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*Mentored by Judge Diane Larsen***

I. INTRODUCTION

The doctrine of res judicata and the rule against claim splitting require a plaintiff to plead and to litigate all relevant claims in the same action.[1] The general goals of these two rules are to ensure accuracy, efficiency, and fairness in the legal system.[2] Even though these three goals should work in tandem, courts have begun placing paramount importance upon the concept of efficiency, or judicial economy.[3] This

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** Judge Diane Larsen has been a Law Division Judge in Cook County for the past 10 years and was the Chief of Policy Litigation for the City of Chicago Law Department prior to serving as a judge.

1. *See* Barbara Anderson Gimbel, *The Res Judicata Doctrine Under Illinois and Federal Law: A Step-by-Step Review of the Res Judicata Doctrine and its Development and Application Under Common Law*, 88 ILL. B.J. 404, 405 (2000) ("[R]es judicata may extend not only to every matter that was determined in the prior lawsuit but to every matter that might have been determined." (citing River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 889 (Ill. 1998))); *see also* PETER R. BARNETT, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS 119–20 (2001) (describing res judicata as including the issue of claim splitting because "one inseparable claim" cannot be split into two partial claims without a judgment from another partial claim applying to the newly filed partial claim).

2. *See* Robert Ziff, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 910–11 (1992) (stating that accuracy refers to an "accurate resolution of the merits of a case"; efficiency is "minimizing the direct costs of litigation," both direct and peripheral; and fairness narrowly refers to the "basic expectations of the parties").

3. *See* LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW 1 (2001) (detailing the different mechanisms the Supreme Court of the United States will use to avoid deciding an issue and discussing the Court's reasons behind these avoidances, such as judicial economy); Ziff, *supra* note 2, at 905 ("[C]ourts occasionally preclude [similar but not identical claims] by developing

change is evidenced by the Illinois Supreme Court's recent decision in *Hudson v. City of Chicago*, where the court dramatically curbed the right to refile voluntarily dismissed litigation in the name of judicial economy.[4]

The concept of finality in litigation is inextricably tied to judicial economy, and while there ought to be finality in litigation, the goal of a clear docket should not validate the mechanical application of res judicata at the expense of fundamental fairness.[5] Instead, courts should balance the interests of judicial economy equally with other litigants' rights.[6] This balance is especially important because the right to refile voluntarily dismissed claims has been previously declared absolute.[7]

As this Note will discuss, however, in *Hudson*, the right to refile voluntarily dismissed litigation in Illinois was inappropriately limited through a mechanical application of res judicata principles.[8] The court

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novel exceptions to the established limitations of res judicata law."). *See also* Zuniga v. Dwyer, 752 N.E.2d 491, 495 (Ill. App. Ct. 2001) (disallowing any practice that would "necessarily lead to increased litigation costs, demand on limited judicial time and resources and potential for double recovery that our supreme court has determined to avoid"). This change reflects a concern regarding over-crowded dockets: 773,204 civil cases were filed in Illinois in 2007 with 732,016 of these filings disposed of prior to trial. State of Illinois, Illinois Circuit Court Statistics, http://www.state.il.us/court/circuitcourt/CCStats.asp (last visited Feb. 12, 2008). This concern over volume is only slightly less striking in federal court, where there were 257,507 civil filings in 2007. U.S. Courts, *Judicial Caseload Profile, All Districts*, *in* FEDERAL COURT MANAGEMENT STATISTICS 2007 (2008), *available at* http://www.uscourts.gov/cgi-bin/cmsd2007.pl.

4. *See* Hudson v. City of Chicago, 889 N.E.2d 210, 222–23 (Ill. 2008) (holding that a plaintiff's right to refile their voluntarily dismissed claims is barred if an involuntary judgment has been entered on any part of the preceding litigation).

5. Dutch D. Chung, Note, *The Preclusive Effect of State Court Adjudication of Patent Issues and the Federal Courts' Choice of Preclusion Laws*, 69 FORDHAM L. REV. 707, 732 (2000) ("The finality of decisions promotes judicial economy and fairness to all parties by preventing repetitive and vexatious litigation and encouraging litigants to resolve all of their disputes within a single litigation.").

6. *See* Michael E. Solimine & Amy E. Lippert, *Deregulating Voluntary Dismissals*, 36 U. MICH. J.L. REFORM 367, 371–72 (2003) (discussing the history of the "unilateral right to voluntarily dismiss" as a broad right subject to various conditions under statute as well as the continuously tighter restrictions created by the courts); Markus May, *Voluntary Dismissals in Illinois—A Critical Review*, 92 ILL. B.J. 484, 489 (2004) (predicting the continued limitations of the practice surrounding voluntary dismissals in Illinois by the courts and potentially the General Assembly).

7. Flores v. Dugan, 435 N.E.2d 480, 482 (Ill. 1982) (holding that an order dismissing a cause for want of prosecution is not a final and appealable order given plaintiff's "absolute" right to refile the same claim against the same party). *See also* Wold v. Bull Valley Mgmt. Co., Inc., 449 N.E.2d 112, 113–14 (Ill. 1983) (upholding *Flores* and deciding that a plaintiff's absolute right to refile trumps the plaintiff's own desire to appeal the granting of the order to dismiss); Case v. Galesburg Cottage Hosp., 880 N.E.2d 171, 176 (Ill. 2007) (holding that the limitations statute grants plaintiffs the absolute right to refile a voluntarily dismissed complaint).

8. *See Hudson*, 889 N.E.2d at 213–14 (changing the previous understanding of refiling a voluntarily dismissed claim as an "absolute right," by determining that a refiled voluntarily

justified such a restrictive application out of concern for judicial economy.[9] Part II of this Note first provides background on the rules governing voluntary dismissals[10] and the doctrine of res judicata.[11] Part II also discusses the integral cases that preceded the court's decision in *Hudson*.[12] Next, Part III discusses the *Hudson* case, including its factual background,[13] the appellate court decision,[14] and the Illinois Supreme Court holding.[15]

Part IV then asserts that the *Hudson* court wrongfully extended the application of *Rein v. David A. Noyes & Co.*, an earlier Illinois Supreme Court case.[16] It then suggests that the Illinois General Assembly intended to preserve a litigant's right to refile a voluntarily dismissed claim.[17] Part IV also argues that, despite *Hudson*'s stated aim of promoting judicial economy, the decision is marred by the court's overriding objective of curbing attorney abuses.[18] Finally, Part V maintains that *Hudson* will impact motion practice by shifting the balance between plaintiffs and defendants.[19] Additionally, Part V concludes that *Hudson* is unlikely to meet the court's main goal of promoting judicial economy.[20]

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dismissed claim is barred by any involuntary dismissal of another part of the suit).

9. *See id.* at 221 (asserting that a separate outcome, recommended by the Illinois Trial Lawyer's Association, would "impair judicial economy").

10. *See infra* Part II.A (describing the right to take a voluntary dismissal and to refile a voluntarily dismissed claim).

11. *See infra* Part II.B (illustrating the doctrine of res judicata as a restriction on the right to take and refile voluntarily dismissed claims, specifically, the final judgment element and the rule against claim splitting).

12. *See infra* Part II.C (discussing *Rein v. David A. Noyes & Co.* and *Piagentini v. Ford Motor Co.*).

13. *See infra* Part III.A (providing the factual basis for the *Hudson* decision).

14. *See infra* Part III.B (discussing the undivided appellate court decision upholding the trial court's order to dismiss the plaintiff's refiled claim under the doctrine of res judicata).

15. *See infra* Part III.C (detailing the majority opinion and dissenting opinions in *Hudson*).

16. *See infra* Part IV.A (asserting that the court in *Hudson* misapplied *Rein* to cases not dealing with attorney negligence and the abuse of voluntary dismissals).

17. *See infra* Part IV.C (addressing the Illinois General Assembly's intention to allow plaintiffs to refile voluntarily dismissed claims so long as the refiling complies with the statutory provisions regulating the voluntary dismissal).

18. *See infra* Part IV.D (illustrating how the stated goals of the court do not apply to the factual scenario presented by *Hudson* and providing more plausible unstated goals of the court in its decision).

19. *See infra* Part V.A (discussing the potential impact of *Hudson* on the motion practice in shifting the rights and responsibilities of plaintiffs and defendants as well as the role of the courts in these situations).

20. *See infra* Part V.A–C (discussing the potential impact of *Hudson* on the motion practice and further claims).

II. BACKGROUND

Litigants are afforded a variety of legal rights.[21] Certain rights, however, are considered absolute.[22] Two such absolute rights include: (1) the plaintiff's right to voluntarily dismiss his claim without prejudice and (2) the defendant's right not to be harassed by repeat litigation.[23] This Part begins by discussing the purpose and effect of giving plaintiffs the right to voluntarily dismiss and later refile their claims.[24] Next, this Part illustrates the ways in which courts and the Illinois General Assembly have defined the boundaries of this right via the doctrine of res judicata.[25] Finally, this Part reviews the Illinois court decisions that established a nexus between the plaintiff's right to refile voluntarily dismissed litigation and the defendant's right to avoid harassment from duplicative litigation.[26]

A. A Plaintiff's Right to Refile Voluntarily Dismissed Claims

The right of plaintiffs to refile voluntarily dismissed claims is inherent in the court's ability to grant such dismissals *without prejudice*.[27] Illinois statute gives plaintiffs the right to voluntarily

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21. Other rights protected for litigants include the right to a speedy trial, People v. Collins, 886 N.E.2d 1248, 1251 (Ill. App. Ct. 2008), and the right to counsel, *In re* Barbara H., 702 N.E.2d 555, 561 (Ill. 1998). Another example of an "absolute right" subject to exception is the right to appeal from a decision of the trial court. People v. Crane, 743 N.E.2d 555, 564 (Ill. 2001).

22. As will be established throughout this Article, "absolute rights" do have necessary restrictions under statute or when balanced with other rights, and while the term "absolute right" will be used, it does not imply that there are no restrictions on these rights. *See* Octavio L. M. Ferraz, *Poverty and Human Rights*, 28 OXFORD J. LEGAL STUD. 585, 591 (2008) (asserting that, while there may not be any "absolute rights," there are "claims of an especially strong character"). *But see* Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 1–16 (1981) (arguing that certain "claim-rights" may be absolute).

23. *See infra* Part II.A– B (discussing the right to voluntarily dismiss a claim and the doctrine of res judicata).

24. *See infra* Part II.A (discussing the development and purpose of the right to voluntarily dismiss a party's own claims and to refile those claims within one year).

25. *See infra* Part II.B (discussing the limiting function of res judicata and the rule against claim splitting).

26. *See infra* Part II.C (discussing *Rein v. David A. Noyes & Co.* and *Piagentini v. Ford Motor Co.* and their disparate effect on motion practice).

27. *See* 735 ILL. COMP. STAT. 5/2-1009 (2006) ("[A] plaintiff may . . . dismiss his or her action or any part thereof . . . without prejudice."); BLACK'S LAW DICTIONARY 502 (8th ed. 2004) (defining "dismissed without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim"). This definition of "without prejudice" is further bolstered by the statutory enactment of a plaintiff's right to refile a voluntarily dismissed claim in section 13-217 of the Illinois Code, discussed in detail later in this section. *See infra* note 31 *et seq.* and accompanying text (describing 735 ILL. COMP. STAT. 5/13-217).

dismiss a claim without prejudice at any time before trial.[28] Plaintiffs are entitled to an automatic voluntary dismissal without prejudice if: (1) the plaintiff has provided notice to the opposing party; (2) all costs by all parties have been paid; (3) a trial or hearing has not begun; and (4) no dispositive motions have been filed.[29] When these requirements are met, Illinois courts consistently recognize plaintiffs' right to voluntarily dismiss a claim without prejudice.[30]

Once a court permits voluntary dismissals under section 2-1009 of the Illinois Code of Civil Procedure, the plaintiff has one year to refile the claim under section 13-217 of the Code.[31] Section 13-217's purpose is to permit plaintiffs to maintain their claim until it is adjudicated on the merits.[32] Many Illinois courts have held that the right to refile a voluntarily dismissed claim under section 13-217 is *absolute*.[33]

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28. 735 ILL. COMP. STAT. 5/2-1009(a) ("[T]he plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared, or each party's attorney, 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."). Under federal law, this right is further limited in time. *See* FED. R. CIV. P. 41(a) ("[A plaintiff] may dismiss an action without a court order by filing . . . a notice of dismissal [and] the dismissal is without prejudice.").

29. *See* May, *supra* note 6, at 484 (prescribing these four requirements for obtaining a voluntary dismissal, after which a plaintiff's right to be granted the dismissal from the court is generally automatic).

30. *See* Smith v. Bartley, 847 N.E.2d 642, 644 (Ill. App. Ct. 2006) (holding that the right to a voluntary dismissal is almost complete so long as the statutory elements are met); Riblet Prods. Corp. v. Starr Nat'l, 611 N.E.2d 68, 75 (Ill. App. Ct. 1993) (upholding the general proposition that a party has the right to voluntarily dismiss its claims any time before trial begins); Gibellina v. Handley, 535 N.E.2d 858, 862 (Ill. 1989) (establishing plaintiff's absolute right to obtain a voluntary dismissal without prejudice on a claim and detailing different circumstances "ranging from the potentially abusive to the innocuous" in which plaintiffs may utilize a voluntary dismissal). *But see* Flesner v. Youngs Dev. Co., 563 N.E.2d 1097, 1099 (Ill. App. Ct. 1990) (determining that there are a number of situations in which voluntarily dismissed claims are never refiled).

31. 735 ILL. COMP. STAT. 5/13-217 (2006) ("[T]he plaintiff . . . may commence a new action within one year or within the remaining period of limitation. . . . No action which is voluntarily dismissed by the plaintiff or dismissed for want of prosecution by the court may be filed where the time commencing the action has expired."); 735 ILL. COMP. STAT. 5/2-1009(a). Throughout the past decade, this section has been closely scrutinized by Illinois courts and the General Assembly. *See infra* Part IV.C (discussing the strong inference that the General Assembly intentionally left section 13-217 unchanged in the most recent tort reform as an indication of its strong preference for the preservation of the rights surrounding refiling voluntarily dismissed claims); *see also* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1064 (Ill. 1997) (finding P.A. 89-7 unconstitutional, including the abrogation of the one-year limit on refiling voluntarily dismissed claims); Lebron v. Gottlieb Mem'l Hosp., No. 2006 L 12109, slip op. at 3–4 (Cir. Ct. Cook County, Nov. 13, 2007) (discussing the 2005 tort reform statutes and P.A. 94-677 which did not alter section 13-217), *cert. granted*, Nos. 105741 & 105745.

32. Bryson v. News Am. Publ'ns, Inc., 672 N.E.2d 1207, 1223 (Ill. 1996) (stating that the purpose of the savings statute is allowing plaintiffs to avoid frustration because of reasons unrelated to the merits of the claim). *But see* Mercantile Holdings, Inc. v. Feldman, 630 N.E.2d 965, 968 (Ill. App. Ct. 1994) (establishing that, while the right to refile is absolute, it does not

Nevertheless, the right to refile voluntarily dismissed litigation is limited by the doctrine of res judicata, which provides that once a court renders a judgment on the merits of a claim, the judgment remains final.[34] This doctrine ensures that courts and defendants are free from the harassment of duplicative litigation.[35] Res judicata bars the refiling of a claim when three criteria are met: (1) there is an identity of parties; (2) there is an identity of a cause of action; and (3) a court of competent jurisdiction has rendered a final judgment on the merits of the claim.[36]

Identity of parties is established through the naming of identical, adversarial parties in a subsequent action.[37] Identity of cause of action

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automatically insulate a plaintiff from certain defenses raised by the defendant). Under federal law, the notice of dismissal acts as an adjudication on the merits if the plaintiff previously dismissed any action "based on or including" the same claim. FED. R. CIV. P. 41(a)(1)(B).

33. Flores v. Dugan, 435 N.E.2d 480, 481 (Ill. 1982) (holding that an order dismissing a cause for want of prosecution is not a final and appealable order given plaintiff's "absolute" right to refile the same claim against the same party); Wold v. Bull Valley Mgmt. Inc., 449 N.E.2d 112, 113 (Ill. 1983) (upholding the *Flores* decision in deciding that a plaintiff's absolute right to refile a cause dismissed for want of prosecution trumps the plaintiff's own desire to appeal the granting of the order to dismiss); *see also* Case v. Galesburg Cottage Hosp., 880 N.E.2d 171, 176 (Ill. 2007) (holding that the limitations statute grants a plaintiff the absolute right to refile voluntarily dismissed complaint). Illinois courts have upheld the statutory limitations to this right, such as the limitations period of one year and the prevention of more than one refiling of the same voluntarily dismissed claim. *See, e.g.*, Timberlake v. Illini Hosp., 676 N.E.2d 634, 636 (Ill. 1997) (barring multiple refilings of the same voluntarily dismissed claim); Ruklick v. Julius Schmid, Inc., 523 N.E.2d 1208, 1211 (Ill. App. Ct. 1988) (discussing the possibility of these limitations). *See also* 51 AM. JUR. 2D *Limitations of Actions* § 275 (2000) ("A savings statute is designed to ensure that diligent litigants retain the right to a hearing in court until they receive judgment on the merits . . . .").

34. This concept sometimes leads to "judicial bootstrapping." William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1846 (2008) (citing the United States Supreme Court's decision in *Durfee v. Duke*, 375 U.S. 106, 111 (1963), as upholding the principle that so long as the issues presented to the court were "fully and fairly litigated," the final judgment of the court prevents the re-litigation of the same claims even if the court's determination on jurisdiction was wrong).

35. *See* Gimbel, *supra* note 1, at 404 (providing that res judicata refers to two distinct concepts of "merger," the effect of a judgment combining all of the claims that were raised or could have been raised into one judgment, and "bar," the accompanying effect of such a judgment disallowing the plaintiff from litigating any of the claims introduced or that could have been introduced under the same transaction in the judgment).

36. GEORGE SPENCER BOWER & SIR ALEXANDER KINGCOME TURNER, THE DOCTRINE OF RES JUDICATA 31 (1969). This Article will only address the first element in detail. The second two elements are outside the scope of this Article and will only be briefly defined.

