precludes the availability of section 24a to an apathetic plaintiff who is dismissed for want of prosecution.[27] This exception, which is based upon a policy similar to that entailed in the equitable defense of laches, precludes a plaintiff from invoking section 24a unless he has been reasonably diligent in pursuing his cause of action to completion.[28] This exception was first recognized in the leading case of *Tidwell v. Smith.*[29] There, plaintiff filed his initial complaint in 1959, within two days of the running of the relevant statute of limitations.[30] Three years later, plaintiff's suit was dismissed for want of prosecution.[31] This dismissal was affirmed on appeal. Eleven and one-half months after the trial court's dismissal for want of prosecution, plaintiff filed a second complaint, alleging the applicability of section 24a. The trial court dismissed this second action as being barred by the statute of limitations, and plaintiff appealed. The appellate court stated that plaintiff came within the letter, but not the intent and spirit, of section 24a:

> Plaintiff's position is more that of brandishing section 24 [sic] as a weapon of aggression to secure for himself another offensive effort against these defendants, after a *self-initiated delay*, which constituted virtual abandonment of his cause of action.
>
> . . . .
>
> . . . We believe that the granting of relief to plaintiff under the circumstances of this case would prostitute the intent and purpose of section 24a.[32]

The self-initiated delay exception created by the *Tidwell* decision has been expressly followed in the appellate cases of *Ray v. Borkorney*[33] and *Quirino v. Chicago-New York News Syndicate.*[34] In *Quirino*, as in *Tidwell*, the plaintiff was very dilatory in filing both the original complaint and the second complaint under section 24a. The *Ray* decision differs from the factual settings in *Quirino* and *Tidwell* in one important respect. While the plaintiff in *Ray* filed his first complaint at a time when the initial limitations period had almost expired, he filed his second complaint, relying on section 24a, within a mere ten days after the dismissal of the original complaint for want of prose-

27. Tidwell v. Smith, 57 Ill. App. 2d 271, 205 N.E.2d 484 (1965). To date, this exception has been applied only to dismissals for want of prosecution. However, as a judicial creation, it could readily be extended to other categories of section 24a.

28. *E.g.*, Brown v. Burdick, 16 Ill. App. 3d 1071, 307 N.E.2d 409 (1974), wherein the court stated that section 24a "was intended to serve as an aid to the diligent, not a refuge for the negligent." *Id.* at 1074, 307 N.E.2d at 411.

29. 57 Ill. App. 2d 271, 205 N.E.2d 484 (1965).

30. ILL. REV. STAT. ch. 83, § 15 (1957).

31. 57 Ill. App. 2d at 272, 205 N.E.2d at 485.

32. *Id.* at 274-75, 205 N.E.2d at 486 (emphasis added).

33. 133 Ill. App. 2d 141, 272 N.E.2d 836 (1971).

34. 10 Ill. App. 3d 148, 294 N.E.2d 29 (1973).

cution. Therefore in determining whether plaintiff came within the purview of the self-initiated delay exception, the court in *Ray* must have relied upon plaintiff's conduct in filing his initial complaint and promptly following that complaint to judgment. Hence, while plaintiff's continued delay in filing his second complaint can serve only to militate against his use of section 24a, the courts apparently place primary emphasis on plaintiff's conduct in pursuing his first complaint to completion in determining whether section 24a is available. When such conduct demonstrates that plaintiff has wholly failed to apply a good faith effort in pursuing his first complaint, *Ray* dictates that no degree of promptness in filing the second complaint will overcome the earlier delay to admit the application of section 24a to plaintiff's cause of action.

The creation of the self-initiated delay exception stems, in part, from the exercise of the court's equitable powers. In applying these equitable powers the courts should balance the conduct of defendant which might have contributed to the delay with the analogous conduct of the plaintiff. If, after this balancing test, the defendant seems only marginally entitled to claim the exception, the legislative intent and basic purpose of section 24a should be allowed to tip the scales back to plaintiff's favor.

