MEMORANDUM ON:

# PRE-TRIAL MOTIONS UNDER SECTIONS 2-615 AND 2-619

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Perhaps no other area in civil procedure creates more difficulty and confusion than Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. These two sections provide similar yet distinct avenues for dispositive pre-trial motions. Each section functions to attack pleadings in civil cases. This article will outline the practice and procedure under each section and illustrate methods for using each to its fullest potential.

**2-615: Motions With Respect To Pleadings**

The 2-615 motions attack defects appearing on the face of the pleadings. They have two basic requirements. The first requirement is the motion must specifically point out the defect complained of. The second requirement is the motion must ask for the appropriate relief.

There are six common bases for attacking pleadings under 2-615:

1) pleading be made more definite and certain;

2) designated immaterial matter be stricken;

3) necessary parties be added, or misjoined parties be dismissed;

4) pleading fails to allege essential elements in the cause of action;

5) pleadings fail to state a claim upon which relief may be granted; and

6) pleadings entitle the moving party to judgment.

Under the first four bases, the formal defects are generally remedied by amending the pleading. Although such 2-615 motions may serve to alert the pleader to the defect, they are encouraged because they help to clarify the triable issues and identify the parties.

Any 2-615 motion directed to formal defects in a complaint should be filed before the answer. As a general rule, answering the complaint waives all objections to formal defects in the pleading. *Thilman & Co. v. Esposito,* 408 N.E.2d 1014 (1st Dist., 1980). The most appropriate time to file a 2-615 motion is within the 30-day period.

Where a 2-615 motion is granted, and the pleader is given leave to amend, filing an amended pleading waives any objection to the ruling on the former pleading. Where a 2-615 motion is denied, the ruling of denial is not a final and appealable order. If the moving party wishes to stand on his motion, he must submit to a default or summary judgment to preserve his right to appeal the ruling on the motion.

The fifth basis for a 2-615 motion, failure to state a claim on which relief may be granted, may be raised at any time, either before or after judgment. *Krachock v. Department of Revenue*, 403 Ill. 148, 85 N.E.2d 682 (1949). This basis for dismissal cannot be waived at the trial level and may be raised for the first time on appeal. This allows the moving party more flexibility concerning the timely filing of the motion. The moving party must establish that there exists no set of facts that can be proven under the pleadings that would entitle plaintiff to relief. *Griffis v. Board of Ed,* 391 N.E.2d 451 (1st Dist., 1979). In determining the legal sufficiency of the complaint, all well-pleaded facts are taken as true and interpreted in the light most favorable to the plaintiff. Mere allegations of legal conclusions are insufficient and need not be accepted by the court. *Hoffman v. Allstate Ins. Co.*, 407 N.E.2d 156 (2d Dist., 1980).

Under the first five bases the moving party is ordinarily the defendant. However, 2-615 may be used by either party to attack any defects appearing on the face of any pleading, 2-615 is not limited to attacking complaints, and 2-615 may be used to attack defective answers, counterclaims or cross-claims.

The sixth basis, a 2-615 motion for judgment on the pleadings, is another exception to the general rule of filing a pre-answer 2-615 motion. A motion for judgment on the pleadings is generally made after the issues have been settled by the pleading phase of litigation and prior to any discovery. Here the court has a right to consider

both the complaint and the answer. *Oak Park Nat. Bank v. Peoples Gas Light & Coke Co.*, 197 N.E.2d 73 (1st Dist., 1964).

A motion for judgment on the pleadings may be used by either party. Where a court can determine the relative rights of the parties in the subject matter solely from the pleadings, a motion for judgment on the pleadings is proper. *Bank & Trust Co. etc. v. Arnold N. May*, 413 N.E.2d 183 (2d Dist., 1980). A 2-615 motion for judgment on the pleadings requires a determination of whether the pleadings disclose any material issue of fact and, if not, whether the moving party is entitled to judgment as matter of law. The motion does not test whether there is any evidence to support the pleadings, rather whether the pleadings present a material issue of fact. If an issue of material fact is presented, it is inappropriate to enter judgment on the pleadings. *Whildin v. Kovacs*, 417 N.E.2d 736 (1st. Dist., 1981).

**2-619: Involuntary Dismissal**

The primary purpose of 2-619 is to afford defendants a means of obtaining at the outset of litigation summary disposition of issues of law or easily proved issues of fact. *In re Custody of McCarthy,* 510 N.E.2d 555 (2d Dist., 1987). A 2-619 motion must relate to one of the nine enumerated grounds for dismissal and not to defects solely in the face the pleading. The 2-619 motions go beyond the face of the pleadings by asserting affirmative matters. The nine grounds for dismissal are:

1) the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction;

2) plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued;

3) another action is pending between the same parties for the same cause;

4) cause of action is barred by a prior judgment;

5) action was not commenced within the time limited by law;

6) plaintiff's claim has been released, satisfied of record, or discharged in bankruptcy;

7) claim asserted is unenforceable under the Statute of Frauds;

(8) claim asserted against defendant is unenforceable because of his minority or other disability; and

9) claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

(Ill.Rev.Stat. Ch. 110, Par. 2-619(a) (1)-(9) (1987)).