37. *See* Gimbel, *supra* note 1, at 407 n.49 (citing Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995) for establishing the fact that res judicata may still bar an action when the plaintiff has merely added another party to the claim). Illinois courts appear to treat this "personal" res judicata more leniently than res judicata concerns arising from relitigated claims, which is somewhat contradictory given the often-stated policy argument that res judicata is intended to protect defendants and not explicitly to protect claims. *See, e.g.*, Hendricks v. Victory Mem'l Hosp., 755 N.E.2d 1013, 1015–16 (Ill. App. Ct. 2001) (holding that a third malpractice complaint arising out of the same transaction and set of operable facts and which were voluntarily dismissed by the plaintiff could be refiled because the hospital defendant was a new party and had not been

exists when two claims arise from a single group of operative facts.[38] Finally, res judicata requires that a court of competent jurisdiction has previously rendered a final appealable order on the merits of a prior claim.[39] Usually, this final, appealable order refers to an involuntary dismissal with prejudice, which is a decision "concerning the rights and liabilities of the parties based on ultimate facts . . . and on which the right of recovery depends."[40] Under Illinois Supreme Court Rule 273, any such decision constitutes a final judgment on the merits, and res judicata bars plaintiffs from bringing the same claim against the same defendant in the future.[41]

Voluntary dismissals are typically rendered without prejudice and, therefore, claims can be refiled.[42] However, plaintiffs taking a

named in the first complaint); Mozer v. Kerth, 586 N.E.2d 759, 768 (Ill. App. Ct. 1992) (determining that a plaintiff may refile a claim against a voluntarily dismissed defendant even if other defendants did not remain in the action).

38. Gimbel, *supra* note 1, at 408. Illinois state courts have evaluated the second element of res judicata, the identity of the cause of action, under two different tests: the "same evidence test" and the "transactional test." *Id.* Two claims would be considered the same action under the same evidence test either if the same facts were necessary for maintaining both actions or if the evidence needed to sustain the first claim was also necessary for the second claim. *Id.* The transactional test requires that either both claims or both pleaded theories of relief arise under the same group of operative facts, not simply the facts which support the judgment in the first action. *Id.* The Illinois Supreme Court has held that, while the result of both tests tended to render the same result, the transactional test provides for more consistent decisions within Illinois as well as in other jurisdictions. River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 893 (Ill. 1998).

39. *See* BLACK'S LAW DICTIONARY 1336–37 (8th ed. 2004) (defining res judicata as requiring a "final judgment on the merits"); Downing v. Chi. Transit Auth., 642 N.E.2d 456, 460 (Ill. 1994) (determining that the summary judgment entered against plaintiffs on the basis that the statute of limitations had run was not a final judgment on the merits (citing People *ex rel.* Burris v. Progressive Land Developers, Inc., 602 N.E.2d 820, 825 (Ill. 1992))).

40. *See* Gimbel, *supra* note 1, at 405 (citing A.W. Wendell & Sons, Inc. v. Qazi, 626 N.E.2d 280, 289 (Ill. App. Ct. 1993)); *see also* ILL. SUP. CT. R. 273 (describing an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, as an adjudication on the merits); People *ex rel.* McAllister v. East, 100 N.E.2d 746, 748 (Ill. 1951) ("[H]owever erroneous the decision, it is binding [and] conclusive as to the rights of the parties.").

41. ILL. SUP. CT. R. 273 ("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, or for failure to join an indispensable party, operates as an adjudication upon the merits."). This rule also applies to the involuntary dismissal of any part of the litigated case such as a counterclaim or partial claim. Richard Black & Theresa A. Phelps, *Survey of Illinois Law: Civil Procedure*, 25 S. ILL. U. L.J. 697, 721–22 (2001).

42. *See infra* Part III.A (discussing the effect of voluntary dismissals and refiling voluntarily dismissed claims); *see also In re* Custody of D.A., 558 N.E.2d 1355, 1358 (Ill. App. Ct. 1990) (holding that voluntary dismissal was not a final order requiring appeal); Arnold Schaffner, Inc. v. Goodman, 392 N.E.2d 375, 377 (Ill. App. Ct. 1979) (dismissal "without prejudice" does not terminate litigation and, therefore, was not final and appealable); ITOFCA, Inc. v. Megatrans Logistics, Inc., 235 F.3d 360, 365 (7th Cir. 2000) (stating that a "dismissal without prejudice would be insufficient to create a final judgment").

voluntary dismissal do not automatically immunize themselves from the doctrine of res judicata.[43] Nevertheless, voluntary dismissals are generally not final, appealable judgments except in unusual circumstances involving the interest of substantial justice or the pendency of other court orders.[44]

B. Claim Splitting: Res Judicata Within a Single Action

Related to the concept of res judicata is the concept of claim preclusion and the conflict arising from a plaintiff separating his claims among multiple modes of litigation.[45] A claim may not be adjudicated separately from other claims when it arises from the same transaction or series of transactions.[46] The rule prohibiting plaintiffs from splitting

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43. Zuniga v. Dwyer, 752 N.E.2d 491, 495 (Ill. App. Ct. 2001) (determining that the code provision allowing plaintiffs to voluntarily dismiss claims without prejudice does not automatically immunize a plaintiff against the bar of res judicata or any other legitimate defenses a defendant may assert in response to the refiling of voluntarily dismissed counts).

44. *See In re* Marriage of Barmak, 657 N.E.2d 730, 732 (Ill. App. Ct. 1995) (holding that a voluntary dismissal without prejudice of a petition for prospective attorney fees was a final judgment and triggered the 30-day period for respondent to file for sanctions); Espedido v. St. Joseph Hosp., 526 N.E.2d 664, 669 (Ill. App. Ct. 1988) (holding that the appellate court had jurisdiction to consider the merits of an appeal from a voluntary dismissal in the interests of substantial justice); City of Palos Heights v. Vill. of Worth, 331 N.E.2d 190, 194 (Ill. App. Ct. 1975) (holding that an order granting plaintiff's motion for a voluntary dismissal was final and appealable due to another pending order). In federal law, this concept is stipulated within Federal Rule of Civil Procedure 41(a)(1)(B). FED. R. CIV. P. 41(a)(1)(B) ("[Voluntary] dismissal is without prejudice. . . . But if the plaintiff previously dismissed any federal—or state—court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits."). Federal courts have consistently held that voluntary dismissals, even when disposing of the entire action and proceeding summary judgment, do not have a res judicata effect. Hughes v. Lott, 350 F.3d 1157, 1161 (11th Cir. 2003) (determining that the claim was not barred by res judicata because the earlier case was dismissed without prejudice and thus the merits were not adjudicated); Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002) (holding that a voluntary dismissal does not have any res judicata effect even if asummary judgment has been entered in another part of the action).

45. The United States Supreme Court accepted this principle in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330 (1979). Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 732 (2005). *See also* Ziff, *supra* note 2, at 905 (discussing the principle that parties may litigate new claims arising from the same transaction as previous litigation if the law governing their facts were recast in such a way that would not have been reasonably anticipated). For example, assume a bank sues one party in bankruptcy court alleging that money is owed on an account and then sues another party in state court regarding the same account on the same debt; the bank has engaged in impermissible claim splitting under the doctrine of res judicata. Smith Trust & Sav. Bank v. Young, 727 N.E.2d 1042, 1045 (Ill. App. Ct. 2000).

46. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). A "transaction" under this section is defined "pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* § 24(2).

their claims into multiple proceedings is grounded in Illinois precedent.[47] This rule promotes the preference for finality and efficiency in the legal system.[48] It also prohibits a party from appealing a final judgment on one claim while a related claim is still pending at the trial court level.[49] However, an exception is triggered when the appeal would have the tri-partite effect of expediting the resolution of the controversy, establishing fairness, and conserving judicial resources.[50]

Illinois courts have held that plaintiffs who split a claim are barred from refiling the entire action at a later time.[51] Accordingly, plaintiffs may not split different theories of relief that relate to one transaction.[52] The presence of a small variation in the facts is insufficient to negate this requirement.[53] In fact, even if a plaintiff is able to present new

47. Casselberry v. Forquer, 27 Ill. 170, 170 (1862) (determining that a plaintiff cannot split a single and entire cause of action); Matthias v. Cook, 31 Ill. 83, 86 (Ill. 1863) (holding that a cause of action cannot be split by discontinuing a part of the action); Radosta v. Chrysler Corp., 443 N.E.2d 670, 672 (Ill. App. Ct. 1982). Federal courts also strongly adhere to the rule against claim splitting as a means of barring claims already determined by or concurrently filed in another court. *See* Wolff, *supra* note 45, at 752 (citing United States Supreme Court decisions relying on the same provisions of the Restatement (Second) of Judgments relied upon in Illinois state courts' decisions).

48. *See* Ziff, *supra* note 2, at 910 (stating that judicial efficiency is one of the goals of the doctrine of claim preclusion); *see also* Mares v. Metzler, 409 N.E.2d 447, 450 (Ill. App. Ct. 1980) (determining that the purpose of the rule against claim splitting enforces the dual concern of judicial efficiency and certainty—a problem that is especially difficult when a final judgment is entered on less than all claims in the action).

49. *See* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment Through a Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 982–86 (1997) (analyzing the growing use of voluntary dismissals to attempt circumvent this restriction).

50. Matson v. Dept. of Human Rights, 750 N.E.2d 1273, 1278 (Ill. App. Ct. 2001) (discussing the purpose of Illinois Supreme Court Rule 304(a) in preventing piecemeal appeal in most situations as including all three concerns); Schal Bovis, Inc. v. Cas. Ins. Co., 732 N.E.2d 1082, 1089 (Ill. App. Ct. 1999) (leaving Rule 304(a) determinations in the sound discretion of the court along with the determination of whether an immediate appeal would be beneficial under the particular circumstances presented in the case to determine the best balance among these interests); ILL. SUP. CT. R. 304(a) ("[In a multi-claim suit,] an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.").

51. *See* May, *supra* note 6, at 489 (stating that Illinois denies parties from dismissing and later refiling causes of action that are mandatorily joined to another, such as loss of consortium claims in divorce proceedings, which would lead to problematic double recovery (citing Zuniga v. Dwyer, 752 N.E.2d 491, 495 (Ill. App. Ct. 2001))).

52. Peregrine Fin. Group, Inc. v. Ambuehl, 722 N.E.2d 723, 729 (Ill. App. Ct. 1999); *see also* Ziff, *supra* note 2, at 918 (providing that a judgment is conclusive for the purposes of claim splitting even if "perfect defenses" to the litigation were later found (citing Cromwell v. County of Sac, 94 U.S. 351, 352–53 (1877))).

53. Agriserve, Inc. v. Belden, 643 N.E.2d 1193, 1195 (Ill. App. Ct. 1994). *See also* Schnitzer

evidence, theories, or remedies in the subsequent case, the rule against claim splitting will likely apply if the cause of action arises out of the same transaction.[54]

Even though this rule bars most subsequent claims, there are narrow exceptions permitting a plaintiff to assert certain claims that could have been litigated in a prior suit.[55] Illinois courts recognize six exceptions, or permissible forms of claim splitting, drawn from the Second Restatement of Judgments, such as when the court expressly reserves the plaintiff's right to maintain a second action or when the defendant acquiesces to the second action.[56] Additionally, some courts recognize a seventh possible exception which prevents the application of res judicata where fundamental fairness so requires.[57] This broad concept

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v. O'Connor, 653 N.E.2d 825, 832–33 (Ill. App. Ct. 1995) (determining that a plaintiff's new allegations asserting that her former employer's board was unresponsive to her demands were merely technical requirements that did not change the transaction under which both sets of allegations were filed). The test for whether a claim may be adjudicated separately from other claims is if it does not arise from the same transaction or series of transactions. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982) ("[A] transaction [under this section is defined] pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.").

54. RESTATEMENT (SECOND) OF JUDGMENTS § 25 (1982) (providing that section 24 of the Restatement applies to a plaintiff's claim "even though the plaintiff is prepared in the second action (1) [t]o present evidence or grounds or theories of the case not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action"); *see also* Baker v. Gen. Motors Corp., 522 U.S. 222, 223 (1998) ("[There is] no reason why the preclusive effects of an adjudication on parties and those 'in privity' with them . . . should differ depending solely upon the type of relief sought in a civil action."). The purpose of this principle is to promote the interest of judicial economy and should, therefore, be construed liberally. *See* Schnitzer v. O'Connor, 653 N.E.2d 825, 832 (Ill. App. Ct. 1995) (determining that extraneous theories of relief and evidence on a second count were "merely technical requirements to sustain the plaintiff's first count" and, therefore, did not affect the application of res judicata).

55. *See infra* Part II.C (discussing the exceptions to the rule against claim splitting).

56. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a)–(f) (1982); *see* Robinson v. Toyota Motor Credit Corp., 775 N.E.2d 951, 958 (Ill. 2002) (finding that, by holding that a federal judgment did not preclude plaintiff's claim, the court expressly reserved the claim for later adjudication). Another way to insulate a claim for refiling is through Illinois Supreme Court Rule 304(a), which provides that "an appeal may be taken from a final judgment as to one or more but fewer than all . . . claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." ILL. SUP. CT. R. 304(a). This rule also prescribes that "any judgment that adjudicates fewer than all the claims . . . is not enforceable or appealable and is subject to revision at any time before the entry of judgment adjudicating all the claims . . . of all the parties." *Id.*

57. *See* Ziff, *supra* note 2, at 925 (discussing the necessity of creating flexible exceptions to the rule against claim splitting "in the name of justice and fair play"); Weisman v. Schiller, Ducanto & Fleck, 733 N.E.2d 818, 822 (Ill. App. Ct. 2000) (stating that the doctrine of res judicata need not be applied where fundamental fairness so requires (citing People v. Somerville, 245 N.E.2d 461, 463–64 (1969))); *see also* Best Coin-Op, Inc. v. Paul F. Ilg Supply Co., Inc., 545 N.E.2d 481, 495 (Ill. App. Ct. 1989) (holding that, under the particular facts of the case, the rule

relaxes the rule against claim splitting in cases where there is an omission by the plaintiff due to ignorance, mistake, fraud, or inequity.[58] As the next section will explore, Illinois courts have applied these exceptions in a variety of ways.[59]

C. The Illinois Courts' Indecision on Refiling Partial Claims After Voluntary Dismissal

Illinois courts have addressed the intersection between res judicata and voluntary dismissal in disparate ways.[60] On the one hand, in *Rein v. David A. Noyes & Co.*, the Illinois Supreme Court declared that res judicata barred refiling a voluntarily dismissed claim, whereas in *Piagentini v. Ford Motor Co.*, an Illinois appellate court declined to apply *Rein*, holding that a refiled voluntarily dismissed claim was not barred by res judicata.[61]

1. *Rein v. David A. Noyes & Co.*: Prohibiting Refiling

In *Rein v. David A. Noyes & Co.*, the Illinois Supreme Court held that a refiled voluntarily dismissed claim was barred under the doctrine of res judicata.[62] In October 1990, the Reins filed suit against a securities dealer seeking to rescind purchases and recover damages under common law fraud (*Rein I*). However, because the statute of limitations had run, the trial court dismissed the rescission claims.[63] The court also denied the plaintiff's request for a partial appeal under Illinois Supreme

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against claim splitting ought to be relaxed).

58. *Best Coin*, 545 N.E.2d at 495 (citing Thorleif Larsen & Son v. PPG Indus., Inc., 532 N.E.2d 423, 427 (Ill. App. Ct. 1988)). *See also* Joel deJesus, *Interagency Privity and Claim Preclusion*, 57 U. CHI. L. REV. 195, 198 (1990) (discussing the four traditional goals of res judicata: "finality, consistency, judicial economy, and fairness" (citing Brown v. Felson, 442 U.S. 127, 131 (1979))).

59. *See infra* Part II.C (discussing two different cases dealing with voluntary dismissals and the doctrine of res judicata: Rein v. David A. Noyes & Co., 665 N.E.2d 1199 (Ill. 1996) and Piagentini v. Ford Motor Co., 852 N.E.2d 356 (Ill. App. Ct. 2006), *vacated*, 886 N.E.2d 1025 (Ill. 2008), *revised*, 2009 WL 113459 (Ill. App. Ct. Jan. 15, 2009).

60. *See Rein*, 665 N.E.2d at 1206 (finding that a refiled voluntarily dismissed claim is barred when an involuntary order has been issued on another claim within the action in a previous judgment). *But see Piagentini*, 852 N.E.2d at 362 (finding that a refiled voluntarily dismissed claim falls under the second exception to the rule against claim splitting).

61. *See infra* Part II.C.1–2 (discussing these two cases at greater length and their application of the previously discussed concepts of voluntary dismissals and res judicata).

62. *Rein*, 665 N.E.2d at 1204 (holding that res judicata bars the refiling of a voluntarily dismissed claim if a final judgment has been rendered on any part of the cause of action).

63. *Rein*, 665 N.E.2d at 1202. *See also* 815 ILL. COMP. STAT. 5/13(d) (1989) (current version at 815 ILL. COMP. STAT. 5/13(d) (2006) (providing in relevant part that "no action shall be brought for relief . . . 3 years from the date of sale")). Therefore, the dismissal under section 2-619(a)(5) for not commencing an action "within the time limited by law" was appropriately granted. *Rein*, 665 N.E.2d at 1202 (citing 735 ILL. COMP. STAT. 5/2-619(c)).

Court Rule 304(a).[64] In August 1991, the plaintiffs voluntarily dismissed their remaining common law claims and then appealed the dismissal of the rescission counts.[65]

Two years later, after losing their appeal, the Reins refiled the case against the same securities dealer.[66] In *Rein II,* they added an equitable estoppel defense to the rescission counts, both of which had been previously denied on appeal.[67] The plaintiffs also asserted the common law fraud claims they had voluntarily dismissed in the previous suit.[68] The trial court dismissed the case under the doctrine of res judicata, a decision which was affirmed on appeal.[69]

The Illinois Supreme Court, affirmed dismissal of the refiled claims under res judicata and the rule against claim splitting.[70] First, the court held that the voluntary dismissal statutes, while prescribing the right of plaintiffs to dismiss and refile claims, do not automatically immunize plaintiffs from the bar of res judicata.[71] The court determined that res

64. *Id.* (determining that there was no just reason to delay the enforcement of the judgment dismissing the rescission claims). Rule 304(a) prescribes that "an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." ILL. SUP. CT. R. 304(a). A finding made by the court under this rule "may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party." *Id.*

65. *Rein*, 665 N.E.2d at 1203–04 (discussing the appellate court's decision to uphold the involuntary dismissal).

66. *Id.* at 1203 (citing Rein v. David A. Noyes & Co., 595 N.E.2d 565, 568 (Ill. App. Ct. 1992) (holding that the plaintiff's complaint was not timely filed within the three year requirement under section 2-619(a)(5) and that plaintiff's argument that the present statute of limitations allows filing within five years of the alleged fraudulent sales is without merit)).

67 *Id.* at 1202 (stating that *Rein II* was "virtually identical" to the complaint filed and dismissed in *Rein I*).

