Loyola University Chicago Law Journal

Volume 23
Issue 3 *Spring 1992 Illinois Judicial Conference Symposium*
Article 6

1992

Cesena v. Du Page County: The Illinois Supreme Court's Exercise of Equitable Jurisdiction and Its Potential Impact on the Attorney-Client Privilege

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Notes

Cesena v. Du Page County: The Illinois Supreme Court's Exercise of Equitable Jurisdiction and Its Potential Impact on the Attorney-Client Privilege

I. INTRODUCTION

The foundation of our legal system exists in part on two competing principles: law and equity. History tells us that the legal and equitable powers of the law once existed independently of each other in two distinct court systems.[1] Courts required different procedures and pleadings depending on whether the remedy was sought in equity or at law. Today, the jurisdiction of most modern courts, state and federal, combines the equitable and legal powers of the courts into one system.[2] Where the system is fully merged, as in Illinois, the pleading and evidentiary requirements are the same. It is then within the judge's discretion to determine whether the remedy should be fashioned around equitable principles or whether it should be dictated by the common law.[3]

Common law and equity have distinct historic and symbolic importance. The common law as it exists today, and as it existed in England and the American Colonies prior to the American Revolution, consists of principles and ideals central to the protection and security of an individual's person and property.[4] Equity, on the other hand, historically served to foster justice and fairness.[5] In essence, an equitable remedy was available when the remedy dictated by the common law either was inappropriate or

1. *See infra* notes 13-28 and accompanying text.

2. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.6 (1973). The degree of merger of law and equity varies among the states. Like the federal court system, Illinois is one of the states that has merged law and equity into one court system. *See* ILL. REV. STAT. ch. 110, para. 2-601 (1989) (originally enacted as Civil Practice Act of 1933, 1933 ILL. LAWS 792, and amended by Civil Practice Act of 1955, 1955 ILL. LAWS 2252).

3. *See infra* notes 29-54 and accompanying text.

4. *See* BLACK'S LAW DICTIONARY 276 (6th ed. 1990) (defining "common law").

5. *Id.* at 540 (defining "equity"); *see* DOBBS, *supra* note 2, § 2.1.

inadequate.[6]

In modern courts where law and equity are merged, equitable jurisdiction typically is not limited to those instances when a legal remedy is inadequate. Instead, the adequacy of a legal remedy serves only as one consideration for the court when it determines whether it *ought* to exercise its equitable jurisdiction.[7] In this regard, judges are entrusted with a great sense of discretion to fashion the appropriate remedy. If this judicial discretion is without limitation, it may open the door to overreaching and abuse. The flexibility of equitable jurisdiction may result in the awarding of equitable remedies when adequate legal remedies exist and should be granted. Such a practice may undermine well-established common law principles.

In a recent Illinois Supreme Court decision, *Cesena v. Du Page County*,[8] the court exercised its equitable jurisdiction and virtually ignored the common law principle of the attorney-client privilege as pled by the litigants at both the trial and appellate levels. The supreme court, after hearing arguments centered specifically on the issue of waiver of the privilege, reversed and remanded the case.[9] The court's holding was in complete disregard of the lower courts' rulings that the defendant attorney was in contempt of court for failing to disclose his client's name.[10] The supreme court instructed the lower court to consider the application of equitable principles.[11] By doing so, the court ignored some facts, assumed others, potentially exceeded its jurisdictional powers, and left the status of the attorney-client privilege in Illinois uncertain.

This Note will trace the separation and subsequent merger of legal and equitable jurisdiction in both the federal and the Illinois court systems. It will discuss the Illinois Supreme Court's equitable jurisdiction and outline the constitutional, statutory, and common law limitations on that power. Thereafter, the Note will review the Illinois Supreme Court's decision in *Cesena* in light of the court's role regarding its equitable jurisdiction, statutory authority, and common law precedent. The Note then concludes

6. BLACK'S LAW DICTIONARY 541 (6th ed. 1990) (defining "equity jurisdiction"); *see* DOBBS, *supra* note 2, § 2.5.

7. DOBBS, *supra* note 2, § 2.6; *see also* Val H. Stieglitz, Note, *The "Inadequacy of Legal Remedy" Requirement for Equitable Relief: The Development of the Rule and Its Application in South Carolina*, 35 S.C. L. REV. 677, 685 (1984).