Criticisms of the Self-Initiated Delay Exception

The judicially-created self-initiated delay exception is not consonant with recent legislation which has expanded the scope of section 24a. The Illinois Legislature amended section 24a in 1967 to allow plaintiff to invoke section 24a when his first suit has been dismissed for want of prosecution.[35] The basis of a dismissal for want of prosecution is plaintiff's lack of diligence in pursuing his first complaint to judgment.[36] Yet, this same lack of diligence has become the basis of the self-initiated delay exception.[37] Clearly then, the creation of this exception is inconsistent with the statutory scheme of including dismissals for want of prosecution within the scope of section 24a. The *Ray* decision evidences this inconsistency most decisively. The plaintiff in *Ray* filed his second complaint under section 24a within just ten days of the dismissal for want of prosecution. Nevertheless, the court held that the self-initiated delay exception applied, and the second complaint was barred by the statute of limita-

35. Act of May 25, 1967, § 1 [1967] Ill. Laws 615, *amending* ILL. REV. STAT. ch. 83, § 24a (1965). The text of section 24a is set forth at note 1 *supra*.

36. Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, 236 N.E.2d 719 (1968); Svela v. Bloch, 294 Ill. App. 515, 14 N.E.2d 299 (1938); Epley v. Epley, 328 Ill. App. 582, 160 N.E.2d 113 (1928).

37. *See* text accompanying notes 27-28 *supra*.

tions. In so holding, the court removed any doubt that plaintiff's dilatory filing of the second complaint formed any part of the basis of the exception. Rather, the *Ray* decision indicates that the exception is built upon plaintiff's lack of diligence in pursuing his first complaint. Unfortunately, the *Ray* court overlooked the fact that it is this precise lack of diligence, with a resulting dismissal for want of prosecution, which the legislature has deemed to be a proper basis for invoking section 24a. The court in the *Quirino* decision expressly followed *Ray* and stated that "section 24a was not intended as a refuge for the negligent but only as an aid for the diligent."[38] The inconsistency between this language and the legislative intent in amending the savings statute to include dismissals for want of prosecution should appear evident.

The self-initiated delay exception, as developed by *Tidwell* and its progeny, dictates virtual elimination of dismissals for want of prosecution from the scope of the savings statute. The legislature in enacting the 1967 amendment[39] could not have intended such a result. Unless great care is taken in further extending the self-initiated delay exception, the category of dismissal for want of prosecution will cease to be within the Illinois savings statute.

A number of problems arise when a plaintiff who has been dismissed is required by venue or jurisdictional considerations to file his second complaint in a different jurisdiction. For example, if a plaintiff is dismissed from federal court for lack of diversity jurisdiction, he may wish to pursue his cause of action in a nearby state court. If the statute of limitations has run, the plaintiff will want to rely on section 24a to enable him to file his second complaint. As such, an examination of whether the Illinois savings statute is available in this and parallel situations is warranted.

The Availability of 24a When There is a Change in Jurisdiction

In situations where plaintiff has suffered a dismissal in federal court for lack of diversity jurisdiction, the precise issue is whether such a dismissal is within the meaning of "nonsuit," as that term is used in section 24a. In *Roth v. Northern Assurance Co.*,[40] the Illinois Supreme Court held that a dismissal for

38. 10 Ill. App. 3d 148, 150, 294 N.E.2d 29, 31 (1973). *Accord*, Brown v. Burdick, 16 Ill. App. 3d 1071, 307 N.E.2d 409 (1974).

39. Act of May 25, 1967, § 1 [1967] Ill. Laws 615, *amending* Ill. Rev. Stat. ch. 83, § 24a (1965).

40. 32 Ill. 2d 40, 203 N.E.2d 415 (1964). *Accord*, Lundstrom v. Winnebago Newspapers, 32 Ill. App. 2d 266, 177 N.E.2d 643 (1961) (abstract