68. *Id.*

69. *Id.* at 1203. The majority of the appellate court discussed the application of res judicata to the motion practice of the plaintiffs' attorneys in much the same way as the Illinois Supreme Court would. *See infra* note 72 and accompanying text. However, the dissenting opinion, written by Justice Rathje, argues that because section 2-1009 allows for voluntary dismissals of partial claims without prejudice, the exception to the rule against claim splitting that allows for split claims "where it would be inequitable to apply the rule" applies. Rein v. David A. Noyes & Co., 649 N.E.2d 64, 70 (Ill. App. Ct. 1995) (Rathje, J., dissenting) (citing Thorleif Larsen & Son, Inc. v. PPG Indus., Inc., 532 N.E.2d 423, 427 (Ill. App. Ct. 1988)). The dissent also argued that the exception to the rule against claim splitting that allows for the court to reserve the plaintiff's right to maintain the second action could apply under the *Restatement (Second) of Judgments* section 26(b) because the trial court is, in essence, preserving the voluntarily dismissed claim for at least one year under section 13-217. *Id.* To not apply these exceptions, the court proposed a "cure [that] is more harmful than the disease itself." *Id.* at 71.

70. *Rein*, 665 N.E.2d at 1202.

71. *Id. See* May, *supra* note 6, at 489 (citing both *Rein* and *Zuniga v. Dwyer*, 752 N.E.2d 491, 495 (Ill. App. Ct. 2001) as basis for the supposition that a voluntary dismissal does not create immunity from a res judicata defense).

judicata prohibited not only the issues actually raised in *Rein I*, but also any issue that *could* have been raised.[72] Therefore, the involuntary dismissal and subsequent appeal of the rescission claim in *Rein I* barred any subsequent actions between the same parties involving the same cause of action.[73]

In addition, the court found that because the plaintiffs had only one suit against the defendants, their voluntary dismissal of the common law counts impermissibly split their cause of action.[74] The court determined that allowing the plaintiffs to refile the case would impair judicial economy and undermine the public policy underlying res judicata.[75] The court also asserted that if plaintiffs were allowed to use voluntary dismissal to circumvent a court's order denying partial appeal under Illinois Supreme Court Rule 304(a), the court's discretion to permit partial appeals would be emasculated.[76]

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72. *Rein*, 665 N.E.2d at 1204 (determining that while a single cause of action may give rights to a number of different theories of recovery, there still only remains one action and all issues that could be raised under this action should be raised, concurrently (citing People *ex rel.* Burris v. Progressive Land Developers, Inc., 602 N.E.2d 820, 825 (Ill. 1992))). *See also Thorleif Larsen & Son, Inc.*, 532 N.E.2d at 425 (defining res judicata as precluding "not only every matter which was offered to sustain or defeat the claim or demand made in the prior action, but also any other matter which might have been offered for that purpose") (citation omitted).

73. *Rein*, 665 N.E.2d at 1205. "[*R*]es *judicata* is broader than plaintiffs suggest" in that if the three elements of res judicata are met (final judgment, identity of parties, and identity of cause of action), every matter that could have been litigated in the first action will be barred in a second action. *Id.* Therefore, the final judgment on the rescission claims bars the common law claims involving the same transaction and the same parties even though there was not a specific final judgment on those claims. *Id.*

74. *Id.* The court suggested that, following the involuntary dismissal of the rescission counts, the plaintiffs should have proceeded with the litigation of the common law counts until a decision was reached. *Id.* at 1208. If the judgment was not favorable, the plaintiffs could have then appealed both the judgment on their common law counts as well as the involuntary dismissal on their rescission counts. *Id.* Even if the plaintiffs had appealed both the involuntary dismissal on the rescission claims and the voluntary dismissal on the common law claims, they would have avoided impermissibly splitting their claims. *See* Cochran, *supra* note 49, at 982 (discussing that, while voluntary dismissals are usually not appealable, they may be used to manufacture a final judgment, which will allow the entire action to be appealable following a voluntary dismissal).

75. *Rein*, 665 N.E.2d at 1208. The court was specifically trying to prevent situations where a plaintiff would be permitted to file a multi-claim litigation, voluntarily dismiss some but not all of the claims, obtain a final judgment on the undismissed claims, and if unsuccessful on the claims not dismissed, refile the previously dismissed claims. *Id.*

76. *Id.* The three concerns arising from this scenario—(1) impairing judicial economy, (2) protecting defendants from harassment and the public from multiple litigation, and (3) emasculating Rule 304(a) by "allowing a plaintiff to circumvent a trial judge's denial of a Rule 304(a) certification by refiling previously dismissed counts following an unsuccessful judgment or appeal"—are referred to consistently as the policy decisions underpinning the analysis of *Rein*. *Id.* *See* Piagentini v. Ford Motor Co., 852 N.E.2d 357, 361 (Ill. App. Ct. 2006), *vacated*, 866 N.E.2d 1025 (Ill. 2008), *revised*, 2009 WL 113459 (Ill. App. Ct. Jan. 15, 2009) (holding that the trial court's order was not a final order in light of the Illinois Supreme Court's holding in *Hudson*

2. *Piagentini v. Ford Motor Co.*: Refiling Allowed

Rein's broad application of res judicata to voluntary dismissals, however, has not been universally applied. In *Piagentini v. Ford Motor Co.*, the Illinois Appellate Court distinguished *Rein* and instead limited the decision to instances where plaintiffs continued litigating their involuntarily dismissed claim after voluntarily dismissing the remainder of their case,[77] In *Piagentini*, the trial court granted the defendant's partial summary judgment and allowed the plaintiffs to voluntarily dismiss their remaining claims.[78]

Unlike in *Rein*, however, the plaintiffs did not seek a Rule 304(a) determination from the court that would allow them to appeal their partial claim, nor did they appeal the summary judgment order.[79] Within one year of the voluntary dismissal, the plaintiffs refiled their complaint, and, three years later,[80] the defendants filed a motion for

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v. City of Chicago); Hudson v. City of Chicago, 889 N.E.2d 210, 217 (Ill. 2008) (reaffirming the same concerns posed in *Rein*).

77. *Piagentini*, 852 N.E.2d at 362. This "crucial distinction" highlights the fact that Ford was in no different position than any other defendant who is party to an action that is voluntarily dismissed and later refiled because the plaintiffs in *Piagentini* did not have any other claims pending or litigated in any other court, but were merely waiting to refile their voluntarily dismissed claim. *Id.* The plaintiffs repeat the "critical" nature of this distinction later as well. *Id.*

78. *Id.* at 358. The court granted the partial summary judgment on account of the plaintiff's failure to disclose any expert witness to testify on the insufficient stability or susceptibility to roll-overs, which left the inadequate occupant protection claim for consideration. *Id*; *see* Thomas R. Malia, Annotation, *Products Liability: Admissibility of Defendant's Evidence of Industry Custom or Practice in Strict Liability Action*, 47 A.L.R. 621, § 2(b) (1986) (discussing the proper foundation needed to introduce evidence related to industry standards). The plaintiffs filed their motion for voluntary dismissal under section 2-1009. *Piagentini*, 852 N.E.2d at 359; *see* 735 ILL. COMP. STAT. 5/2-1009 (1994) (current version in 735 ILL. COMP. STAT. 5/2-1009 (2006) (providing that voluntary dismissal is without prejudice as long as it is refiled within one year under section 13-217).

79. *Piagentini*, 852 N.E.2d at 359 (discussing the factual background and filing procedure of the parties, which did not include an attempted appeal or a circumvented Rule 304(a) finding). Courts may, under Rule 304(a), allow an appeal of a partial claim when the appeal would expedite the resolution of the controversy, would be fair to the parties, and would conserve judicial resources. *See* Matson v. Dept. of Human Rights, 750 N.E.2d 1273, 1278 (Ill. App. Ct. 2001) (stating that the decision to grant Rule 304(a) relief is a matter within the sound discretion of the court).

80. The court also discussed the defendant's potential waiver of its res judicata defense by waiting three and half years before raising the argument, subsequently determining it was inequitable to allow the successful raising of the res judicata defense under these circumstances. *Piagentini*, 852 N.E.2d at 363 ("[I]t would hardly be 'equitable' to allow Ford to successfully raise res judicata after the parties . . . spent money on experts, discovery, and all of the other costs associated with bringing a lawsuit."). The court also determined that the defendants could not claim to be unjustly burdened by the refiled litigation three and a half years after notice of refiling. *Id.*

summary judgment under the doctrine of res judicata.[81] The trial court granted the defendant's motion, and the plaintiffs appealed.[82]

The appellate court overruled the trial court's order for summary judgment.[83] The court reasoned that none of the policy concerns enumerated in *Rein II* were applicable; the plaintiffs did not attempt to circumvent a Rule 304(a) finding, and did not continue litigating one claim while preserving others through a voluntary dismissal.[84] The court ultimately determined that *Rein II* only barred piecemeal litigation, including partial appeals, which was not at issue in *Piagentini*.[85]

These two cases highlight the courts' disparate application of res judicata to the practice of refiling prior voluntarily dismissed claims.[86] Two years after the appellate court decided *Piagentini*, however, the Illinois Supreme Court eradicated any confusion surrounding this issue in *Hudson v. City of Chicago*.[87]

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81. *Id.* at 362. Res judicata, as a defense used to dispose of cases already litigated, ought to be timely filed because of one of the basic principles of the defense itself: economy of court time. *See* Les Mendelsohn, *Election of Remedies and Settlement-New Lyrics to an Outworn Tune*, 12 ST. MARY'S L.J. 367, 372 (1980) (providing four such basic principles of res judicata as being free from vexatious litigation, the danger of double recovery, desirability of stable decisions, and economy of court time); William E. Mooney, Sr., *The Doctrine of Preclusion in Negligence Cases*, 1968 INS. L.J. 747, 747 (1968) (discussing the basic principles of res judicata in the context of tort claims).

82. *Piagentini*, 852 N.E.2d at 362.

83. *Id.* at 358.

84. *Id.* at 361–62. The appellate court determined that *Rein* only applied to these situations where a plaintiff had attempted to preserve its own claims through a voluntary dismissal after a court refused to do so in order that another claim could be litigated through the appeals process. *Id.* at 359–60 (citing Best Coin-Op, Inc. v. Paul F. Ilg Supply Co., 545 N.E.2d 481, 489 (Ill. 1989) for its discussion on the rule against claim splitting where an action is, by nature, indivisible, and may not be divided into separate lawsuits as well as the inequitable technical application of res judicata). The court made it clear that res judicata should not be used as a "sword by a defendant . . . [to] avoid[] litigation." *Id.* at 362. Coupling these two definite statements by the appellate court, it is apparent that *Piagentini* was intended to be the foil factual scenario to the situation and the Illinois Supreme Court's analysis in *Rein*. *Id.*

85. *Id.* The concept of res judicata preventing piecemeal litigation is well-documented and is, in fact, the purpose behind the rule against claim splitting. *See* Andrew S. Weinstein, *Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Actions*, 75 N.Y.U. L. REV. 1085, 1117 (2000) (discussing the importance of avoiding piecemeal litigation); Dubina v. Mesirow Realty Dev., Inc., 687 N.E.2d 871, 876–77 (Ill. 1997) ("[A] plaintiff seeking to split his claims and appeal in a piecemeal manner may be barred by *res judicata*.").

86. *See* Rein v. David A. Noyes & Co., 665 N.E.2d 1199 (Ill. 1996) (finding that a refiled voluntarily dismissed claim is barred when an involuntary order has been issued on another claim within the action in a previous judgment). *But see Piagentini*, 852 N.E.2d at 356 (finding that a refiled voluntarily dismissed claim falls under the second exception to the rule against claim splitting when the court expressly reserves the claim for later adjudication).

87. *See infra* Part III (discussing *Hudson v. City of Chicago*, 889 N.E.2d 210 (Ill. 2008), at length, including the factual background as well as the decisions of the appellate court and the

III. DISCUSSION

Through its decision in *Hudson*, the Illinois Supreme Court elevated the general duty of the courts to regulate the judicial system over the duty to protect individual litigants' right to adjudicate their claims.[88] This Part begins by describing the facts underlying *Hudson* as well as the decisions at the trial and appellate court levels.[89] It then discusses the Illinois Supreme Court's majority and dissenting opinions.[90]

A. Factual Background: The Tale of Two Dismissals

At approximately 4:00 p.m. on November 25, 1998, five-year old George Hudson had an acute asthma attack.[91] Ednarine Hudson, George's mother, called 911 to request emergency assistance.[92] The service dispatched a fire engine to the Hudson home, but the vehicle was not equipped with advanced life-support (ALS).[93] Upon arriving, the firemen called for a vehicle equipped with ALS.[94] The ambulance arrived fifteen minutes after Ednarine Hudson's original 911 call, but George had already died.[95]

On March 30, 1999, Ednarine and George Hudson, Sr., filed a two-count wrongful death complaint against the City of Chicago, claiming

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Illinois Supreme Court).

88. *See* Pfaff v. Chrysler Corp., 610 N.E.2d 51, 76 (Ill. 1992) (Heiple, J., dissenting) ("The idea that there should be two simultaneous actions pending, both taking up already choked dockets, where one would be *res judicata* to the other, is almost unjustifiable.").

89. *See infra* Part III.A–B (discussing the facts and procedural history of *Hudson*).

90. *See infra* Part III.C.1 (discussing the majority and dissenting opionions).

91. Plaintiff's Petition for Leave to Appeal at 4, *Hudson*, 889 N.E.2d 210 (No. 100466).

92. *Hudson*, 889 N.E.2d at 212. In their refiled complaint, the plaintiffs also alleged that the city was aware of George Hudson's asthmatic condition prior to this emergency phone call. Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 4.

93. *Hudson*, 889 N.E.2d at 212. Dispatchers generally send ALS engines to respond to any 911 medical emergency. *See* Stephanie Banchero & William Recktenwald, *City's Response to Emergencies in Critical State: Fire Department's Outdated System Is Putting Lives at Risk, Experts Say*, CHI. TRIB., Dec. 21, 1997, at C1 (discussing how the city operates with an outdated emergency medical system as compared to other cities across the nation).

94. *Hudson*, 889 N.E.2d at 212. Because of the need for ALS, Chicago proposed a plan in 1997 where 24 engine companies would carry ALS and would receive the majority of emergency calls. STEVE MACKO, EMERGENCY RESPONSE & RESEARCH INST., CHICAGO TO IMPLEMENT PARAMEDIC-ENGINE COMPANIES 193 (1997), *available at* http://www.emergency.com/chigpara.htm (detailing the proposed plan). In 1997, Chicago released four engines equipped with ALS to add to the more than fifty-six already operating in the city. *See* Editorial, *Help in Emergencies*, CHI. SUN TIMES, Nov. 4, 1997, at 29 (discussing the implementation of the ALS plan).

95. *Hudson*, 889 N.E.2d at 212. The average response time throughout Chicago in 1990 was four minutes and fifteen seconds according to Fire Department Spokesman Jerry Lawrence. David C. Rudd, *City Adds Two New Ambulances to Help Response Times*, CHI. TRIB., May 9, 1990, at C7.

that George died as a result of the city's negligent delay as well as the city's willful and wanton conduct in providing ALS.[96] The circuit court granted the city's motion to dismiss the negligence claim because of its immunity under the EMS Act.[97] The plaintiffs, however, continued to litigate the willful and wanton conduct claim.[98] On July 25, 2002, the plaintiffs voluntarily dismissed the willful and wanton claim because they were unable to prepare for trial following the unexpected death of their lead attorney.[99]

The plaintiffs then refiled the willful and wanton claim one year later as *Hudson II*.[100] The city moved to dismiss, arguing that *Hudson II* violated the principle of res judicata because an involuntary dismissal of the negligence claim had already been granted in *Hudson I*.[101] The

96. *Hudson*, 889 N.E.2d at 212.

97. *Id. See also* EMS Act, 210 ILL. COMP. STAT. 50/3.150(b)–(c) (2006) (providing in relevant part that a governmental organization shall not be liable for any civil damages for any act or omission in connection with emergency services unless the act or omission was the result of willful and wanton misconduct and that this exemption from civil liability for emergency care was provided by the Good Samaritan Act under 745 ILL. COMP. STAT. 49/1 *et seq.* (2006)). The defendant's filed the motion to dismiss pursuant to 735 ILL. COMP. STAT. 5/2-619(a)(2). *See* 735 ILL. COMP. STAT. 5/2-619(a)(2) (2006) (stating in relevant part that the "defendant may, within the time for pleading, file a motion for dismissal of the action . . . [if the] defendant does not have legal capacity to be sued).

98. *Hudson*, 889 N.E.2d at 230 (Kilbride, J., dissenting).

99. *Id. See generally* 735 ILL. COMP. STAT. 5/2-1009(a) (2006) ("[A] plaintiff may, at any time before trial begins . . . dismiss his action or any part thereof as to any defendant, without prejudice."). The plaintiffs filed for a motion to voluntarily dismiss their willful and wanton conduct claim after the attorney on the case was unable to adequately prepare for trial because of the unexpected death of the lead attorney on the case. *Hudson*, 889 N.E.2d at 230.

100. *Hudson*, 889 N.E.2d at 212 (majority opinion); 735 ILL. COMP. STAT. 5/13-217 (2006) (providing in relevant part that the plaintiff may refile a voluntarily dismissed claim within one year of the dismissal). *See* O'Casek v. Children's Home & Aid Soc. of Ill., 874 N.E.2d 150, 152–53. (Ill. App. Ct. 2007) (finding section 13-217 unconstitutional for issues unrelated to refiling voluntarily dismissed claims), *rev'd on unrelated grounds sub nom.* Crull v. Sritana, 878 N.E.2d 753 (Ill. App. Ct. 2007).

101. *Hudson*, 889 N.E.2d at 213; 735 ILL. COMP. STAT. 5/2-619(a)(4) (2006) (providing in relevant part that "the action is barred by a prior judgment"); ILL. SUP. CT. R. 273 ("[A]n involuntary dismissal of an action, other than for a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits."). While the involuntary dismissal on account of the city's immunity was a final, appealable order, it was arguably not an adjudication on the merits because the Supreme Court of the United States has declared that an immunity claim is "'conceptually distinct' from the merits of the plaintiff's claim." Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 292–93 n.192 (1995) (quoting Mitchell v. Forsyth, 472 U.S. 511, 527–28 (1985)). *See also* Hudson v. City of Chicago, No. 03-L-8516, slip op. at 4 (Ill. App. Ct. Mar. 16, 2005) ("[T]here was no adjudication on the merits because immunity deprives the trial court of subject matter jurisdiction and lack of jurisdiction is not an adjudication on the merits.").

circuit court granted the motion to dismiss, and the plaintiffs appealed.[102]

B. The Appellate Court Decision: Res Judicata Bars Refiling

In affirming the dismissal, the appellate court relied on *Rein*'s application of res judicata to situations in which only some claims in a case are voluntarily dismissed.[103] The court identified three components of res judicata necessary to make the prior adjudication conclusive against future proceedings under the same transaction: (1) the parties are identical in both lawsuits; (2) an identity of cause of action exists; and (3) a court of competent jurisdiction rendered a final judgment on the merits in the first lawsuit.[104]

The appellate court determined that the involuntary dismissal of the negligence claim in *Hudson I* constituted a final judgment and barred the filing of *Hudson II*.[105] Even an involuntary dismissal based on statutory immunity may be a final judgment and bar a subsequent claim under res judicata.[106] Because both the negligence and the willful and wanton conduct claims arose from the same group of operative facts, the court determined that the two claims represented an identity of cause of action, and, therefore, should have been litigated together in *Hudson*

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102. *Hudson*, No. 03-L-8516, slip op. at 4 (appealing the trial court's findings that the application of immunity did not raise jurisdictional issues and was, therefore, an adjudication on the merits and res judicata barred the refiled claim).