8. 582 N.E.2d 177 (Ill. 1991).

9. *Id.* at 182.

10. *Id.* at 180.

11. *Id.* at 182.

that when an equitable remedy is involved, the adage, "hard cases make bad law," may apply.[12]

II. BACKGROUND

A. The Merger of Law and Equity

The first period of English equity, when courts of law and courts of equity existed in one unified court system, lasted from approximately the thirteenth century to the mid-fourteenth century.[13] Cases were presented to the common law courts whether the remedy sought was based in law or equity.[14] Since there were no procedural or jurisdictional distinctions, the court would fashion a remedy in either law or equity, whichever the court deemed would "do justice." A court's goal was to foster the "fair administration of the law."[15]

Beginning in the late thirteenth century, the common law courts' broad remedial power began to dissipate with the hardening of the common law writ system.[16] By the late fourteenth and early fifteenth centuries, courts of equity and courts of law became two distinct entities.[17] The common law courts maintained stricter rules of pleading, proof, and evidence than the equity or chancery courts. While the typical remedy at law was a monetary award, in equity or chancery courts the remedy was dictated by the con-

12. *See* Patricia Loughlan, *No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies*, 17 MELB. U. L. REV. 132, 134 (1989).

13. *See* Stieglitz, Note, *supra* note 7, at 678-79. Common law courts, acting *in personam*, issued injunctions in the form of writs of prohibition. *Id.* at 679. The remedies issued were in accordance with the rights specified in the writs. *Id.* Typically, the writ would require the recipient to desist from certain proscribed activities or to perform certain acts. *Id.* As long as the court granted the writ, the court would make no distinction between an action in law or a suit in equity. *Id.* The Chancellor of England, a member of the King's council similar to our Secretary of State, issued the common law writs. *Id.* at 680. Since it was within the discretion of the Chancellor to issue new writs and grant new forms of relief, only the Chancellor's willingness to issue a writ controlled the extent to which the common law could redress a party. *Id.*

14. *Id.* at 678.

15. *Id.* at 679.

16. *Id.* The divorce between law and equity began in the mid-1300s with the growing rigidity of the common law writ system. *Id.* at 680. As early as 1258, statutes were enacted that required the Chancellor to seek the consent of the King and his entire council before issuing a writ. *Id.* The restrictions placed on the Chancellor's power to freely issue writs converted the old common law system into a rigid, unresponsive, and inflexible system, abolishing any notion of discretion. *Id.* at 681; *see also* John A. Krause et al., *Equitable and Extraordinary Remedies Seminar*, ILLINOIS JUDICIAL CONFERENCE REGIONAL SEMINAR 1 (1981).

17. Stieglitz, Note, *supra* note 7, at 679; *see* DOBBS, *supra* note 2, § 2.1.

science of the Chancellor.[18] Therefore, the relief the chancery court granted addressed the moral conscience of the law and fostered fairness, justice, and flexibility, unlike the remedies dictated by the common law.[19]

With the growing independence of the common law and equity courts, a need arose to distinguish the jurisdictional limits of each court. Generally, cases requiring an equitable remedy fell into two categories: those in which equity served as the basis of the substantive law, such as the law of trusts or mortgages; and those in which the applicable common law remedy either was oppressive or inadequate.[20]

It was not until the mid-nineteenth century that a reform movement swept through the English court system.[21] The Judicature Acts of 1873 and 1875 simplified procedures and practices in English law and subsequently abolished the distinctions between law and equity.[22]

1. The History of Courts in the Early United States

The American colonial courts infrequently utilized their equitable jurisdiction.[23] However, when the states enacted modern procedural statutes and law and equity were merged, the courts revitalized their equitable jurisdiction.[24] States enacted one of two common schemes.[25] Some states followed the federal system combining all civil actions into one "form of action," abolishing any distinctions between law and equity.[26] The other states, including Illinois, followed the English scheme, maintaining the distinction between actions in law and suits in equity and retaining separate courts for each action.[27] The latter states, however, administer the courts of law and equity in one court system governed by the same

18. Stieglitz, Note, *supra* note 7, at 681.

19. DOBBS, *supra* note 2, § 2.1.

20. *Id.*; *see* Stieglitz, Note, *supra* note 7, at 677-78.

21. *See* George P. Smith, II & Walter W. Nixon, III, *La Dolce Vita—Law and Equity Merged at Last!*, 24 ARK. L. REV. 162, 164 (1970).