lack of diversity jurisdiction came within the purview of a section 24a nonsuit. The plaintiff in *Roth* brought the original action in federal district court against multiple defendants to recover on their respective fire insurance policies.[41] The district court determined that plaintiff had failed to meet the required minimum jurisdictional amount and dismissed the suit for lack of diversity jurisdiction.[42] Plaintiff then attempted to refile the same complaint in an Illinois state court. The defendants contended that a dismissal for lack of diversity jurisdiction was not within the meaning of the term "nonsuit," and therefore plaintiff's second complaint was barred by the one year limitations period.[43] The trial court agreed with the defendants' contentions and dismissed the second complaint. In reversing this dismissal, the Illinois Supreme Court determined that the statute of limitations should be considered in light of its objectives and found that the basic policy implementing the limitations statute was to allow a defendant "to investigate the circumstances upon which liability is predicated while the facts are still accessible."[44] The Illinois Supreme Court in *Roth* found that this policy had been fulfilled.[45] It is suggested that the *Roth* decision is founded upon sound considerations. Once the policy implementing the statute of limitations has been realized, there are few equitable considerations which remain to exclude a dismissal for lack of diversity jurisdiction from the purview of the term "nonsuit" as used in section 24a. The court's quotation of

opinion); Swiontek v. Greenstein, 33 Ill. App. 2d 355, 179 N.E.2d 427 (1961).

41. The federal decision is unreported.

42. Generally, a plaintiff is not allowed to aggregate his claims against multiple defendants for purposes of obtaining the minimum jurisdictional amount. *See* 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1659, at 305 (1972).

43. The insurance contracts contained a one year contractual limitations period. Since the cause of action arose prior to the 1959 amendment, the court had to determine if the old section 24a included such limitations periods. The court held that section 24a applied. The issue has since become moot by virtue of the 1959 amendment which expressly added contractually created limitations periods to the scope of section 24a.

44. 32 Ill. 2d at 49, 203 N.E.2d at 420.

45. In reaching this decision the court found the words of Justice Cardozo appropriate.

> The statute [New York's savings statute] is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits . . . . The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts. When that has been done, a mistaken belief that the court has jurisdiction stands on the same plane as any other mistake of law. . . . There is nothing in the reason of the rule that calls for a distinction between the consequences of error in respect of the jurisdiction of the court and the consequences of any other error in respect of a suitor's rights.

Gainer v. City of New York, 215 N.Y. 533, 539-40, 109 N.E. 594, 596 (1915).

an opinion written by Mr. Justice Holmes[46] appears to indicate that section 24a should be liberally construed to apply in most situations where the defendant has notice of plaintiff's claim within the initial limitation period.[47]

A similar result was reached in *Sachs v. Ohio National Life Insurance Co.*[48] There, the plaintiffs sought in state court to enforce the "superadded" liability of a shareholder of an insolvent bank. The action was dismissed for want of jurisdiction over the amended and supplemental complaint. The plaintiff refiled his original complaint in district court within one year, alleging the applicability of section 24a. The district court ruled that section 24a did not apply and dismissed the action as being barred by the statute of limitations. After reviewing the Illinois state court decisions, the federal court of appeals stated that section 24a reflected "a legislative intent to protect the party who brings the action from a complete loss on the merits because of a procedural defect."[49] The court further implied that section 24a should be liberally construed to protect that legislative intent. Therefore, the federal court of appeals decided that section 24a was available in federal district court after a dismissal from state court for lack of jurisdiction.

A parallel question is presented when a plaintiff is dismissed in an out of state jurisdiction and seeks to refile the identical complaint in Illinois state court against the same defendant, now an Illinois resident. The Illinois appellate court addressed this issue in *Cook v. Britt.*[50] In *Cook* the plaintiff had been injured in an automobile accident and sought redress for her injuries against the defendant, a Georgia resident. Subsequent to the accident, but prior to the service of process, the defendant established a new residence in Illinois. Plaintiff obtained service of process on the Georgia Secretary of State, pursuant to the laws of Georgia, who then served the defendant in Illinois by registered mail. Almost two years after the suit was filed, the Supreme Court of Georgia, in an unrelated case, held unconstitutional the statute that the plaintiff had used to obtain jurisdiction over the defendant.[51] Plaintiff's Georgia suit was then dismissed. Within three months after the Georgia dismissal

46. New York Cent. R.R. v. Kinney, 260 U.S. 340, at 342 (1922):
[W]hen a defendant has had *notice from the beginning* that the plaintiff sets up and is trying to enforce a claim against [defendant] because of specified conduct, *the reasons for the statute of limitations do not exist*, and we are of the opinion that a liberal rule should be applied (emphasis added).
47. 32 Ill. 2d at 49-50, 203 N.E.2d at 420.
48. 131 F.2d 134 (7th Cir. 1942), applying Illinois law.
49. *Id.* at 137.
50. 8 Ill. App. 3d 674, 290 N.E.2d 908 (1972).
51. Young v. Morrison, 220 Ga. 127, 137 S.E.2d 456 (1964).