103. *Id.* at 6. *See* Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1208 (Ill. 1996) (holding that an involuntary dismissal on a partial claim may bar refiling the action under res judicata if the remaining claims are voluntarily dismissed). For a more detailed analysis of *Rein*, see *supra* Part II.C.1 (discussing the decision in *Rein* and the reasoning of the court in its decision).

104. *Hudson*, No. 03-L-8516, slip op. at 5 ("[R]es judicata applies if: (1) a court of competent jurisdiction rendered a final judgment on the merits in the first lawsuit; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both lawsuits.") (citation omitted). The plaintiffs did not dispute the identity of parties, but they did contend that there was no final judgment and no identity of cause of action. *Id.* at 4.

105. *Id.* at 5–6 (relying on Illinois Supreme Court Rule 273, which provides that "unless the order of dismissal . . . provides otherwise, an involuntary dismissal of a cause of action . . . operates as an adjudication on the merits").

106. *Id.* at 6 (citing Robertson v. Winnebago County Forest Preserve Dis., 703 N.E.2d 606, 612 (Ill. App. Ct. 1998), *abrogated on unrelated grounds by* Kingbrook Inc. v. Pupors, 779 N.E.2d 867, 871 (Ill. 2002)) (determining that because the allegations in the Survival Act complaint were identical to the allegations in the wrongful death claim, the doctrine of res judicata barred the Survival Act complaint). The court refused to apply any precedent on final judgments that discussed the "identity of parties" element. *Hudson*, No. 03-L-8516, slip op. at 7 (citing DeLuna v. Treister, 708 N.E.2d 340, 349 (Ill. 1999); Leow v. A.B. Freight Lines, Inc., 676 N.E.2d 1284, 1289 (Ill. 1997); Downing v. Chi. Transit Auth., 642 N.E.2d 456, 459–60 (Ill. 1994)). *See also* Gimbel, *supra* note 1, at 406–07 (discussing personal res judicata).

I.[107] Following the appellate court's decision, the plaintiffs filed a petition for leave to appeal to the Illinois Supreme Court.[108]

C. *The Illinois Supreme Court Decision: Making* Rein *in a Whole New Way*

After granting leave to appeal, in a 4-2 decision, the Illinois Supreme Court affirmed the dismissal of *Hudson II*. Relying heavily on the its decision in *Rein*, the court held that allowing the *Hudson* plaintiffs to refile their claim violated both res judicata principles and the rule against claim splitting.[109]

1. The Majority Opinion: *Rein* with Brackets

Writing for the court, Chief Justice Thomas held that the doctrine of res judicata barred *Hudson II*.[110] After the court first established that the requirements for identity of parties and identity of cause of action were not at issue in this case, it turned its analysis to the determination of whether there was a final adjudication.[111]

The court determined that the involuntary dismissal of the negligence claim constituted an adjudication on the merits and became a final decision after the entering of the voluntary dismissal; therefore, it was

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107. *Hudson*, No. 03-L-8516, slip op. at 9, 11 (determining that none of the exceptions to the rule against claim splitting applied in this case); RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982) ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."). Furthermore, since plaintiffs included a catch-all "otherwise negligent" allegation against the defendants in *Hudson II*, the refiled claim almost perfectly resembled *Hudson I*. *Hudson*, No. 03-L-8516, slip op. at 9. Because of the "otherwise negligent" claim, the court determined that there was an identity of cause of action because the original claim and the refiled claim were virtually identical. *Id.* In supporting the identity of cause of action analysis, the appellate court determined that both the original claim and the refiled claim arose out of the same group of operable facts, "namely the 911 call and the alleged delay in sending an advanced life support vehicle." *Id.*

108. *See* Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 2–3 (praying for leave to appeal from the Illinois Supreme Court on the grounds that the appellate court decision over-extended the ruling in *Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199 (Ill. 1996), and will have a chilling effect on the filing of novel claims).

109. Hudson v. City of Chicago, 889 N.E.2d 210, 213 (Ill. 2008) *See also Rein*, 665 N.E.2d at 1205 (discussing, in identical language, the res judicata effect of a prior final judgment on a partial claim).

110. *Id.* at 214 (citing Dubina v. Mesirow Realty Dev., Inc., 687 N.E.2d 871, 874 (Ill. 1997) (holding that once all claims in a multi-claim suit are resolved, all orders become final and appealable)).

111. *Hudson*, 889 N.E.2d at 213. The plaintiffs did not dispute either identity of cause of action or identity of parties on appeal to the Illinois Supreme Court. *Id.*

binding on the entire case for the purpose of res judicata.[112] Therefore, the court held that refiling the willful and wanton claim did not continue the original suit, but began an entirely new action.[113] As in *Rein*, the legislatively-created right to refile after a voluntary dismissal did not automatically immunize the plaintiffs against all legitimate defenses that the defendant may assert, including res judicata.[114] Relying on *Rein*, the court held that res judicata may bar the refiling of a claim that has been voluntarily dismissed where a final judgment has been entered on another part of the case.[115]

The court further asserted that the refiled claim was barred because it could have been litigated in *Hudson I*.[116] Even though the willful and wanton conduct claim was not adjudicated on the merits, the plaintiffs were barred from refiling it because it should have been litigated together with the negligence claim, both of which arose out of the same operative facts.[117] By refiling the new action, the plaintiffs engaged in impermissible claim splitting.[118]

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112. *Hudson*, 889 N.E.2d at 214 (citing *Dubina*, 687 N.E.2d at 874). Voluntary dismissals of remaining claims in a multi-claim suit may be used to make non-final orders final and appealable. *See* Cochran, *supra* note 49, at 982 (discussing this effect of voluntary dismissals).

113. *Id.* at 217 (citing *Dubina*, 687 N.E.2d at 875 for its determination that a refiled action is a new and distinct action under section 13-217).

114. *Hudson*, 889 N.E.2d at 217 (citing *Rein*, 665 N.E.2d at 1208); 735 ILL. COMP. STAT. 5/2-1009 (2006); 735 ILL. COMP. STAT. 5/13-217 (2006). Because the plaintiffs met the four requirements specified in section 2-1009 and refiled *Hudson II* within one year of the dismissal of *Hudson I*, as required by section 13-217, they met the requirements of these two statutes regulating the granting and refiling of voluntary dismissals. *See supra* Part II.A–B (discussing these statutes and other provisions regarding the practice of voluntary dismissals).

115. *Hudson*, 889 N.E.2d at 217. The plaintiffs asserted that *Nowak v. St. Rita High School* is a more accurate precedent to apply where the plaintiffs were barred by the circuit court from refiling the state claim in state court under res judicata after the federal court declined to exercise supplemental jurisdiction. Nowak v. St. Rita High Sch., 757 N.E.2d 471, 481 (Ill. 2001). The Illinois Supreme Court determined that since there was no adjudication on the merits of the claim, the refiled state claim was not barred, distinguishing a previous decision in *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883 (Ill. 1998), in which the court determined that the plaintiff did not have his "day in court." *Id.* at 479 (citing *River Park*).

116. *Id.* at 213. "[I]f the three requirements of res judicata are met and the [refiled counts] could have been determined in [the previous suit], plaintiffs will be barred from litigating the [refiled counts]." *Id.* at 215 (quoting Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1206 (Ill. 1996)). For the court's discussion surrounding the principle that res judicata bars any claim that may have been raised in the previous claim regardless of whether the party raised it, see LaSalle Nat'l Bank v. County Bd. of Sch. Trs., 337 N.E.2d 19, 22 (Ill. 1975) (discussing that res judicata extends to matter decided in an original action as well as to matters that could have been decided). *See also* Gimbel, *supra* note 1, at 407 (evaluating the three elements of res judicata).

117. *Id.* at 217 (citing *Rein*, 665 N.E.2d at 1206). The *Restatement (Second) of Judgments* requires that the two claims arise from the same transaction and states that what constitutes a "transaction" should "be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations . . . ."

The court also determined that none of the exceptions to the rule against claim splitting existed in *Hudson*.[119] It found *Rein* and *Hudson* factually similar because the plaintiffs in both cases chose to voluntarily dismiss their claims, and neither case fell under one of the exceptions to the rule.[120]

Rein, according to the court, was not intended as an anti-abuse doctrine to prevent attorneys from using voluntary dismissal to get around the denial of a Rule 304(a) order.[121] Even though *Rein* articulated three policy justifications, which included protecting trial courts' ability to decide when to grant partial appeal under 304(a), the *Hudson* court determined that these policy justifications were not *Rein*'s ultimate holding.[122] Avoiding the distinction between the attorney's aggressive behavior in *Rein* and the actual hardship faced by those in *Hudson* after the death of their attorney, the court held that attorneys' subjective intent in taking voluntary dismissal could not be considered

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RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982).

118. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982) (defining the types of claims that cannot be split as claims or remedies "with respect to all or any part of the transaction . . . out of which the action arose"); *see also supra* note 56 (listing two of the six exceptions to the rule against claim splitting).

119. *Hudson*, 889 N.E.2d at 216 (quoting *Rein*, 665 N.E.2d at 1207); RESTATEMENT (SECOND) OF JUDGMENTS § 26(b) cmt. b (1982) (discussing the ways in which a court may preserve an action for litigation). *See supra* note 56 and accompanying text (listing two of the six exceptions to the rule against claim splitting). The court did make a suggestion that plaintiffs ask defendants to acquiesce to the claim splitting, and if the defendants refused, then the plaintiffs would be better able to make an informed decision on whether to proceed with a voluntary dismissal. *Hudson*, 889 N.E.2d at 220 ("If the defendant is unwilling to [acquiesce in the refiling], the [plaintiff's] attorney will know that he proceeds at his peril."). *See infra* Part V.A.2 (discussing the new leverage that defendants will have in the motion practice of plaintiff's attorneys).

120. *Hudson*, 889 N.E.2d at 218 (citing *Rein*, 665 N.E.2d at 1207); *Nowak*, 757 N.E.2d at 479 (finding that an exception to the rule against claim splitting did apply because a final judgment could not have been reached under section 26(1)(c) of the Second Restatement of Judgments). The plaintiff in *Rein* arguably took a voluntary dismissal in order to circumvent the court's decision to deny a Rule 304(a) order while the plaintiff in *Hudson* arguably took a voluntary dismissal in good faith because of being unprepared for trial after the unexpected death of the attorney before trial. *Hudson*, 889 N.E. 2d at 232 (Kilbride, J., dissenting).

121. *Hudson*, 889 N.E.2d at 219 (citing *Rein*, 665 N.E.2d at 1199).

122. *Hudson*, 889 N.E.2d at 222. The three policy justifications articulated by the *Rein* court were (1) the holding prevents parties from splitting their claims through a voluntary dismissal, obtaining a final judgment on one of the undismissed claims, and, if unsuccessful in the litigation of the undismissed claims, refiling the previously dismissed claims at a later time; (2) the ruling would prohibit plaintiffs from attempting to circumvent a judge's refusal of a Rule 304(a) certification through a voluntary dismissal; and (3) the court recognized its right to regulate the judicial system in order to avoid burdening the courts with "duplicative" litigation. *Rein*, 665 N.E.2d at 1208.

in assessing res judicata because such speculation would be impractical.[123]

The court next discussed the potential chilling effect *Hudson* would have on novel and speculative theories of relief.[124] It cautioned plaintiffs' attorneys to weigh the assertion of speculative claims with the possibility of surrendering the right to refile the sound claims at a later time.[125] The court also held that its decision does not encroach on legislative power because, in enacting section 13-217, the Illinois General Assembly never addressed the issue of refiling a partial claim after final judgment on another claim within the same litigation.[126]

The court only articulated two possible ways in which the result in *Hudson* could have been different from *Rein*: (1) that res judicata does not apply equally to similar situations of refiling voluntarily dismissed claims after a final judgment has been entered, or (2) that res judicata does apply to these situations, but one of the exceptions applies to *Hudson* that was applicable in *Rein*.[127] The court rejected both possibilities.[128]

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123. *Hudson*, 889 N.E.2d at 219. "An attorney's subjective motivation in taking a voluntary dismissal is not a part of a res judicata analysis." *Id.* The plaintiffs argued that *Rein* was intended as a "case-specific, anti-abuse doctrine." *Id.* *See also* Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 7 (providing that the attorney abuse in *Rein* warranted the court's holding in that particular case but asserting that, since no such abuse exists in *Hudson*, this case should be decided differently).

124. *Id.* at 218. When bringing a multi-claim suit, there is a strong likelihood that the claims will be dealt with piecemeal, and *Hudson* would effectively limit the plaintiff's opportunities with its remaining claims once an involuntary dismissal has been entered on one of the claims in the suit. *Id.*

125. *Id.* at 220.

126. *Id.* at 221; 735 ILL. COMP. STAT. 5/13-217 (2006); 735 ILL. COMP. STAT. 5/2-1009 (2006). *But see* Lebron v. Gottlieb Mem. Hosp., No. 2006 L 12109, slip op. at 3–4 (Cir. Ct. Cook County, Nov. 13, 2007) (discussing the changes made by the Illinois General Assembly to various aspects of tort law in the state, not including the statutes regulating voluntary dismissals, which supports the argument that the General Assembly intended to protect the rights conferred under these statutes because, in previous reform, these statutes have been altered), *cert. granted*, Nos. 105741 & 105745. *See infra* Part IV.C (discussing in greater detail the other possible intent of the Illinois General Assembly to preserve the right to refile voluntarily dismissed litigation in recent tort reform).

127. *Hudson*, 889 N.E.2d at 220. *See infra* Part IV.B.2 (discussing how *Hudson* did actually meet this second possibility that the court indicated would distinguish *Hudson* from *Rein* if an exception from the rule against claim splitting existed by supporting the notion of fundamental fairness).

128. *Hudson*, 889 N.E.2d at 220 ("We do not find any indication in *Rein* that its holding was meant to be limited to these two situations.").

2. Justice Kilbride's Dissent: Concern and Disappointment

Justice Kilbride, joined by Justice Fitzgerald, disagreed with the majority's complete reliance on *Rein* and asserted the paramount importance of the "without prejudice" language of a voluntary dismissal.[129] The dissent asserted that *Rein* was decided correctly, but for the wrong reasons, and that the court in *Hudson* should have limited or overruled *Rein* because the case has proven unworkable.[130] *Rein*, it suggested, was limited to situations involving attorney abuse and misconstrued the interplay between Supreme Court Rule 273 and sections 2-1009 and 13-217 of the Illinois Code of Civil Procedure.[131]

According to the dissent, *Rein* relied merely on dicta in finding that a voluntary dismissal could operate as an adjudication of a claim on its merits.[132] Despite the majority's contention, the court in *Rein* never made the connection between an adjudication on the merits and a final appealable order.[133] Therefore, the dissent asserted that the plaintiffs'

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129. *Id.* at 223 (Kilbride, J., dissenting).

130. *Id.* ("I believe that this court should now take the opportunity to limit or overrule *Rein*.").

131. *Id.*; ILL. SUP. CT. R. 273 (providing in relevant part that "an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits"); 735 ILL. COMP. STAT. 5/2-1009 (2006) (providing that a court's grant of a voluntary dismissal is "without prejudice"); 735 ILL. COMP. STAT. 5/13-217 (2006) (providing that a voluntary dismissal without prejudice may be refiled within one year of the order granting the dismissal).

132. *Hudson*, 889 N.E.2d at 224 (Kilbride, J., dissenting) (citing Downing v. Chi. Transit Auth., 642 N.E.2d 456, 458 (Ill. 1994) for its decision in the case on statute of limitations grounds rather than on the res judicata doctrine).

133. *Id.*; ILL. SUP. CT. R. 273 (not discussing the relationship between an adjudication on the merits created by an involuntary dismissal and a final judgment). The final judgment, according to the majority, was that the voluntary dismissal resolved all claims in the suit, but a voluntary dismissal is not a final, appealable order. *See* BLACK'S LAW DICTIONARY 662 (8th ed. 2004) ("[F]inal-judgment rule: a party may only appeal from a district court's final decision that ends the litigation on the merits."). Federal courts have also consistently held that voluntary dismissals, even when disposing of the entire action and proceeding summary judgment, do not have a res judicata effect. Hughes v. Lott, 350 F.3d 1157, 1161 (11th Cir. 2003) (determining that the claim was not barred by res judicata because an earlier case was dismissed without prejudice, and thus the merits were not adjudicated); Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002) (holding that a voluntary dismissal does not have any res judicata effect even if summary judgment has been entered in another part of the action). Similarly, other states' highest courts have held that voluntary dismissals may still be refiled without implicating the doctrine of res judicata even if a final judgment has been reached on another part of the action. *See, e.g.*, Fairchilds v. Miami Valley Hosp., Inc., 827 N.E.2d 381, 390 (Ohio App. Ct. 2005) (determining that a plaintiff's voluntary dismissal prevented the trial court's previous summary judgment from applying as a final judgment and from having a res judicata effect on the refiled voluntarily dismissed count); Westbay v. Gray, 48 P. 800, 801 (Cal. 1897) (finding that the trial court had no authority to include within the judgment of dismissal an order which precludes the plaintiff from instituting another action in which "the merits of the controversy may be litigated").

voluntary dismissals in *Hudson* and *Rein* did not automatically "convert" the previously filed involuntary dismissal into a final and appealable order.[134]

The dissent also took issue with the difference between the two cases after the voluntary dismissal was filed.[135] While the dissent agreed with the principle that all claims that arise from the same set of operative facts should be litigated together, it argued that this rule is "clearly inapplicable" in *Hudson* because all of the claims were filed together in the original lawsuit.[136] In *Rein*, the plaintiffs continued to litigate their involuntarily dismissed claim through the appeals process, while the plaintiffs in *Hudson* merely continued to litigate their voluntarily dismissed claim with the expectation of refiling that claim later.[137] Justice Kilbride further asserted that by granting the voluntary dismissal, the court expressly reserved the claim.[138] The dissent suggested that a voluntary dismissal *without prejudice* allows for this reservation of the claim and, therefore, the willful and wanton conduct claim remained viable in *Hudson II*.[139]

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134. *Hudson*, 889 N.E.2d at 225 (Kilbride, J., dissenting) (citing 735 ILL. COMP. STAT. 5/2-1009 (1994) (current version at 735 ILL. COMP. STAT. 5/2-1009 (2006)). *See also* People *ex rel.* Burris v. Progressive Land Developers, Inc., 602 N.E.2d 820, 825 (Ill. 1992) (stating that a final judgment must adjudicate the substantive rights of the parties); Kinzer v. City of Chicago, 539 N.E.2d 1216, 1220 (Ill. 1989) (determining that, because the new action is merely a continuation of the previous action, the previous action cannot act as a bar under res judicata); Chapman v. United Ins. Co. of Am., 602 N.E.2d 45, 46 (Ill. 2002) (finding that, absent a Rule 304(a) finding, a party must wait for the trial court to dispose of all claims before an appeal).