It should be noted that neither 2-615 nor 2-619 sets a specific, absolute limitation on the time within which a motion to dismiss may be filed. Like 2-615 motions, the appropriate time for filing a 2-619 motion is before the answer. Section 2-619 states that the motion be filed "within the time for pleading." However, unlike 2-615 motions, failure to raise affirmative 2-619 grounds by motion does not constitute a waiver, because the grounds may be asserted in the answer. The trial court in its discretion may allow a party to withdraw an answer and file a 2-619 motion. *In re Custody of McCarthy*, 510 N.E.2d 555 (2d Dist., 1987). Additionally, answering the complaint after denial of a 2-619 motion does not waive error in denying the motion. However, courts frown on the practice of filing 2-619 motions on the eve of trial or after substantial litigation and discovery.

Under 2-619, the moving party carries the initial burden of demonstrating the absence of a genuine issue of material fact. If it appears on the face of the pleading that no genuine issue exists, then affidavits are not required. However, if it is not apparent on the face of the pleading, the moving party is required to attach affidavits or other evidence in support of the motion. If the moving party fails to meet the initial burden, the motion is denied. Where the moving party files an affidavit and the non-moving party does not file a counter-affidavit in response, the facts alleged in the affidavit must be taken as true. The non-moving party may not simply rely on contrary averments contained in the pleadings. The form and substance of an affidavit or counter-affidavit must be objected to at the trial court level to preserve the issue for appeal.

If a material fact exists the court has two options. The court must either (1) deny the motion without prejudice and allow the moving party to reraise the defense in the answer; or (2) decide the motion on the merits. Here, 2-619 creates unique requirements distinguishing jury cases from non-jury cases. Where there is a right to a jury and a jury demand has been properly filed by the party opposing the motion, the court must deny the motion without prejudice and allow the moving party to reraise the defense in the answer. The issue(s) of fact must be decided by the

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jury. *Greenstein v. Norgle*, 283 N.E.2d 492 (4th Dist., 1972).

If the cause of action is a non-jury matter or a jury trial has been waived, the court has two options. The court must either (1) deny the motion without prejudice and allow the moving party to reraise the defense in the answer; or (2) hold an evidentiary hearing. *Consumer Electric Company v. Cobelcomex, Inc.*, 501 N.E.2d 156 (1st Dist. 1986). If the result of an evidentiary hearing is a denial on the merits, then the defense cannot be plead over and reraised in the answer. Accordingly, if the court grants the motion, then the cause of action pertaining to the defense should be dismissed.

**Caveat: Hybrid Motions**

Combining 2-615 and 2-619 motions is a prescription for disaster. It is not proper practice to attach affidavits to a 2-615 motion and request the court to grant summary judgment in the alternative. In *Janes v. First Federal Saving & Loan Ass'n of Berwyn*, 312 N.E.2d 605 (1974), the Illinois Supreme Court held that the joinder of a 2-615 motion and a motion for summary judgment was improper because the 2-615 motion was based on the issue of whether the pleading was sufficient and the motion for summary judgment almost necessarily assumes that it is. The Court pointed out that such a motion seemed to be predicated on the inappropriate assumption that there exists a hybrid procedure where a defendant can challenge the legal sufficiency of the complaint *and* at the same time answer it and demand judgment on the merits.

The Court reiterated that the Illinois Code of Civil Procedure establishes two distinct procedures. Combining the two is likely to confuse both the parties and the court. The Court stated that the defendant should have first challenged the legal sufficiency of the complaint and if, and only if, a sufficient legal cause of action had been stated then the court could entertain a motion for summary judgment. Since the *Janes* decision, courts have expanded their rejection of such hybrid motions to include those combining 2-615 and 2-619. *Herman v. Hamblet,* 401 N.E.2d 973 (1st Dist., 1980). Careful pleading practice requires the movant to specifically designate whether the motion is brought pursuant to section 2-615 or 2-619. Illinois courts are generally unsympathetic to motions filed without the proper designation. The failure to properly designate the motion can result in reversible error where the court grants the motion and the non-moving party can demonstrate some prejudice from the improper designation. *Downers Grove Associates v. Red Robin Intern.*, Inc., 502 N.E.2d 1053 (1st Dist., 1986).

Armed with an understanding of the grounds for relief under Sections 2-615 and 2-619 and avoiding combining the two in any motion, the careful practitioner can successfully avert presenting a faulty motion.

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