order, plaintiff sought to file an identical complaint in Illinois under the auspices of section 24a. The trial court found the suit barred by the statute of limitations and dismissed the complaint. Plaintiff maintained that she had been diligent in pursuing her claim. She argued that since defendants had actual knowledge of her suit within the period of the statute of limitations, she should be able to pursue her cause of action on the basis of section 24a. The appellate court, after citing *Roth* and *Sachs*, stated that statutes are presumed constitutional, and that plaintiff had a right to rely on the validity of the Georgia statute. Since the defendant was on notice of plaintiff's claim, the court decided that "it would be most unfair and unjust to now deprive her of her day in court in Illinois."[52] The court implicitly recognized that the fulfillment of the basic purpose of the limitations statute by the filing of the first suit within the relevant period enabled this particular dismissal to fall within the scope of the nonsuit provision of section 24a.

The previous cases presented few, if any, procedural problems apart from the issue of the applicability of section 24a. Unfortunately, significant *Erie*[53] problems would arise in instances where the first and second complaints were filed in two federal courts, each located in a different state.[54] Presumably, section 24a would apply when the second complaint is filed in an Illinois district court. Such a result is suggested by the holding of *Cook v. Britt*.[55] There, the plaintiff was allowed to apply section 24a after a dismissal of the initial complaint from the Georgia courts. Since Illinois state courts will apply section 24a in such situations, *Erie* and its progeny would require the Illinois federal district courts to apply section 24a in like instances. However, where Illinois is the situs of the first complaint, but the situs of the second complaint is a district court outside of Illinois, the use of section 24a would rest upon the foreign state's conflicts of law.[56] Since the statutes of limitations of an individual state are frequently applied irrespective of where the cause of action arose,[57] it appears similarly that the section 24a

52. 8 Ill. App. 3d at 679, 290 N.E.2d at 911.

53. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

54. For a factual setting in which plaintiff was dismissed in federal district court and allowed to file a second complaint in the *same* district court, *see* Factor v. Carson, Pirie Scott & Co., 393 F.2d 141 (7th Cir. 1968), *cert. denied*, 393 U.S. 834 (1968).

55. 8 Ill. App. 3d 674, 290 N.E.2d 908 (1972).

56. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1971):

> We are of the opinion that the prohibition declared in *Erie Railroad v. Tompkins* . . . extends to the field of conflict of laws. [For example,] the conflicts of laws rules to be applied by the federal courts in Delaware must conform to those prevailing in Delaware's state courts.

57. *See* Jackson v. Shuttleworth, 42 Ill. App. 2d 257, 192 N.E.2d 217 (1963).

time extension would rarely be available for use outside of Illinois. It is appropriate to note, however, that many states possess their own savings statutes which may provide the relief that the plaintiff would seek.[58]

The cases involving a change of jurisdiction have given an expansive interpretation to the scope of the term "nonsuit" as used in section 24a. In part, this result has been prompted by the desire to provide every litigant with a full and fair opportunity to be heard. However, a similar expansion of the phrase "dismissal for want of prosecution" as used in section 24a was precluded by the Illinois Supreme Court decision of *Keilholz v. Chicago & North Western Railway*.[59]

THE *Keilholz* DECISION

The central issue presented in *Keilholz* was whether an involuntary dismissal for failure to comply with an order of a court was within the meaning of "dismissal for want of prosecution," as that phrase is used in the savings statute. The plaintiff in *Keilholz* had sustained injuries allegedly arising out of a train-truck collision. Plaintiff filed the initial complaint within the two year statute of limitations, alleging that her injuries had been incurred through the negligence of defendant. During the pretrial proceedings, plaintiff was ordered by the court to attend a pretrial conference in person, accompanied by her counsel.[60] The court was notified a week in advance of plaintiff's inability to attend, but the court did not warn the plaintiff that failure to attend the conference would result in dismissal. Upon the plaintiff's failure to appear in person, the trial court dismissed the suit, basing its dismissal on the sanctions provided by Illinois Supreme Court Rule 219(c)(v).[61] The statute of limitations then expired during the pendency of the action, and instead of seeking an appeal,[62] plaintiff chose to pursue her grievance by