135. *Hudson*, 889 N.E.2d at 233 (Kilbride, J., dissenting) (discussing how the greatest differences between *Hudson* and *Rein* involve the actions of the attorneys in their motion practice).

136. *Id.* (discussing that both the negligence claim and the willful and wanton conduct claim were in fact filed together in *Hudson I* as opposed to the willful and wanton conduct claim being presented for the first time in *Hudson II*).

137. *Id.* "The interim period . . . was one of inactivity: 'a hiatus, but never a detour.'" *Id. See also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505–06 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim" and, thus, permissibly deviating from a linear course of litigation).

138. *Hudson*, 889 N.E.2d at 232 (Kilbride, J., dissenting) (citing *Semtek*, 531 U.S. at 505–06 for holding that the "primary meaning" of a dismissal without prejudice is to allow the plaintiff to return to the same court with the same underlying claim); RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1980) (providing that an exception to the rule against claim splitting is that the court preserves the issue for later litigation).

139. *Hudson*, 889 N.E.2d at 232, 233 (Kilbride, J., dissenting); 735 ILL. COMP. STAT. 5/2-1009(a) (2006). *See also* Terry W. Schackmann & Barry L. Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal (Part I)*, 58 J. MO. B. 78, 83 (2002) (stating that "voluntary dismissals without prejudice leave open indefinitely when plaintiffs can reassert the unresolved claims, limited only by the relevant statute of limitations"). The dissent also asserted that, because the defendants were not prejudiced by the refiled claim, they waived their objection

After the petition for rehearing was denied, George Hudson's parents lost their last chance to adjudicate their willful and wanton conduct claim against the City of Chicago.[140] The Illinois Supreme Court also vacated *Piagentini*, establishing the incontrovertible and thorough application of res judicata to partial voluntarily dismissed claims if an involuntary judgment was previously issued to any other part of the litigation. [141] However, as Part IV will explore, this decision by the court misapplied the rule against claim splitting and mechanically applied res judicata as a tool to dispose of litigation.[142]

IV. ANALYSIS

The *Hudson* case presented distinguishable facts that warranted limiting *Rein*'s application solely to cases of attorney abuse.[143] The *Hudson* court wrongly determined that the plaintiffs engaged in claim splitting.[144] However, even if the plaintiffs had split their claims, the split fell neatly within at least two well-founded exceptions to the rule against claim splitting: (1) the express reservation of claims for later review by the court and (2) the interest of fundamental fairness.[145] The court also misinterpreted the Illinois General Assembly's intent regarding the right of plaintiffs to refile their voluntarily dismissed

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by filing their objection in an untimely manner, which falls under one of the exceptions to claim splitting. *Hudson*, 889 N.E.2d at 233 ("[The defendants] should have objected at the time the order was entered, allowing plaintiffs to withdraw their motion. . . . [D]efendant's silence in acquiescing to the voluntary dismissal should bar the defendants' stale objection to the refiled suit."). Many other objections are deemed waived if not brought in a timely manner: objections to jurisdiction, objections to pleadings, objections to the disposition of motions, etc. *See* Charles Alan Wright & Arthur R. Miller, *Federal Rules of Civil Procedure*, *in* 5C FED. PRAC. & PROC. CIV.3D § 1391 (2008) (describing waiver and preservation of objections).

140. *Hudson*, 889 N.E.2d at 231 (Kilbride, J., dissenting).

141. Piagentini v. Ford Motor Co., 852 N.E.2d 357, 361 (Ill. App. Ct. 2006) (issuing the motion to the appellate court to vacate in light of the recent *Hudson* decision), *vacated*, 866 N.E.2d 1025 (Ill. 2008), *revised*, 2009 WL 113459 (Ill. App. Ct. Jan. 15, 2009). *See supra* Part II.C.2 (discussing *Piagentini* and its relation to *Rein* as a foil for the court's handling of res judicata on issues of refiled voluntarily dismissed claims).

142. *See infra* Part IV (analyzing the issues the court did not fully consider in their application of *Rein* to *Hudson*).

143. *See infra* Part IV.A (addressing why the analysis in *Rein* should not have been extended to *Hudson* because of the absence of abuse regarding voluntary dismissals and Illinois Supreme Court orders). The *Hudson* court even proclaimed their decision an "unremarkable exercise" in "*simply insert[ing]* the case names and concepts" from *Hudson* to the quoted passage from *Rein*. *Hudson*, 889 N.E.2d at 217 (emphasis added).

144. *See infra* Part IV.B (discussing the rule against claim splitting and the distinct difference between situations that invoke this rule and the situation in *Hudson*).

145. *See infra* Part IV.B (illustrating how the factual scenario in *Hudson* falls within at least two exceptions of the rule against claim splitting under the Second Restatement of Judgments and judicial precedent).

partial claims.[146] This Part concludes by discussing the *Hudson* court's unarticulated goals: addressing lower court dissent and perceived increases in attorney abuse by voluntarily dismissing claims.[147]

A. The Court BroadlyExtended Rein*'s Application Beyond Cases Involving Attorney Abuse*

Prior to *Hudson*, courts usually cited *Rein* only in those narrow situations where its application of res judicata might prevent attorneys from abusing voluntary dismissals.[148] There are three specific instances of attorney abuse in that case which were not present in *Hudson*:[149] (1) the *Rein* plaintiffs used voluntary dismissal to circumvent a Rule 304(a)

146. *See infra* Part IV.C (discussing the Illinois General Assembly's intent in drafting section 13-217 to support the assertion that the General Assembly intended to protect the right to refile partial voluntarily dismissed claims).

147. *See infra* Part IV.D (presenting two possible goals intended, but not voiced, by the court's *Hudson* decision: that *Hudson* was intended as a warning for consistency among appellate court districts after *Piagentini* and that as a response to growing concerns over plaintiff's abusing their right to a voluntary dismissal).

148. Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 8; Piagentini v. Ford Motor Co., 852 N.E.2d 357, 361 (Ill. App. Ct. 2006) (asserting that *Rein* was meant to apply only in circumstances where a plaintiff appeals an order granting the defendant an involuntary dismissal while voluntarily dismissing all remaining claims in order to pursue the appeal), *vacated*, 866 N.E.2d 1025 (Ill. 2008), *revised*, 2009 WL 113459 (Ill. App. Ct. Jan. 15, 2009). *See also* Steven P. Garmisa, *Refiled Claim Clears Hurdle Set by Rule Against Claim Splitting*, CHI. DAILY L. BULL., Aug. 2, 2006, at 10001 (stating that "the problem in *Rein* was that the plaintiffs misused the statutes on voluntary dismissal and refiling"). This presumption is also based on the lack of judicial commentary on the *Rein* case. *See* Mason v. Parker, 695 N.E.2d 70, 71 (Ill. App. Ct. 1998) (discussing *Rein* in terms of the three elements of res judicata); DeLuna v. Treister, 708 N.E.2d 340, 344 (Ill. 1999) (using *Rein* to support the elements of res judicata as well as the principle that res judicata bars all claims that *could have* been raised). These cases coupled with the fact Chicago attorneys are releasing numerous discussions of *Hudson* support the claim that *Rein* was perceived as an anti-abuse case. *See, e.g.*, Jeffrey M. Hansen, *Recent Illinois Supreme Court Decisions Concern Res Judicata, Contact-Sport Torts, and an Exception to Merger-By-Deed Doctrine*, ILL. INST. FOR CONTINUING LEGAL EDU., (2008), (noting that the recent *Hudson* opinion unveils the risk that a plaintiff takes of being subjected to a future successful res judicata defense when voluntarily dismissing the claims following any decision on the merits), *available at* http://search.freefind.com/find.html?id=27811896 (search "contact sport tort"); Illinois Lawyer Blog (May 16, 2008), http://www.illinoislawyerblog.com/2008/05/be_wary_of_the_voluntary_1.html (warning attorneys of the wide-reaching application of *Hudson*); Timothy Chorvat & Sara S. Ruff, *Caution: Res Judicata May Bar the Refiling of a Voluntarily Dismissed Claim*, 53 TRIAL BRIEFS ILL. ST. B. ASSOC. 1, 1 (June 2008) *available at* http://www.jenner.com/news/pubs_item.asp?id=000014699424 ("*Hudson* serves as a lesson to the unwary wishing to voluntarily dismiss and refile their actions under section 2-1009 of the Illinois Code: know the case law related to res judicata or you may find yourself without remedy."); Insurance Defense Litigator Blog, http://insurancedefenselitigator.blogspot.com/ (Jan. 31, 2008) (reporting on the recent *Hudson* decision).

149. *See infra* Part IV.A. While all three of these abuses are dispositive as to why the *Hudson* court should not have applied *Rein*, only the first will be discussed at great length in this section.

finding;[150] (2) the attorneys violated section 13-217 by refiling their voluntarily dismissed claim in nineteen months as opposed to one year;[151] and (3) the refiled complaint contained the claims that were involuntarily dismissed in *Rein I*, even after the involuntary dismissal was upheld on appeal.[152]

The *Hudson* court never addressed this distinction, arguably because the plaintiffs abided by the statutory time requirement and only refiled the voluntarily dismissed claim.[153] The court did acknowledge, however, that the plaintiffs in *Hudson* dismissed their final claim only after the unexpected death of their lead attorney, and not, as was the case in *Rein*, to circumvent an unfavorable ruling by the trial court.[154] Noticeably lacking in *Hudson*, therefore, was any culpable motive underlying the voluntary dismissal.[155] However, the court declared that

150. Brief for the Illinois Trial Lawyers Association (ITLA) as Amicus Curiae Supporting Petitioners at 3, Hudson v. City of Chicago, 889 N.E.2d 210 (Ill. 2008) (No. 100466). *See also* Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1208 (Ill. 1996) ("[This practice] would emasculate Rule 304(a) by allowing a plaintiff to circumvent a trial judge's denial of a Rule 304(a) certification by refiling previously dismissed counts following an unsuccessful judgment or appeal on counts not previously dismissed.").

151. *Rein*, 665 N.E.2d at 1202. This action clearly violates the statutory requirement to refile voluntarily dismissed claims in Illinois within one year or within the statute of limitations. 735 ILL. COMP. STAT. 5/13-217 (2006). *See also* May, *supra* note 6, at 484 (stating the one-year refiling provision as a requirement of refiling voluntarily dismissed claims).

152. *Rein*, 665 N.E.2d at 1202 (stating that the only "material difference" between *Rein I* and *Rein II* was the pleading of the equitable estoppel defense to the statute of limitations bar, which was rejected on appeal). By pleading the rescission claims and the equitable estoppel defense again, the plaintiffs were attempting, in essence, to refile their previous suit in its entirely, which would be barred by res judicata as an identity of cause of action. *See supra* note 36 and accompanying text (detailing the three requirements of res judicata).

153. *Hudson*, 889 N.E.2d at 213 (stating that the "central issue is whether the involuntary dismissal of plaintiffs' negligence claim and plaintiffs' subsequent voluntary dismissal . . . barred the refiling of their . . . claim").

154. *See* Solimine & Lippert, *supra* note 6, at 378–79 (discussing that the purpose of Federal Rule of Civil Procedure Rule 41 is not only to protect the right of the plaintiff to obtain and refile a voluntary dismissal, but also to protect defendants from the undue prejudice possible by the imposition of a unilateral dismissal). The plaintiffs in *Hudson* pursued a voluntary dismissal for the very reason such a practice is available: to allow plaintiffs to decide when and how they wish to proceed with their pleaded claims. *See Hudson*, 889 N.E.2d at 213 (stating that the plaintiff's motion practice, which supports the assertion that their pursuit of a voluntary dismissal, was benign).

155. *Rein*, 665 N.E.2d at 1205 (stating that the plaintiffs voluntarily dismissed one of their claims in order to appeal the involuntary dismissal on their other claims). This practice of using a voluntary dismissal to dispose of the final claims in a suit in order to make other orders in the suit final and appealable is a common enough practice, but the *Rein* court takes issue with the decision of the attorney to take the voluntary dismissal after the trial court refused to preserve the remaining claims through another mechanism. *See* Cochran, *supra* note 49, at 982 (discussing how federal courts will allow a voluntary dismissal in order to "manufacture" a final judgment on the entire action to gain access to the appellate courts).

taking attorney motivation into consideration would be too cumbersome and speculative.[156]

Even if the *Hudson* attorneys had such a motive, Illinois courts had previously held that a plaintiff's intent to avoid a dismissal with prejudice does not alter his right to refile voluntarily dismissed claims.[157] Judicial precedent establishes that an attorney's motivation in taking a voluntary dismissal does not impede a plaintiff's access to that option.[158] *Hudson*, however, stands for the negative principle that an attorney's motivation in taking a voluntary dismissal cannot be considered when deciding whether to preserve the right to refile under section 13-217.[159]

These two situations have the disparate effect of upholding the plaintiff's absolute right of a voluntary dismissal on one hand, while barring the plaintiffs' right to refile that voluntarily dismissed claim on the other hand.[160] This rule has the illogical effect of granting voluntary

156. *Hudson*, 889 N.E.2d at 220 (asserting that the difference between *Rein* and *Hudson*, in this respect, is a "distinction without a difference" because "an attorney's subjective motivation is not part of a res judicata analysis"). This statement is somewhat inconsistent with other court determinations that the subjective intent of attorneys may be at issue in motion practice. *See* Jerold S. Solovy et al., *Sanctions Under Federal Rule of Civil Procedure 11*, 540 PRAC. L. INST./LITIG. 101, 249 (1996) ("[I]t may be necessary to inquire into the subjective intent of an attorney or party in filing a pleading, even through the pleading was objectively reasonable." (citing Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987))).

157. Metcalf v. St. Elizabeth's Hosp., 513 N.E.2d 12, 16 (Ill. App. Ct. 1989) (determining that the plaintiff's motive did not alter his absolute right to file for voluntary dismissal); Jacobsen v. Ragsdale, 513 N.E.2d 1112, 1116 (Ill. App. Ct. 1987) (finding that, under section 2-1009, the right to voluntarily dismiss a claim is absolute "regardless of circumstances or motive"). *See also* David F. Herr, et al., *Motions Affecting Issues to Be Tried*, MOTION PRAC. 4d, §16.03[C], 16–60 (2002 Supp.) (stating that "a plaintiff's tactical advantage from voluntary dismissal generally does not constitute sufficient ground for denying the motion").

158. Kilpatrick v. Church of the Nazarene, 531 N.E.2d 1135, 1138–39 (Ill. App. Ct. 1988) (finding that "the voluntary dismissal statute grants plaintiffs the absolute privilege to dismiss regardless of the circumstances or motive"); Valdovinos v. Luna-Manalac Med. Ctr., Ltd., 764 N.E.2d 1264, 1266 (Ill. App. Ct. 2002) (determining that, unless plaintiffs choose to relinquish their right to file a voluntary dismissal, the right is absolute regardless of other intent or motivation). *See also* Solimine & Lippert, *supra* note 6, at 394 (discussing how, under the federal rule governing voluntary dismissals, a plaintiff's motivation in obtaining a voluntary dismissal is rarely discussed because of the difficulties involved).

159. *Hudson*, 889 N.E.2d at 219. When addressing voluntary dismissals under Federal Rule of Civil Procedure 41, courts have held that attorney intent in refiling voluntarily dismissed claims after any remand or appeal may be dispositive in determining whether to allow an appeal. *See* Schackmann & Pickens, *supra* note 139, at 83–84 (noting that eight circuits consistently enforce this rule that voluntary dismissals without prejudice have the effect of destroying appellate jurisdiction).

160. *See generally Rein*, 665 N.E.2d at 1208 (declining to review attorney motivation in obtaining a voluntary dismissal even though the attorney, arguably acting in bad faith, intended to circumvent the denial of a Rule 304(a) finding in order to appeal an involuntary dismissal); *Hudson*, 889 N.E.2d 210 (declining to review attorney motivation in refiling a voluntarily

dismissals in situations when attorneys act in bad faith, and barring refiling when attorneys act in good faith.[161] When federal courts determine whether an attorney acted in bad faith under Rule 11, they look to the factual situation surrounding the attorney's actions *under the circumstances*.[162] The court should have applied this same reasoning in its analysis of *Hudson* and found that, because *Rein* involved three separate instances of attorney abuse, the circumstances in *Hudson* were different enough to allow the refiling of the voluntarily dismissed claims.[163]

B. The Rule Against Claim Splitting Was Inappropriately Applied

The purpose of the rule against claim splitting is to ensure finality in litigation, which prevents plaintiffs from harassing defendants and burdening courts with duplicative litigation.[164] It requires plaintiffs to

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dismissed count even though the attorney was, arguably acting in good faith, unprepared for trial following the death of her father).

161. FED. R. CIV. P. 41(b). The distinction between an attorney acting in good faith and an attorney acting in bad faith is considered important by the courts in motion practice under Federal Rule of Civil Procedure Rule 11, which provides in relevant part that "by presenting to the court a pleading, written motion, or other paper . . . an attorney certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that the motion is presented for a proper purpose and that all factual contentions are supported by law and evidence. FED. R. CIV. P. 11. *See also* Sybil Louise Dunlop, *Are an Empty Head and a Pure Heart Enough? Mens Rea Standards for Judge-Imposed Rule 11 Sanctions and Their Effects on Attorney Action*, 61 VAND. L. R. 615, 627–31 (2007) (discussing the different applications of Rule 11 among federal district courts; notwithstanding the different applications, the courts use the same principles of good faith or bad faith standards).

162. *See* SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS, at 26 (1985) ("The court need not delve into the attorney's subjective intent. The record in the case and all of the surrounding circumstances should be an adequate basis."). *See also* Dunlop, *supra* note 161, at 625 (stating that the split application of Rule 11 among the federal circuit courts is whether to apply a bad faith standard or an objective standard of reasonableness "in circumstances where the lawyer has no opportunity to withdraw or correct" the alleged violation.).

163. *See* Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 8 (arguing against the application of *Rein*, and now *Hudson*, to promote the automatic barring of refiled voluntarily dismissed claims without consideration to the particular circumstances of the case). While sanctions under Rule 11 were never at issue in *Hudson*, the rationale behind determining whether an attorney acted in bad faith regarding their motion practice should apply to situations regarding recovery as it does in situations regarding attorney sanctions, especially if future courts are bound to mechanically bar refiled voluntarily dismissed claims, regardless of the circumstances under which the claim was voluntarily dismissed. *Id.* Similarly, the goals behind Rule 11 are identical to the goals purported by the court in its decision in *Hudson*: "promoting the goal of limiting harassment, delay and expense . . . ." Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988). However, sometimes the court does refuse to apply attorney motivation as a factor. *See* Solimine & Lippert, *supra* note 6, at 378 (discussing an Ohio case where bad faith was ignored on account of the difficulty of proof, allowing the attorney to obtain a voluntary dismissal "even at the eleventh hour" (citing State *ex rel.* Hunt v. Thompson, 586 N.E.2d 107 (Ohio 1992))).

164. *Rein*, 665 N.E.2d at 1208. *See* Gimbel, *supra* note 1, at 404 ("Finality is an important

litigate all of their relevant claims in one action.[165] The exceptions to the rule are clearly delineated in the *Second Restatement of Judgments* and in courts' application of these provisions.[166] This section will begin by illustrating that *Hudson* did not involve claim splitting and why, even if it had, that the case fell under at least two exceptions to the rule.[167]

1. Plaintiffs Did Not Engage in Claim Splitting

The rule against claim splitting is designed to prevent plaintiffs from pursuing their claims in "two conflicting lines of litigation."[168] Courts, therefore, attempt to prevent plaintiffs from the circular practice of pursuing certain claims at the trial or appellate level while attempting to preserve other claims through a voluntary dismissal.[169] This exact

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goal in litigation . . . ."). Gimbel's article goes on to discuss the relationship between res judicata, the parent-doctrine to the rule against claim splitting and finality. *Id.* While this may be the purpose of claim splitting, this overarching goal of finality is not necessarily a good thing. *See* Laura Gaston Dooley, *The Cult of Finality: Re-thinking Collateral Estoppel in the Postmodern Age*, 31 VAL. U. L. REV. 43, 60 (1996) (arguing that the courts' pre-occupation with finality leads to the application of numerous inequitable rulings).

165. *See Rein*, 665 N.E.2d at 1206 (stating that the rule against claim splitting bars a plaintiff from "suing for part of a claim in one action and then suing for the remainder in another action." (citing Baird & Warner, Inc. v. Addison Indus. Park, Inc., 387 N.E.2d 831, 837 (Ill. App. Ct. 1979), which discusses the inability of a party to maintain several causes of action for recovery on one suit))); Radosta v. Chrysler Corp., 443 N.E.2d 670, 672 (Ill. App. Ct. 1982) (applying the rule against claim splitting to receiving damages); Thorleif Larsen & Son, Inc., v. PPG Indus., Inc., 532 N.E.2d 423, 427 (Ill. App. Ct. 1982) (determining that, while claim splitting may be a good tactical decision, it is still not permissible in Illinois); Best Coin-Op, Inc. v. Paul F. Ilg Supply Co., 545 N.E.2d 481, 493–94 (Ill. App. Ct. 1989) (detailing situations in which the rule against claim splitting bars subsequent actions)). This rule includes filing any theories of relief arising from one claim in the same suit. RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. d (1982) (discussing how the filing of new theories of relief under the same transaction is barred by res judicata under the rule against claim splitting).

166. *See infra* Part IV.B.2 (discussing the relevant exceptions to the rule against claim splitting).

167. *See infra* Part IV.B (arguing that the factual scenario in *Hudson* does not implicate the rule against claim splitting and presenting two possible exceptions to the rule against claim splitting under the facts in *Hudson*: that the court preserved the willful and wanton claim for later litigation and that fundamental fairness requires the permissibility of the split claims in this particular case given the death of the lead attorney).

168. Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 9. The drafters of the Restatement (Second) of Judgments stated that the rule against claim splitting is "willing to tolerate changes in direction of the course of litigation," but the fact that the plaintiffs in *Hudson* pursued only one claim and its valid directional course through a refiled voluntary dismissal strengthens the assertion that the plaintiffs did not engage in claim splitting of any kind because they plead all of their bases for recovery under one transaction in one suit and only pursued the litigation of the intact action, and after voluntarily dismissing the remaining claim, only pursuing that remaining claim. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

169. *Rein*, 665 N.E.2d at 1208 ("If plaintiffs were permitted to proceed [with refiling] any plaintiff could file an action with multiple counts, dismiss some but not all of the counts, obtain a

situation occurred in *Rein*, where the plaintiffs appealed an involuntarily dismissed claim while attempting to preserve a voluntarily dismissed claim leveling the trial court.[170] Therefore, the plaintiffs effectively split their claims among more than one court of the same jurisdiction, which violates the rule against claim splitting.[171]

In *Hudson*, however, once the circuit court entered an involuntary dismissal, the plaintiffs ceased to pursue that claim.[172] Similarly, when the plaintiffs voluntarily dismissed their other claim, the period between the dismissal and the refiling of the voluntarily dismissed claim was one

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final judgment on the undismissed counts, and if unsuccessful on the counts not dismissed, refile the previously dismissed counts."). This cyclical handling of claims would, arguably, lead to the permissible refiling of claims resulting in interminable litigation, thus undermining the purpose of res judicata to protect courts and defendants from the harassment of duplicitous litigation. *Id.* While this seems to be the current prerogative of the court currently, neither *Rein* nor *Hudson* address the drafters' discussion in the Second Restatement of Judgments of the effect of a voluntary dismissal on claim splitting in general when an involuntary dismissal against the plaintiff has already been reached on another claim under section 20, which states that "a personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim if . . . the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice." RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(b)(1) (1982).

170. Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 2. *.See also* Cochran, *supra* note 49, at 979 (discussing the prevalence of this practice given the tightening avenues of appeal available for litigants and how voluntary dismissals are becoming a tool by which parties can achieve a unilateral final judgment as opposed to using voluntary dismissals to preserve claims for later adjudication). A point of note regarding the phenomenon of using voluntary dismissals to obtain a final judgment is that federal judges appear to encourage the practice, whereas in Illinois, the courts view the practice with disdain. *Id.*

171. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (providing that a final, appealable judgment on one count will bar the litigation of another count arising from the same transaction). This situation, however, does not exist by pursuing a single line of litigation through the permissible practice of refiling voluntarily dismissed claims without prejudice. *See* Ziff, *supra* note 2, at 944 (asserting that dismissals without prejudice do not usually implicate res judicata because of the court's explicit order stating that the dismissal is without prejudice and may be refiled again (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b, reporter's note (2002) to support the rule that each jurisdiction must determine the effect of a voluntary dismissal, but it notes that a voluntary dismissal acting as a bar is "reasonable" when the defendant is not even aware of the complaint—a situation not present in *Hudson*))).

172. *Hudson*, 889 N.E.2d at 215. Under federal law, a voluntary dismissal does not have a res judicata effect because it is not a final judgment and may be refiled without implicating the rule against claim splitting. *Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 990, 1008 n.3000 (2008) (citing Hughes v. Lott, 350 F.3d 1157, 1161 (11th Cir. 2003), which determined that a prisoner's section 1983 claim was not barred by res judicata because earlier case dismissed without prejudice, and thus merits not adjudicated)). *See also* Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002) (holding that a voluntary dismissal does not have any res judicata effect even if summary judgment has been entered in another part of the action) (citing Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 3237 (1955) for the proposition that if a nonsuit is not accompanied by findings of law or fact, it does not have the res judicata effect of barring other claims in the transaction, even if a summary judgment has been issued on another claim in the action)).

of "inactivity."[173] The plaintiffs did not appeal the trial court's involuntary dismissal or continue litigating their negligence claim in any way.[174] Instead, they waited to refile their willful and wanton conduct claim.[175]

2. Even If Plaintiffs Split Their Claims, *Hudson* Falls Within Two Exceptions to the Rule Against Claim Splitting

Even if *Hudson* was an example of claim splitting, it was permissible claim splitting.[176] While other exceptions exist, this section will discuss two specifically: (1) that by granting the voluntary dismissal, the court preserved plaintiffs' claims for later litigation, and (2) that the concept of fundamental fairness requires an exception be made in this situation.[177]

First, under the *Second Restatement of Judgments*, plaintiffs may split claims if the court expressly reserves their right to maintain the second claim at a later time.[178] The United States Supreme Court has also

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173. Petition for Rehearing at 9–10, *Hudson*, 889 N.E.2d 210 (No. 100466) ("[I]n every other case, the plaintiffs had improperly split their cause of action into two conflicting lines of litigation or took the nonsuit in order to appeal other claims."). By deciding not to pursue an appeal on their involuntarily dismissed claim or instituting any new actions, the plaintiffs in *Hudson* did not engage in claim splitting through any of the articulated violations, and the court gave no reason why this situation should create a new example of impermissible claim splitting. *Id.*

174. Plaintiff's Petition for Leave to Appeal, *supra* note 91, at 9.

175. *Id.* *See* Schackmann & Pickens, *supra* note 139, at 84 (2002) (discussing how a Rule 54(b) order by a federal court, which certifies the existence of separate claims, does not "dilute the fundamental rule against splitting a cause of action and deciding appellate cases piecemeal." (quoting Page v. Preisser, 686 F.2d 336, 339 (8th Cir. 1978), which held that claim splitting is still an impermissible practice if multiple claims are being adjudicated at multiple levels of the appellate process regardless of a court's certification of the split itself)).

176. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982) (listing the six exceptions to the rule against claim splitting). While this Part will not address it in any length, the defendants also acquiesced to the split claims. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26(a) (2004). The defendants acquiesce to the split because they did not object to the voluntary dismissal without prejudice, which implied a future refiling. *See infra* notes 219–22 (discussing the applicability of this exception to *Hudson*). *See also supra* note 139 and accompanying text (discussing Justice Kilbride's argument for the application of this exception and supporting law).

177. *See supra* Part IV.B.1 (applying one of the exceptions to the rule against claim splitting under the Second Restatement of Judgments section 26 and a general common law principle).

178. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982) ("[T]he court in the first action has expressly reserved the plaintiff's right to maintain the second action," which is accomplished through language that a judgment is *without prejudice* and may be expressed in "the judgment itself, in the findings of fact, conclusions of law, opinion, or similar record."). In essence, this exception represents the opposite impact that judgments usually have, in that their preclusive effect is not usually realized in any "immediate or executory" way. *See* Wolff, *supra* note 45, at 751 (discussing the effect of this exception). Instead, the court realizes the potential impact of the order or judgment under this exception and explicitly excludes the present situation from a bar under res judicata and the rule against claim splitting. RESTATEMENT (SECOND) OF JUDGMENTS § 26(b) (1982).

determined that the inherent purpose of voluntary dismissals without prejudice is to allow a plaintiff to return to the same court and refile the same underlying claim.[179] Such dismissals are, by definition, "without prejudice" and do not usually invoke res judicata because they do not adjudicate the merits of the claim.[180] Because there is no appeal from a voluntary dismissal, the right to refile the claim represents the only way in which a decision on the merits may be obtained after a voluntary dismissal.[181]

In addition to the fact that, in granting voluntary dismissal the trial court expressly preserved the Hudson's second claim, considerations of

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179. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505–06 (2001) ("The primary meaning of 'dismissal without prejudice,' we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim" and is not impermissible claim splitting.). *See also* May, *supra* note 6, at 484 (discussing the effect of a voluntary dismissal "without prejudice" as allowing an absolute right of plaintiff's to refile their voluntarily dismissed claims within the statutorily prescribed period of one year under 735 ILL. COMP. STAT. 5/13-217 (1994) (current version at 735 ILL. COMP. STAT. 5/13-217)). Even when the court does not include the phrase "without prejudice," the intention of the court to preserve the claim for later adjudication has been enough to fall under this exception to the rule against claim splitting. *See* Gishwiller v. Hobart, 79 N.E.2d 846, 850 (Ill. App. Ct. 1948) (determining that even though an order of dismissal does not contain the words "without prejudice," judgment of dismissal is not res judicata to a new proceeding for the same cause of action between the same parties because no judgment was made on the merits of the claim).

180. JANET WALKER ET AL., THE CIVIL LITIGATION PROCESS 454 (6th ed. 2005) ("[I]f the prior court did not get to the merits of the plaintiff's claim, but dismissed the proceeding on some preliminary or procedural point, it would be too harsh to foreclose the plaintiff."). Courts at the state level in Illinois, as well as the United States Supreme Court, have also highlighted the importance of this feature in applying res judicata. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 466 U.S. 75, 77 n.1 (1984) (discussing the requirement of an adjudication on the merits under the definition of res judicata); Liddell v. Smith, 213 N.E.2d 604, 608 (Ill. App. Ct. 1965) (finding that even though defendants were defaulted, the plaintiff could still assert a previously voluntarily dismissed claim in a subsequent action because of the absolute right to refile a voluntarily dismissed claim). This right to voluntarily dismiss and refile a claim, therefore, allows a plaintiff to deviate from the normal course of litigation. Reply Brief of Appellants at 2, Hudson v. City of Chicago, 889 N.E.2d 210 (Ill. 2008) (No. 100466) ("In expressly allowing a plaintiff to voluntarily dismiss a case *without prejudice*, § 2-1009 is clearly intended to afford a plaintiff a respite from the normal course of litigation.").

181. *See* Resurgence Fin., L.L.C. v. Kelly, 875 N.E.2d 679, 682 (Ill. App. Ct. 2007) (finding that even though summary judgment preceded the voluntary dismissal, the voluntary dismissal did not qualify as a final, appealable order or a procedural step toward final judgment); Koffski v. Vill. of N. Barrington, 609 N.E.2d 364, 370 (Ill. App. Ct. 1993) (finding that, as a rule, plaintiffs are prevented from appealing an order granting a voluntary dismissal on the basis that their absolute right to refile protects the re-litigation of the claim at a later date); Edward E. Gillen Co. v. City of Lake Forest, 581 N.E.2d 739, 741 (Ill. App. Ct. 1991) (determining that a plaintiff is protected from prejudice by the absolute right to refile voluntarily dismissed litigation even though an order granting voluntary dismissal is not appealable). *See also* Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 HARV. L. REV. 1989, 1996–97 (1990) (discussing the effect of a court's finding that the same claim may be brought at a later time and recognizing this exception in cases dealing with the foreseeability of future illness).

fundamental fairness and substantial justice favor permitting the claim to be refiled.[182] The plaintiffs in *Hudson* filed for voluntary dismissal on their remaining claims only after the death of the lead attorney and their resulting inability to prepare for trial in the given time.[183] There was no ill will on the part of the plaintiffs' attorney in *Hudson* because the attorney's untimely death was certainly not an event for which he could have prepared.[184] Thus, courts should examine the circumstances giving rise to a voluntary dismissal and consider whether its decision may cause an unjust result.[185]

Voluntary dismissal should usually fall under one of these exceptions to the rule against claim splitting.as was the case in *Hudson*.[186] Even if these exceptions do not apply, fairness would warrant a preservation of the voluntarily dismissed claim in *Hudson* for later adjudication.[187]

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182. Weisman v. Schiller, Ducanto & Fleck, 733 N.E.2d 818, 822 (Ill. App. Ct. 2000) ("[T]he doctrine of res judicata need not be applied where fundamental fairness so requires."); *see also* Pelon v. Wall, 634 N.E.2d 385, 388 (Ill. App. Ct. 1994) (holding that the courts need not apply the doctrine of res judicata so technically as to create unjust results, but instead, the courts must determine whether a second suit will "advance the goals of judicial economy and fairness").

183. *Hudson*, 889 N.E.2d at 230 (Kilbride, J., dissenting). In cases dealing with delay as a result of the serious illness or death of the attorney, the court may excuse the delay where justice requires the excuse under the particular circumstances in the case. Theresa L. Leming & Jeanne Philbin, 24 AM. JUR. DISMISSAL § 74 (2008) (stating that how the death or illness of an attorney or party is handled may depend on the nature of the controlling statute or rule of practice).

184. *See* IVAN TURGENEV, A HOUSE OF GENTLEFOLK 182 (1917) ("The most ordinary, inevitable, though always unexpected event, death[.]"). Obtaining a voluntary dismissal as a result of the death of a vital member of the litigation is markedly different from the tactical decision in *Rein* to pursue a voluntary dismissal after being denied the ability to appeal a partial claim. *See* Rein v. David A. Noyes & Co., 665 N.E. 2d 1199, 1205 (Ill. 1996) (clarifying why the doctrine of res judicata barred the plaintiffs' claim).

185. Monica Renee Brownewell, *Rethinking the Restatement View (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 37 VAL. U. L. REV 879, 890–91 (2003) (discussing this exception in terms of "unfairness" to the party being barred from litigating a claim and stating that the goal of res judicata is to promote "fairness and orderliness"); *Pelon*, 634 N.E.2d at 388. *See also* Baker v. Gen. Motors Corp., 522 U.S. 222, 250 (1998) (discussing how the "fairness" concerns of res judicata include both fairness to the defendant in being free from duplicative litigation and fairness to the plaintiff in having a "full and fair" opportunity to litigate their claims (quoting Kremer v. Chem. Constr. Corp., 456 U.S. 461, 480–81 (1982)).

186. *See Hudson*, 889 N.E.2d at 213 (describing the motions process of *Hudson* and how the only remaining claim that the plaintiffs were litigating was their refiled voluntarily dismissed claim). Taken together, the voluntary dismissal statutes imply that a voluntary dismissal without prejudice is not fulfilled until the claim is refiled because the court expressly reserved that claim for a later date, which uses the same language as the exception to the rule against claim splitting. *See* 735 ILL. COMP. STAT. 5/2-1009 (2006) (allowing the plaintiff to obtain a voluntary dismissal without prejudice); 735 ILL. COMP. STAT. 5/13-217 (2006) (stating that because the voluntary dismissal is without prejudice, it can be refiled within a year, thus fulfilling the "without prejudice" language).

187. *See* DONALD A. DRIPPS, ABOUT GUILT & INNOCENCE 112 (2003) (discussing that, in criminal law, the United States Supreme Court defined the concept of "fundamental fairness" as a broad concept "to be tested by an appraisal of the totality of facts in a given case" (quoting Betts

C. *The Illinois General Assembly Intended Section 13-217 to Allow Plaintiffs to Refile Partial Claims*

In addition to its refusal to apply any of the general exceptions to the rule against claim splitting, the court never addressed either the Illinois General Assembly's intent in enacting section 13-217, or its reasons for altering the statute.[188] In general, the legislature has consistently used the phrase, "without prejudice," to denote a preservation of rights, so the use of this language in section 13-217 seems to implicitly preserve an issue for later litigation.[189] Even in recent extensive tort reform initiatives, the General Assembly did not alter any provisions in section 13-217.[190] This inaction is a strong inference that they did not intend to change its original goal of affording plaintiffs the right to refile voluntarily dismissed claims.