58. *See, e.g.*, 10 DEL. CODE § 8118(a) (1975).
59. 59 Ill. 2d 34, 319 N.E.2d 46 (1974).
60. The order came pursuant to ILL. REV. STAT. ch. 110A, § 218(a) (1973).
61. *Id.*, § 219(c)(v) provides in part:

> (c) Failure to Comply with Order or Rules.
> If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provision of rules 201 through 218, or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:
>
> . . . .
>
> (v) that, as to the claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or *that his suit be dismissed with or without prejudice* (emphasis added).

62. It should be noted that plaintiff could have successfully appealed

refiling her action under section 24a. The trial court held that the second suit was barred by the statute of limitations and plaintiff appealed from this adverse ruling.

The appellate court addressed itself to two issues in deciding if the plaintiff could refile her action under section 24a.[63] First, it considered whether a dismissal under Rule 219(c)(v) is a "dismissal for want of prosecution," as that phrase is used in section 24a.[64] Second, the court considered whether the "artificial" res judicata effect of Illinois Supreme Court Rule 273 barred the second action, or whether section 24a was a statute of this state which otherwise specified within the meaning of the phrase qualifying Rule 273.[65] The appellate court first noted that the purpose of Rules 218 and 219 is to encourage the expeditious prosecution of cases.[66] Having so determined the purpose of Rules 218 and 219, the appellate court held that the penalties under these rules were "essentially penalties 'for want of prosecution' within the meaning of section 24a."[67] The appellate court concluded by holding that section 24a was a statute which "otherwise specifies" within the meaning of the introductory phrase of Rule 273.[68] The appellate court remanded the case, having decided both of these questions in plaintiff's favor. However, defendant requested, and was granted, an appeal to the Illinois Supreme Court.

The Illinois Supreme Court reversed the appellate court determination, basing its decision on a different interpretation of the phrase "dismissal for want of prosecution" as used in section 24a.[69] The court reasoned that while every procedural rule and sanction, when viewed from a sufficiently remote perspective, may be designed to expedite the prosecution of cases, the

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the trial court's dismissal based upon a theory of abuse of the power granted in ILL. REV. STAT. ch. 110A, § 219(c)(v) (1973). *See generally* annotations collected in ILL. ANN. STAT. ch. 110A, §§ 218(a), 219(c)(v) (Smith-Hurd 1973, Supp. 1975).

63. 10 Ill. App. 3d 1087, 295 N.E.2d 561 (1973), *rev'd*, 59 Ill. 2d 34, 319 N.E.2d 46 (1974).

64. *Id.* at 1091, 295 N.E.2d at 564.

65. *Id.* For consideration of this issue, *see* text accompanying notes 74-88 *infra.*

66. 10 Ill. App. 3d at 1091-92, 295 N.E.2d at 564-65, wherein the court stated:

> The purpose, *inter alia*, is to authorize and implement the pretrial conference procedure . . . . All to what end? Obviously, to move the case more expeditiously either to settlement or to trial, and, if to trial, then to a more expeditious trial; in short, *to expedite the prosecution of the case* (emphasis added).

67. *Id.* at 1092, 295 N.E.2d at 565.

68. *Id.* at 1093-94, 295 N.E.2d at 565-66. It should be noted that the appellate court qualified this holding by saying that if the case had been dismissed *with prejudice* then section 24a would not apply. The case held that section 24a was applicable only when the order was without prejudice or was silent on the issue of prejudice.

69. Keilholz v. Chicago & North Western Ry., 59 Ill. 2d 34, 319 N.E.2d 46 (1974).

focus of section 24a is narrow. The court held that a dismissal for the failure to comply with an order of the court was not within the four types of orders contained in the savings statute.[70] The court agreed with the dissenting appellate judge that to rule otherwise would "eliminate the most effective sanction for the disregard of those orders" issued pursuant to Rule 219.[71] This ruling, that the scope of section 24a did not extend to dismissals for failure to comply with the orders of a court, obviated the need for a consideration of the appellate court's ruling on the second issue, the interrelationship between Rule 273 and section 24a. As a result, the precise nature of this interrelationship has never been examined by an Illinois court.[72]

The holding of *Keilholz* places further restrictions upon the scope of the provision in section 24a for dismissals for want of prosecution.[73] It remains to be seen whether future decisions concerning the effect of Rule 273 will continue to limit the Illinois savings statute.