Until *Hudson*, the court had been reticent to establish any other limitations to the refiling provision without the General Assembly's

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v. Brady, 316 U.S. 455, 462 (1942))). In *Hudson*, the totality of the facts give rise to the conclusion that the voluntarily dismissed claims should be refiled because of the situation in which the plaintiffs found themselves: unprepared for trial after the unexpected death of their attorney and with the adjudication of their case resting on the one claim. *Hudson*, 889 N.E.2d at 230 (Kilbride, J., dissenting).

188. *See Hudson*, 889 N.E.2d at 222–23 ("[W]e see no basis for concluding that the legislature intended in sections 2-1009 and section 13-217 to give plaintiffs an absolute right to split their claims."). *But see supra* note 30 and accompanying text (discussing Illinois courts' analysis of section 13-217 to prescribe an absolute right to refile voluntarily dismissed litigation). The *Restatement (Second) of Judgments* also discusses the effect of even partial voluntarily dismissed claims as being presumed capable of refiling unless the rule of the particular jurisdiction has determined differently. RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. b (1982).

189. This intent may also be seen throughout references made to the section as the "savings statute" by both courts and legislative bodies. *See, e.g.* Act of Aug. 22, 2008, Pub. Act 95-895, 2008 Ill. Legs. Serv. 2135 (West) (to be codified at 810 ILL. COMP. STAT. 5/1-308(a)) ("A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice' . . . are sufficient.").

190. *See* Act of Aug. 25, 2005, Pub. Act 94-0667, 2005 Ill. Laws 4934 (providing various reforms to different statutes, not including section 13-217, which was amended in the previous tort reform, an amendment that was later found unconstitutional). *See also* Lebron v. Gottlieb Mem'l Hosp., No. 2006 L 12109, slip op. at 3–4 (Cir. Ct. Cook County Nov. 13, 2007) (discussing the 2005 tort reform statutes and their effect on current legislation, which did not include section 13-217, even though the previous 1995 tort reform did attempt to modify this section), *cert. granted*, Nos. 105741 & 105745. This inference is strong, especially considering that the General Assembly has attempted to alter section 13-217 in past tort reforms by removing the one limitation to the refiling provision: the one-year filing requirement. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1062 (Ill. 1997) (finding P.A. 89/7 unconstitutional in its entirety, including the deletion of the one year filing requirement). *See also* Thomas H. Fegan, *This Ruling is Likely to Draw More Litigation*, CHI. DAILY L. BULL., Apr. 8, 1998, at 6 (noting that the Illinois Supreme Court did not explicitly discuss whether the changes to section 13-217 were unconstitutional).

approval.[191] Given the well-founded definition, intent, and application of section 13-217, the *Hudson* court should have provided a more thorough analysis before drastically changing the statute's understood meaning.[192]

D. Hudson*'s Unarticulated Agenda: Curbing Abuse*

The court clearly enumerated its purpose in *Hudson*.[193] First, it stated that its ruling promoted judicial economy.[194] However, *Hudson* never posed a risk to efficiency because the plaintiffs were engaged in the benign practice of voluntarily dismissing their claims and never split any active claims.[195] Even if the situation in *Hudson* had threatened

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191. *See* Kahle v. John Deere Co., 472 N.E.2d 787, 789 (Ill. 1984) ("Any further limits on the plaintiff's common law rights [to refile voluntarily dismissed litigation] should be enacted by the legislature, not declared by this court."); *Hudson*, 889 N.E.2d at 213 (detailing *Hudson's* facts).

192. Michael J. Gallagher & Mary Snyder, *Civil Procedure*, 20 LOY. U. CHI. L. J. 215, 218–21 (1988) (discussing the different interpretations of section 13-217, and relying on legislative intent to assert that the right to refile is restricted to one refiling and may not be used to attempt to circumvent a prior order by the court and citing *Gendek v. Jehangir*, 518 N.E.2d 1051 (Ill. 1988) and *Muskrat v. Sternberg*, 521 N.E.2d 932 (Ill. 1988)); *see also* Paul Caghan, *The Absolute Right to Refile: A Plain Meaning and Interpretation of Section 24a of the Illinois Limitations Act—* Franzese v. Trinko, 27 DEPAUL L. REV 533, 533–35 (1977) (discussing *Franzese v. Trinko* where the Illinois Supreme Court determined that the General Assembly intended the savings statute to create an absolute right to refile dismissals without prejudice, and the court held that "no exception may be read into" the statute, including a judicially-created exception).

193. *See Hudson*, 889 N.E.2d at 221, 223 (directly quoting and applying *Rein*'s underlying policy interests without taking account of the different facts and procedural elements of the two cases). This problem of regurgitating *Rein* is a consistent one for the *Hudson* court and is most obvious when talking about the goals of the *Rein* court that do not apply in this case. *Id.* at 223 (Kilbride, J., dissenting). A "modern" goal of the judicial system is improving access to the courts, which is ironic considering *Hudson*'s limiting principles. Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 690 (2007) ("The goals today are essentially the same as those which defined the notion of access to justice . . . [illustrated by] recent changes in the judiciary designed to expand access.").

194. *Hudson*, 889 N.E.2d at 221 ("Such a practice would impair judicial economy."). This is a legitimate and necessary goal. *See* Ziff, *supra* note 2, at 910 (stating that the three basic goals of a procedural system are accuracy, efficiency, and fairness and applying these goals to res judicata). Specifically, efficiency refers to the "direct costs of litigation," including the money implicitly spent on lawyers, judges, and clerical expenses. *Id.*

195. *See* OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, FEDERAL JUDICIAL CASELOAD STATISTICS MARCH 31, 2007, at 52–54 (2007), [hereinafter CASELOAD STATISTICS] *available at* http://www.uscourts.gov/caseload2007/tables/C04Mar07.pdf (depicting that, of the 254,349 total cases filed in the twelve-month period ending in March 31, 2007, 196,547 were dismissed or settled before trial, and, of those 196,547 cases, 168,925 were terminated before pretrial). *See also* STEVEN K. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-153177, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES 1 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/tcilc.pdf (stating that seventy-five percent of the torts cases filed in major counties were "disposed through an agreed settlement or voluntary dismissal").

judicial economy, this consideration should not trump the paramount importance of fairness to all parties.[196]

Second, the court asserted that its decision protected defendants from the harassment of duplicative litigation and frivolous claims that require precious time and money to disprove.[197] While this is a valid concern, it was not presented in *Hudson*, where the unexpected death of the attorney forced the plaintiffs to voluntarily dismiss their otherwise sound claim, and did not prejudice the defendant.[198]

Not only did the court's reasoning in *Hudson* not reflect the factual distinctions with *Rein*, but the court also promoted an unarticulated goal through its decision.[199] *Hudson* represents the court's desire to curb potential abuses by attorneys regarding voluntary dismissals.[200] Courts have been concerned with the high number of frivolous claims filed by

196. *See* Anne Krueger & Valerie Alvord, *Court Scandal Is a Story of Give and Take*, SAN DIEGO UNION TRIB., Apr. 14, 1996, at A-1 (quoting the lead attorney for the defense: this "scandal" includes "the overwhelming issue that seemed to be on the judge's mind was judicial economy as opposed to the fairness of consolidating"); Marissa Dawn Lawson, Note, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable*, 23 REV. LITIG. 463, 486–88 (2004) (arguing that binding arbitration clauses are unconscionable because they promote efficiency in the court system over fairness to litigants).

197. *Hudson*, 889 N.E.2d at 221 ("Such a practice would . . . effectively defeat the public policy underlying res judicata, which is to protect the defendant from harassment and . . . multiple litigation."). However, the court never articulates that the doctrine of res judicata was also intended to serve the dual aims of efficiency and fairness, which involves a plaintiff's right to their "day in court." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. c (1982) (defining an "issue" as involving "a balancing of important interests: on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute"). Similarly, while the rights regarding voluntary dismissals have been declared "absolute," the doctrine of res judicata has not been so defined. *See* ALLAN D. VESTAL, RES JUDICATA/PRECLUSION 559 (1969) ("Although the interest of society in the orderly adjudication of matters supports res judicata/preclusion, there are significant limitations which circumscribe its application.").

198. *Hudson*, 889 N.E.2d at 230 (Kilbride, J., dissenting) (discussing the legitimate decision of the replacement attorney to voluntarily dismiss the claim rather than proceed to trial unprepared through no reasonable fault of her own). "Reasonable" fault is the standard by which lawyers are judged when determining whether sanctions are necessary, one of which is to dismiss a claim with prejudice and incapable of being refiled. FED. R. CIV. P. 11.

199. *See infra* Part IV.B (asserting two possible reasons for the court's decision in *Hudson* that were not discussed in the holding: (1) a response to inconsistent applications of the rule from *Rein* and (2) a response to prevalent attorney abuses of voluntary dismissals, even though the attorneys in *Hudson* did not abuse this motion in the case).

200. *See* May, *supra* note 6, at 484–89 (discussing the various limitations under statute and through court interpretation that have been placed on the right to voluntarily dismiss and refile claims in recent Illinois jurisprudence); Note, *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of the Voluntary Nonsuit*, 63 YALE L.J. 738, 738 (1954) (responding to plaintiff abuses of the voluntary dismissal, "[v]arious state statutes attempted to avoid abuses by restricting absolute dismissal").

plaintiffs over the last few years.[201] Similarly, courts have recently attempted to limit the frequent abuse of voluntary dismissals.[202] While *Hudson* is not an example of such a situation, the court appears to be responding to this growing concern by preempting possible abuse by attorneys who would have used voluntary dismissal to impermissibly split claims.[203]

Due to the evident factual differences, *Hudson* should have been decided independently from *Rein*.[204] Had the *Hudson* court recognized the factual differences between the two cases and appropriately limited the rule against claim splitting, it could have avoided eviscerating section 13-217's original purpose in permitting voluntary dismissal.[205] The next Part will address the implications of the court's failure to recognize these dispositive distinctions.[206]

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201. *See* Maureen N. Amour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 689 (1996) ("This 'crisis in the courts' [a 'perceived litigation explosion'] motivated the Committee to encourage aggressive judicial regulation of the litigation process to punish and deter the filing of frivolous claims."). *But see* VIVIENNE HARPWOOD, MEDICINE, MALPRACTICE & MISAPPREHENSIONS 83 (2007) ("[A]lthough fraudulent and frivolous claims are to be frowned upon, there is nothing morally reprehensible, given the fault-based nature of tort, about using the system legitimately in order to obtain compensation for the injuries caused by the fault of another."); Joshua D. Kelner, *The Anatomy of an Image: Unpacking the Case for Tort Reform*, 31 U. DAYTON L. REV. 243, 288 (2006) ("In explaining the causes of this crisis, [tort reformers] portrayed the legal system as deluged with frivolous claims and indicated that it was such meritless lawsuits that dictated the necessity for reform.").

202. *See* Vincent P. Cook & Peter W. Schoonmaker, *New Limits Needed for Voluntary Dismissals*, CHI. DAILY L. BULL., Aug. 10, 2004, at 6 (discussing the varied ways in which plaintiffs will abuse voluntary dismissals and the Illinois courts' response to these abuses). *See also* Gibellina v. Handley, 535 N.E.2d 858, 866 (Ill. 1989) ("This step by our court is necessitated by the noted abusive use of the voluntary dismissal statute."). However, even the court in *Gibellina* began its discussion of the alleged abuse of the voluntary dismissal by noting that the different procedural sequence in each case is important to this analysis. *Id.* at 860.

203. *See Hudson*, 889 N.E.2d at 217 (implying this very concern); Brief for Defendants at 35–51, *Hudson*, 889 N.E.2d 210 (No. 100466) (discussing the broad application of *Rein*). However, even *Gibellina*, which was directly responding to an attorney abuse of a voluntary dismissal, did not actually curb those abuses. Steven C. Ward, Gibellina v. Handley*: Toward a Federal Approach to Voluntary Dismissals*, 79 ILL. B.J. 336, 340 (1991) (stating skepticism as to whether the case would really have its desired effect).

204. *See supra* Part IV (addressing how facts—particularly the attorney abuses in *Rein* and the circumstances surrounding the taking and refiling of the voluntary dismissal in *Hudson*—should have led the *Hudson* court to differentiate *Rein*).

205. *See supra* Part IV.C (discussing the intention of the Illinois General Assembly regarding section 13-217).

206. *See infra* Part V (depicting the potential impacts of the *Hudson* case on the future relationship between parties and the court in motion practice as well as the necessary clarification of the voluntary dismissal statutes by the General Assembly in order to articulate the extent of a plaintiff's right to refile voluntarily dismissed claims).

V. IMPACT

Hudson created a rule that will consistently bar the refiling of voluntarily dismissed claims once a court *involuntarily* dismisses any other claim within the suit.[207] Nevertheless, this decision has other potential implications, some of which have already been realized in Illinois.[208] As Part V.A. will illustrate, *Hudson* will shift the balance in motion practice by depressing a plaintiff's right to refile voluntarily dismissed claims while giving defendants more leverage in pretrial procedure.[209] An equal balance will only be maintained by judges who recognize the effect of granting a voluntary dismissal without prejudice and who understand whether the plaintiffs will be able to later refile the voluntary dismissal.[210] Similarly, as Part V.B will demonstrate, courts' desire to distinguish *Hudson*, coupled with the possible increase in attorney malpractice claims from misuse of voluntary dismissal, will make *Hudson* ineffective at reaching its goal of economizing judicial resources.[211]

A. Shifting the Balance in Motion Practice

The *Hudson* case has already created an imbalance of power among parties during the pretrial stage.[212] The primary reason for seeking a voluntary dismissal without prejudice is to retain the right to refile that

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207. *See Hudson*, 889 N.E.2d at 229–30 (Kilbride, J., dissenting) (addressing the major differences between *Rein* and *Hudson*, especially in terms of attorney abuse and claim splitting, in determining that the two cases are distinguishable and, therefore, that *Hudson* should have limited *Rein*'s holding). *But see id.* at 219 (majority opinion) (declining to limit *Rein*'s holding in order to preserve judicial economy).

208. *See infra* Part V.B (delineating two major effects of *Hudson*: (1) altering the balance in favor of defendants in motions practice by limiting the ability of plaintiffs to pursue voluntary dismissals and (2) failing to meet the most prevalent goal in *Hudson*, which was to promote judicial economy).

209. *See infra* Part V.A (illustrating this imbalance further by demonstrating how a plaintiff's ability to obtain and effectively refile a voluntarily dismissed claim depends on the mercy of the opposing defense attorney, a situation discussed and recommended by the *Hudson* court).

210. *See infra* Part V.A (addressing the role of judges in the granting of voluntary dismissals and how their decision making process in these circumstances must necessarily change in light of *Hudson*).

211. *See infra* Part V.B (providing ways in which the goal of *Hudson* in promoting judicial economy will not be reached on account of reactionary decisions by other courts as well as malpractice claims arising out of the misunderstandings of attorneys and judges regarding the effect of voluntary dismissals on a multi-claim suit).

212. *See Hudson*, 889 N.E.2d 210 (illustrating throughout that plaintiffs' right to refile voluntarily dismissed claims in a multi-claim suit where an involuntary dismissal has been entered in a previous claim is now predicate, in part, on the acquiescence of defense attorneys and the sympathy of the courts in viewing the facts so as to fit the situation within one of the six exceptions to the rule against claim splitting without strong consideration for an exception in the interest of fundamental fairness).

claim within the statutory time limit of one year.[213] By impeding the right to refile, plaintiffs are less likely to seek a voluntary dismissal.[214]

Specifically, plaintiffs' attorneys will now have to weigh the utility of pleading a speculative claim against the possible need to voluntarily dismiss and refile another claim.[215] This may result in the chilling of novel, speculative claims.[216] Following *Hudson*, Illinois plaintiffs will

213. *See* Jerold S. Solovy, et al., *Class Action Controversies, in* CURRENT PROBLEMS IN FEDERAL CIVIL TRIAL PRACTICE, 1994, at 530–31 (PLI Litig. & Admin. Prac., Course Handbook Series, No. H4-5183, 1994) (stating that a plaintiff need not provide a defendant with notice of a voluntary dismissal without prejudice so long as the defendant was not unduly prejudiced, and the plaintiff's purpose was refiling the dismissed claim (citing Shelton v. Pargo, Inc., 582 F.2d 1298, 1314 (4th Cir. 1978))). This consideration implies that as long as the plaintiff's intention in obtaining a voluntary dismissal is to refile the already existing claim again, the defendant ordinarily would not be prejudiced by such a refiling. *See* Case v. Galesburg Cottage Hosp., 880 N.E.2d 171, 178 (Ill. 2007) (holding that, even when the statute of limitations has run on the initial claim, it may be refiled without notifying the defendant because of the statutory provision allowing refiled voluntarily dismissed claims within one year under section 13-217). *But see* Jeffrey A. Parness, *Refiled Claims: It's Notice, Not Service*, 96 ILL. B.J. 152, 154 (asserting that defendants are often prejudiced when the statute of limitations has run on a claim and the refiling is still allowed because of section 13-217).

214. *See infra* Part V.A.1 (illustrating how *Hudson* will change the use and effect of voluntary dismissals beginning with the pleading stage and continuing through to trial).

215. Oftentimes, plaintiffs will include claims that will be dismissed in order to challenge the constitutionality of the law of that claim on appeal. *See* D. Alan Rudlin and Linsey W. Stravitz, *Novel Toxic Tort and Superfund Claims in* ENVIRONMENTAL AND TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1991 AND BEYOND, at 205 (PLI Comm. L. & Prac., Course Handbook Series No. A4-4342, 1991) (discussing how "novel theories of damages have been developed to remedy perceived shortcomings of the traditional tort system"). *See also e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 488 (1954) (reinvigorating the movement for racial equality in education with a speculative claim after *Plessy v. Ferguson*, 163 U.S. 537 (1896)); Lawrence v. Texas, 539 U.S. 558, 564 (2003) (following the decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the plaintiffs pursued a speculative claim seeking constitutional recognition of the right to privacy). While there is no direct indication that the plaintiffs in *Hudson* were attempting to challenge the law of civil immunity, the ruling in *Hudson* may smother pleading that has the potential of changing the legal status quo. *See Hudson*, 889 N.E.2d at 220 (implying that *Hudson* may limit speculative pleading).

216. *Hudson*, 889 N.E.2d at 220 ("[P]laintiffs who have both sound claims and speculative ones may have to weigh whether it is more important to take a chance with the speculative claim or to have a better chance of being able to maintain an absolute right to voluntarily dismiss and refile."). There is surely some confusion regarding the definition of "speculative" in the range from disallowed fraudulent claims to permissible novel claims. *See* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 138 (2002) (using "novel" as synonymous to "speculative" when discussing claims in "unsettled areas of law"). While there are "speculative claims" that are frivolous or, at the very least, bizarre, the mere fact that a claim is "speculative" does not mean that the claim is harassing the defendant or the judicial system. *Compare*, Brief and Argument of the Plaintiff-Appellee at 3–4, Charles v. Siegfried, 651 N.E.2d 154 (Ill. 1995) (No. 76617) (asserting a claim challenging the social host liability provision in the Dram Shop Act of Illinois, which does not allow a minor who dies from alcohol consumption at another minor's home to recover from the owner of the home where the deceased minor was served alcohol), *with* Christopher Burbach, *Heavens! Chambers' Suit*

be less likely to plead novel claims for fear that they will forfeit the protection afforded by a voluntary dismissal if their speculative claims are dismissed by a judge disinclined to challenge the status quo.[217]

As if restricting a statutory right alone was not enough, the *Hudson* court gave considerable power to defendants by highlighting its preference for defendants' acquiescence to a voluntary dismissal.[218] As the *Hudson* court noted, another of the exceptions to the rule against claim splitting allows a party to split its claims if the other party "acquiesces" to the split.[219] If a defendant refuses to allow the split, the plaintiff's attorney will know that "he proceeds at his peril."[220] Consequently, the plaintiff's ability to obtain a voluntary dismissal without prejudice must have the defendant's stamp of approval.[221]

Against God Tossed Out, Judge Says There's No Way to Serve Court Papers on the Almighty, OMAHA WORLD-HERALD, Oct. 15, 2008, at 01B (discussing a recent Nebraska case where a senator sued God).

217. *Hudson*, 889 N.E.2d at 220 (discussing this possible effect of *Rein* and *Hudson*). *See also* Ross B. Edwards, Hudson*: New Limits on a Plaintiff's Right to Refile a Voluntarily Dismissed Case*, 96 ILL. B.J. 294, 321 (2008) (discussing the subsequent caution of plaintiffs in pleading new claims on account of the *Hudson* ruling).

218. *Hudson*, 889 N.E.2d at 220 (discussing the role of defendants in the plaintiff's pursuit of a voluntary dismissal). While the court asserted that plaintiffs may ask defendants to acquiesce to a voluntary dismissal, defendants may also be faced with an ethical dilemma with plaintiffs who are unaware of the effect of seeking voluntary dismissal after an involuntary dismissal has been issued on another claim within their suit; this role is only important in cases of pro se plaintiffs. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(2) (2002) (discussing how an attorney is not allowed to take advantage of an unrepresented client and must suggest that the unrepresented person seek independent legal advice). *But see* Manicki v. Zeilman, 443 F.3d 922, 927 (7th Cir. 2006) (determining that the defendant had no duty to warn the plaintiff of the dangers of filing a subsequent suit and holding that the defendant's silence was not acquiescence in this instance because the refiling involved a purely procedural question of what issues must be raised, and when, in a federal lawsuit).

219. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a) (1982) ("The parties have agreed . . . that the plaintiff may split his claims, or the defendant has acquiesced therein."). The comments state that when a defendant "consents, in express words or otherwise," to the split, the defendant is not harassed or prejudiced by the split. *Id.* at § 26 cmt. a. Similarly, if the defendant fails to object to the split, then the defendant has acquiesced to the split. *Id.* Therefore, the argument by Justice Kilbride in the dissenting opinion of *Hudson* does appear to follow the intention of the drafters of the Restatement that an agreement by both parties, even if tacit, to allow the plaintiff to voluntarily dismiss one of their claims *without prejudice* would fall under this exception to the rule against claim splitting. *See Hudson*, 889 N.E.2d at 233 (Kilbride, J., dissenting) (presenting the argument in favor of the application of this exception); *see also* Imperial Constr. Mgmt. Corp. v. Laborers Int'l Union of N. Am. Local 96, 729 F. Supp. 1199, 1205-06 (N.D. Ill. 1990) (determining that the "acquiescence rule" applied in Illinois when a defendant does not file a timely objection); Disher v. Info. Res., Inc., 691 F. Supp. 75, 77 (N.D. Ill. 1988) (holding that, by not objecting to a voluntary dismissal with prejudice, the defendants acquiesced to the splitting and subsequent proceeding involving claims under the same transaction).

220. *Hudson*, 889 N.E.2d at 220.

221. *Id.* The majority only discusses the exception to the rule against claim splitting regarding

This newly crafted imbalance of power between litigants must be refereed by the courts, which poses problems for judges in two distinct ways.[222] First, a voluntary dismissal must, in general, be considered capable of refiling before the suit can be appealable because of the otherwise arguable pendency of voluntarily dismissed claims.[223] Therefore, given the strict ruling in *Hudson*, courts must now actively and accurately assess the effect of previous motions within a suit before granting an effective voluntary dismissal without prejudice.[224] Judges may also be required to refuse to grant voluntary dismissal without prejudice where the voluntary dismissal cannot be refiled.[225]

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the court's express permission of the split in a footnote at the beginning of their discussion, even though this exception is the most applicable to the *Hudson* case. *See id.* at 216 n.2. *See supra* Part IV.B.1 (asserting that this exception does readily apply to the facts presented in *Hudson*).

222. *See infra* note 226 and accompanying text (discussing the possible recourses to "expressly reserve" a claim for later adjudication to meet the exception to the rule against claim splitting).

223. Valdovinos v. Luna-Manalac Med. Ctr., Ltd., 718 N.E.2d 612, 619 (Ill. App. Ct. 1999) (finding that an order granting a plaintiff's motion for voluntary dismissal "must still be capable for enforcement before [it] can be deemed final for the purposes of appeal"). While Courts are not generally required to concern themselves with the impact of their decisions regarding a later res judicata bar because the effect of a final judgment can only be determined with certainty in subsequent proceedings, voluntary dismissals pose a special problem. *See* Wolff, *supra* note 45, at 720 ("[C]ourts regularly take it as a matter of course that the preclusive effect of a judgment is not a subject with which a rendering court should concern itself, but, rather is a feature of a judgment that can . . . only receive serious attention—in a subsequent proceeding."). While courts may not be able to predict the effect of their judgments, the necessity of a rendering court to comprehend the consequences of their ruling is paramount, especially when these consequences are not "outside the rendering forum's knowledge or control." *Id.* (discussing the problems inherent with the assumption that courts do not predict the effect of their rulings).

224. *See* Peregrine Fin. Group, Inc. v. Ambuehl, 722 N.E.2d 723, 725 (Ill. App. Ct. 1999) (determining that the first role of the circuit court is to address "the res judicata effect of the prior judgments"). One main concern is that the judge must consider all judgments in all preceding motions when dealing with a routine motion to voluntarily dismiss a claim without prejudice, especially if the suit has been transferred from another court or jurisdiction or when the prior judgment is unpublished. *See* Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 293 (2001) (discussing the difficulty of attempting to maintain consistency when examining the effect of prior judgments on a case presently before the court). This situation may lead to the practice of "offensive" res judicata. *See* Richard B. Kennelly, Jr., *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1403–04 (1994) ("[I]n the second proceeding, the judge may 'nullify' by declining to accord preclusive effect to a prior judgment if doing so seems unfair.").

225. While the existence of more "activist judges" is a point of much consternation, the necessity of judges taking more of a tutorial role may be required. *See* Diarmuid F. O'Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 MARQ. L REV. 895, 896 (2008) ("[I]t has become popular for Americans of all political persuasions to applaud the values of 'judicial restraint' while criticizing so-called 'activist judges.'"). In granting voluntary dismissals, judges will be forced to gauge the level of understanding that each party possesses in order to make an informed decision regarding the effect of a voluntary dismissal on the future of their case in light of *Hudson*, which will require a more managerial judicial system and will be particularly difficult in cases involving pro se

Second, as a result of *Hudson*, the language "without prejudice" does not automatically allow for the refiling of a voluntarily dismissed claim, even when the plaintiff follows all of the statutory requirements for obtaining and refiling a voluntary dismissal.[226] Therefore, rather than simply following the procedure for voluntary dismissal and refiling under section 13-217, judges now must expressly articulate their desire to preserve claims in order to prevent their later preclusion under res judicata.[227]

Thus, because *Hudson* will create an imbalance between plaintiffs and defendants, individual judges must actively intervene in order to maintain the integrity of their decisions regarding voluntary dismissals, which will lead to more time and money spent on motion practice in the future.[228]

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litigants. *See* Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 205–06 (2007) (discussing the differences between three types of courts: inquisitorial, adversarial, and managerial, concluding that American courts need to be more managerial in order to have more control of the proceedings). While greater judicial activism is a potential solution to this problem, the additional requirements on the courts to grant a voluntary dismissal could lead to the abolition of the absolute right to refile voluntarily dismissed claims and of obtaining voluntary dismissals in the first place. *See supra* notes 28–30 and accompanying text (discussing the absolute right to obtain a voluntary dismissal without prejudice under section 2-1009). However, managerial courts are problematic for efficiency. *See* Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1671 (1995) (discussing the docket burdens of a managerial court).

226. *See Hudson*, 889 N.E.2d at 216 n.2 (discussing how the language "without prejudice" is normally used by the court to reserve a claim for later adjudication but does not meet the exception under the Restatement (Second) of Judgments section 26(1)(b)). The ways in which courts "expressly reserve" a later right are varied and usually rest on common law understandings of practices and procedures. *See, e.g.*, Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1210 (2007) (discussing the "express reservation" of a property interest through a right of reverter). The common law understanding of the words "without prejudice" is to expressly reserve the claim. *See Absolute Dismissal*, *supra* note 200, at 738 ("At common law a plaintiff had an absolute right to dismiss his suit without prejudice" and refile at a later date.).

227. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982). While not addressed by this Article, there are numerous potential problems with changing the language to allow for the refiling of voluntarily dismissed claims: (1) the integrity of section 13-217 and (2) the general definition of the phrase "without prejudice," which is consistently used in court orders and legislation to denote an express reservation of rights. *See supra* Part IV.C (discussing the importance of section 13-217 and the language "without prejudice" as declared by the Illinois General Assembly and court precedent).

228. *See infra* Part V.B (discussing the correlation between these changes in the practice of law to the rise in time and money spent on motion practice, specifically voluntary dismissals, which are the most often used means of disposing of litigation).

B. Hudson *as a Goal-Oriented Decision*

While clearing the docket of frivolous claims to promote judicial economy was the *articulated* goal of the *Hudson* court, there is no real evidence that the court's ruling will achieve it.[229] To the contrary, there is an indication that judges will be required to spend *more* time and resources ascertaining how and when to grant voluntary dismissals.[230]

Already, the court has dealt with the inconsistent application of this issue in *Piagentini*.[231] Future courts may find exceptions in the *Hudson* ruling given the numerous points of disagreement between the majority and dissent.[232] Similarly, since the *Hudson* court never addressed the

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229. Hudson v. City of Chicago, 889 N.E.2d 210, 222 (Ill. 2008). Politics and social science have turned this goal into a veritable mission for cheaper and quicker litigation or, more simply, a "better machine." Williams, *supra* note 193, at 607. *See also* Maurice Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, *in* THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 29–59 (Harry W. Jones ed., 1965) (discussing the problem of crowded dockets and various solutions proposed and implemented in response). These goals would operate without judges "adopting efficiency as a goal" and instead focusing on substantial justice and fairness. Robert D. Cooter & Daniel L. Rubinfeld, *Trial Courts: An Economic Perspective*, 24 L. & SOC'Y REV 533, 544 (1990) (discussing other possibilities for promoting judicial economy other than through judges and their individual dockets).

230. *See supra* Part V.A (discussing the additional obligations of judges after *Hudson*, which will lead to greater time and resources allocated to deal with the new complications as a consequence of *Hudson*). The additional time required will be extraordinary given the amount of cases disposed by voluntary dismissal. *See* CASELOAD STATISTICS, *supra* note 195, at 52–54 (determining that about seventy-five percent of all cases in major cities are being disposed of by voluntary dismissal or settlement).

231. Piagentini v. Ford Motor Co., 852 N.E.2d 356, 361 (Ill. App. Ct. 2006) (distinguishing *Rein* on account of the differences in facts regarding attorney abuse, the decision to appeal and voluntarily dismiss concurrently, and the articulated policy concerns in *Rein*, which did not exist in *Piagentini*), *vacated*, 886 N.E.2d 1025 (Ill. 2008), *revised*, 2009 WL 113459 (Ill. App. Ct. Jan. 15, 2009.

232. *See* Hudson, 889 N.E.2d at 220–21 (responding to the plaintiffs but not mentioning the arguments posed by the dissenting opinion). One of these differing opinions is whether a refiled voluntarily dismissed claim is a new action. *See id.* at 214, 228 (Kilbride, J., dissenting) (discussing the differing analyses of the effect of a refiled voluntarily dismissed claim). When a plaintiff refiles his previously voluntarily dismissed claim under section 13-217, the refiling constitutes a "new action." *See* Moran v. Ortho Pharm. Corp., 907 F. Supp. 1228, 1229 (N.D. Ill. 1995) (determining that plaintiffs began a "new action" under the Illinois voluntary dismissal statute); Neuman v. Burstein, 595 N.E.2d 659, 662 (Ill. App. Ct. 1992) (determining that a refiled action was a "new action"). This rule also applies when a refiled voluntarily dismissed action is based on the same core of operative facts as a pending action in a different court. *See* Schrager v. Grossman, 752 N.E.2d 1, 6 (Ill. App. Ct. 2000) (holding that a state court action based on same core of operative facts as pending federal action was a "new action"). In both circumstances, while the refiled count is a "new action" under section 13-217, none of the cases discussed whether a new action under 13-217 is a continuation of the voluntarily dismissed count or whether the new action is a new case entirely for res judicata purposes. *See Hudson*, 889 N.E.2d at 227 ("This court has also been less than clear in determining whether a plaintiff's refiled complaint constitutes a new action or a continuation of a voluntarily dismissed action."). The dissenting opinion in *Hudson* discusses this issue at length and concludes that the refiled count is

fundamental fairness exception to the rule against claim splitting in its analysis, future courts may apply this exception without explicitly disregarding the ruling in *Hudson*.[233]

Further, considering the fact that the plaintiffs in *Hudson* are now suing their attorney, there may be an effect on attorney liability.[234] Attorneys' potential liability to their clients will now be a major concern, not only for failing to bring a cause of action that applied to a particular case, but for bringing a cause of action that was involuntarily dismissed, thus barring any possible recovery on a subsequently voluntarily dismissed claim.[235] Given these uncertainties created in the wake of *Hudson*, the volume of potential malpractice claims may pose a problem to judicial economy not addressed in the court's decision.[236]

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considered a continuation of the voluntarily dismissed action; therefore, it is not impermissible claim splitting under the doctrine of res judicata. *Id.* at 227–28.

233. *See Hudson*, 889 N.E.2d at 220 (discussing the six exceptions to the rule against claim splitting without mentioning this common law exception). *See also supra* Part IV.B.2 (detailing the exception to the rule against claim splitting on account of fundamental fairness and addressing how that exception applied to *Hudson*). This problem of fundamental fairness becomes especially difficult when dealing with unexpected life changes, as was the case in *Hudson*, and with pro se litigants who may not be aware of the consequences of their decision to pursue a voluntary dismissal without prejudice after *Hudson*. *See supra* note 225 and accompanying text (discussing the role of the courts in dealing with respective knowledge of parties, including pro se plaintiffs).

234. *Hudson*, 889 N.E.2d at 217 (inserting, in brackets, the cause of action from *Hudson* into the verbatim reasoning from *Rein*, stating that the court must "simply insert the case names and the types of counts from this new case into the above-quoted passage from *Rein*" (citing Rein v. David A. Noyes & Co., 665 N.E.2d 1199, 1205–06 (Ill. 1996))). While judges who grant ineffective voluntary dismissals probably will not face any personal repercussions (since judges have immunity from mistaken misapplication of precedent), this situation may change given the fact that so many cases are disposed of through voluntary dismissal specifically intended to be refiled at a later date. *See* David R. Cohen, *Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Immunity*, 41 CASE W. RES. L. REV. 267, 274–76 (1990) (discussing the changes to judicial immunity as well as the potential necessity of malpractice insurance).

235. *See Hudson* 889 N.E.2d at 219 n.4 (noting, in a footnote, defendant's request that the court take judicial notice of Case Number 04-L-008252, in which the plaintiffs from *Hudson* are attempting to sue their attorney for malpractice for failing to appeal the involuntary dismissal of their negligence count). This particular case is extremely worrisome, seeing as though one of the distinctions between *Rein* and *Hudson* was that the involuntarily dismissed claim in *Hudson* was never pursued beyond the dismissal and, therefore, the voluntary dismissal was not merely used as a tool to maintain two different causes of action in two different courts, which is clearly barred by the rule against claim splitting.

236. *See supra* Part V.A (discussing the imbalance between plaintiffs' attorneys, defense attorneys, and judges in motion practice regarding voluntary dismissals as well as the difficult situations that now face these three groups of lawyers when determining whether to take voluntary dismissals and how to apply the taking of a voluntary dismissal at later points in the litigation).

Thus, when considering the effect of its judgment, the *Hudson* court appeared unconcerned with the vast changes in motion practice and the general imbalance that the holding would invariably create.[237] Regardless of this oversight, *Hudson* will have a lasting impact on motion practice and, ultimately, will not meet the court's goal of promoting judicial economy.[238]

VI. CONCLUSION

While the goal of an efficient judicial system is important, it must be balanced against the rights of litigants and the courts' responsibility to ensure an accurate and fair civil justice system. When coupled with the Illinois General Assembly's intent to allow the refiling of voluntarily dismissed claims, the *Hudson* court's decision to bar plaintiffs from refiling these claims once an involuntary dismissal has been reached on any other claim within the suit is difficult to understand. Whether the court or the General Assembly attempts to rectify this imbalance, there will be a dramatic power shift for Illinois litigants at the motion stage that will affect how courts and attorneys handle the cases before them.

237. *See Hudson*, 889 N.E.2d at 220 (discussing the few implications of its decision, the court mentioned the potential for these negative effects but rejected them as compelling in light of promoting judicial economy).

238. While Illinois courts have already started using *Hudson* as a reason to promote judicial economy, the fact remains that *Hudson* will not reduce the rising number of claims filed. *See* Treadway v. Nations Credit Fin. Serv. Corp., 892 N.E.2d 534, 542 (Ill. App. Ct. 2008) (using *Hudson* to assert the application of res judicata to bar a complaint "in the interests of judicial economy"), *appeal denied*, 2008 Ill. LEXIS 1591 (Ill. 2008).