Rule 273 and Section 24a: Does a "Silent Dismissal" Order Preclude the Availability of Section 24a?

The creation of Illinois Supreme Court Rule 273[74] in 1967 resolved many problems concerning when a silent dismissal order would be res judicata, by allowing all such dismissals to operate as adjudications on the merits. This rule is qualified by the phrase, "[u]nless . . . a statute of this state otherwise specifies." In those instances where the dismissal is within the purview of section 24a, and the dismissal order fails to state whether the suit is dismissed with or without prejudice, the plaintiff must decide whether he can rely upon section 24a in pursuing his case to completion. The issue becomes whether cases eligible for the section 24a time extension will be exempted from operation of Rule 273, because section 24a is a statute of this state which otherwise specifies. If section 24a is not a statute of this state within the meaning of Rule 273, the second suit will be barred, not by the statute of limitations, but rather by the doctrine of res judicata. No case has occurred in which an Illinois court has been required to rule upon this important question.[75] With-

70. *Id.* at 37, 319 N.E.2d at 48.
71. *Id.* at 38, 319 N.E.2d at 48.
72. For a case referring to the issue, *see* Sunderland v. Future Inv., Inc., 120 Ill. App. 2d 361, 256 N.E.2d 667 (1970).
73. Dismissals for want of prosecution have also been limited by the self-initiated delay exception. *See* text accompanying notes 27-39 *supra*.
74. Ill. Rev. Stat. ch. 110A, § 273 (1973).
75. In Keilholz v. Chicago & North Western Ry., note 63 *supra*, the Illinois appellate court was required to rule upon this issue. However, the Illinois Supreme Court's reversal of the case on other grounds makes this ruling *obiter dicta*. For a discussion of the *Keilholz* case, *see* text accompanying notes 60-73 *supra*.

out case law guidelines, a brief examination of the history of section 24a and the doctrine of res judicata, prior to the existence of Rule 273, will prove helpful.

Prior to 1967, the effective date of Rule 273, the doctrine of res judicata and section 24a co-existed in relative harmony. The purpose of section 24a is to "facilitate the disposition of litigation upon the merits."[76] A common law adjudication on the merits precluded the applicability of section 24a, since the purpose of section 24a was fulfilled when the merits of the controversy were resolved. So long as the foundation of res judicata rested upon an *actual* adjudication on the merits, no conflict could exist. When the foundation of res judicata was altered by the enactment of Supreme Court Rule 273, this peaceful co-existence was shattered. Under Rule 273, res judicata could become operative before the purpose of section 24a had been fulfilled, that is, before there had been an adjudication on the merits. By creating Rule 273, the Illinois Supreme Court sought to simplify a difficult question.[77] Unfortunately, in resolving the uncertainty of whether a silent dismissal order is res judicata, the Illinois Supreme Court has created an apparent conflict between the operation of section 24a and the theory of res judicata as manifested by Rule 273. In creating this conflict, between a rule of court and a statute of this state, the supreme court has placed a recurring theme in issue, the extent of the rule-making power of the Illinois Supreme Court.

The Illinois Supreme Court's Rule-Making Authority

From early common law it has been recognized that a rule of court can never supersede a *substantive* statute.[78] If the statute can only be regarded as *procedural*, a solution to the conflict can be reached only by reference to the status of the rule-making authority of the state's highest court.[79] The extent of these powers will then determine whether the court's rule can limit or supersede the statute.[80]

76. Roth v. Northern Assurance Co., 32 Ill. 2d 40, 49, 203 N.E.2d 415, 419 (1964).

77. ILL. ANN. STAT. ch. 110A, § 273, Committee Comments (Smith-Hurd 1973), where the committee stated that "[t]his rule is new . . . and sets to rest the question of the effect of an involuntary dismissal other than those excepted by the rule."

78. Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635 (1923), wherein the Court stated that "a rule [of a court cannot] abrogate or modify the substantive law."

79. Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. ILL. L.F. 903, 905.

80. The power of the court has been classified as "complete" when a court has the power to abrogate a procedural statute; it is "concurrent" when the power is vested in both the legislature and the courts; and it is "supplementary" when the courts' rules are inferior to and controlled

The 1970 Illinois Constitution fails to provide any definition of the court's rule-making power.[81] While several provisions refer to the power,[82] none define it.[83] The primary grant of constitutional authority to promulgate general rules is located in section 16 of the Judiciary Article.[84] The section provides that "[g]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules."[85] Section 16 "was not intended to modify the *concurrent power relationship* between the legislature and the judiciary on the matter of court rules generally."[86] Where a concurrent power relationship exists, the statute in question must be examined to determine if it infringes on an inherently judicial function.[87] A determination that the statute does not infringe on an inherently judicial function would mean that the statute will, to the extent that the rule and the statute conflict, supersede the rule.[88] However, an interpretation that would allow both the rule and the statute to have meaningful co-existence would obviate any determination that either must take precedence over the other.

CONCLUSION

An interpretation does exist whereby section 24a can remain consistent with Rule 273. The scope of Rule 273 is broad, extending to any involuntary dismissal which fails to state whether that dismissal is with or without prejudice.[89] In contrast, the scope of section 24a is narrow,[90] applying primarily to involuntary

by any legislative enactment. *See* Note, *The Rule-Making Powers of the Illinois Supreme Court*, 1965 U. ILL. L.F. 903, for an excellent discussion of these categories.

81. RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, *Comm. Proposals*, vol. VI at 825 (1969-70).

82. ILL. CONST. art. VI, §§ 4, 6, and 16 (1970).

83. *Id.*

84. ILL. CONST. art. VI, § 16 (1970).

85. *Id.*

86. Comment, *People ex rel. Stamos v. Jones: A Restraint on Legislative Revision of the Illinois Supreme Court Rules*, 6 J. MAR. J. 382, 393 (1973). *See also* RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, *Comm. Proposals*, vol. VI at 825 (1969-70): "It is not the intention or the effect of the recommendation to affect this concurrent power relationship . . . ."

87. *See* Agran v. Checker Taxi Co., 412 Ill. 145, 149, 105 N.E.2d 713, 715 (1952), where the court stated that "if the power is judicial in nature, it necessarily follows that the legislature is expressly prohibited from exercising it."

88. *Id.* The *Agran* court also emphasized that "the General Assembly has the power to enact laws governing judicial practice only where they do not unduly infringe upon inherent powers of the judiciary." *Id.* at 149, 105 N.E.2d at 715 (1952).

89. The scope of the rule is limited by the exceptions appearing in the rule itself. ILL. REV. STAT. ch. 110A, § 273 (1973).

90. *See* Keilholz v. Chicago & North Western Ry., 59 Ill. 2d 34, 37, 319 N.E.2d 46, 48 (1974), wherein the court stated that "the focus of section 24 [sic] is narrow."

nonsuits and dismissals for want of prosecution. Those categories of dismissals specifically enumerated in section 24a should be exempt from the expansive scope of Rule 273 by virtue of an interpretation making section 24a a statute of this state which otherwise specifies, within the qualifying phrase of Rule 273. This construction would allow Rule 273 to be operative to the vast majority of dismissals, while enabling section 24a to apply as broadly as the Illinois legislature envisaged. A construction making section 24a applicable only if the dismissal order states that the dismissal is "without prejudice" would unduly circumscribe the function of the savings statute. The Illinois Supreme Court has already determined that section 24a is remedial in nature and should be "liberally construed, so as to prevent destruction of the purpose of the legislation."[91] This purpose would be effectively "destroyed" by a statutory construction which precluded the use of section 24a in instances of silent dismissals. In light of the remedial nature of section 24a and the meaningful purpose of Rule 273, the proferred construction seems preferable. With such a construction, section 24a can continue to afford plaintiff every opportunity to achieve a just and equitable resolution of his controversy.

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91. Roth v. Northern Assurance Co., 32 Ill. 2d 40, 42, 203 N.E.2d 415, 416 (1964).