22. *Id.*

23. *See* Krause et al., *supra* note 16, at 1.

24. *Id.*

25. *See id.*; *see also* RICHARD A. MICHAEL, ILLINOIS PRACTICE, CIVIL PROCEDURE BEFORE TRIAL § 22.7 (1989) (discussing the merger of law and equity in the federal and state courts, specifically in Illinois).

26. *See* FED. R. CIV. P. 1, 2; *see also* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 67 (1983) (discussing the merger of law and equity in the federal courts).

27. *See* ILL. REV. STAT. ch. 110, para. 2-601 (1989); *see also* GEORGE FIEDLER, THE ILLINOIS COURTS IN THREE CENTURIES 238-41 (1973) (discussing the history and structure of Illinois courts).

procedural code.[28]

2. The Equitable and Legal Powers of Illinois Courts

Illinois statutorily abolished the distinction between law and equity in the Illinois Civil Practice Act of 1933, which was later amended by the Civil Practice Act of 1955.[29] It was not until January 1, 1964 that Illinois formally eliminated this distinction, when the state legislature amended the 1870 Constitution by adopting an entirely new Judicial Article, Article VI. This new article requires only that a matter be justiciable in order to be within a circuit court's jurisdiction.[30] Since both actions at law and suits in equity involve "justiciable" matters, a showing of either the presence or absence of an adequate legal remedy is no longer required.[31] As a result, the Illinois courts are free to fashion whatever remedy they deem appropriate, either at law or in equity.

Unlike its description of the circuit court's jurisdiction, the amended Judicial Article did not explicitly define the Illinois Supreme Court's jurisdiction. Prior to the adoption of Section 5 of the new article,[32] the supreme court's review of appellate court decisions was limited by statute.[33] These restrictions were based on a

28. *See* MICHAEL, *supra* note 25, § 22.7.

29. *See supra* note 2. The Civil Practice Act provides in relevant part:

> [T]here shall be no distinctions respecting the manner of pleading between actions at law and suits in equity.

Civil Practice Act of 1933, 1933 ILL. LAWS 792, *amended by* Civil Practice Act of 1955, 1955 ILL. LAWS 2252; *see also* FIEDLER, *supra* note 27, at 247-48.

30. Harry G. Fins, *Re-examination of "Jurisdiction" in Light of the New Illinois Judicial Article*, 53 ILL. B.J. 8, 9-10 (1964). Prior to 1964 and the adoption of the new Judicial Article to the 1870 Illinois Constitution, the circuit courts of Illinois possessed three sources of jurisdiction: legal, equitable, and statutory. *Id.* Circuit courts had either a judge at law or a chancellor in equity. *Id.* Litigants who filed a complaint in an equity court were required to allege the non-existence of an adequate remedy at law before an equitable remedy would be awarded. *Id.* at 11.

31. *Id.* at 11-12.

32. Section 5 of the amended Judicial Article provided, in part: "Subject to rules, appeals from the Appellate Court to the Supreme Court in all other cases shall be by leave of the Supreme Court." ILL. CONST. of 1870, art. VI, § 5 (amended 1964).

33. Fins, *supra* note 30, at 15. Also instructive is the Civil Practice Act of 1933, ILL. REV. STAT. ch. 110, para. 89 (1963) (*repealed by* 1967 ILL. LAWS 3654 in order to conform with the amended Article IV), which provided, in relevant part:

> [A]ny final determination of any cause or proceeding tried without a jury, *except as to equitable issues*, is made by the Appellate Court, as the result wholly or in part of a finding of the facts, concerning the matter in controversy . . . ."

Id. (emphasis added). Another interesting provision is subsection 92(3)(b) of the Civil Practice Act of 1933, ILL. REV. STAT. ch. 110, para. 92(3)(b) (1963) (*repealed by* 1967 ILL. LAWS 3654), which was repealed in order to conform to the amended Judicial Article, and provided:

> Error of fact, in that the judgment, decree or order appealed from is not sus-

distinction between equitable and non-equitable issues.

After the adoption of Section 5, however, the supreme court's jurisdiction covered both equitable and non-equitable review. The amendment granted the supreme court unlimited authority to handle appeals from the appellate court by giving the supreme court the power to grant an appeal upon application by a party.[34] When Illinois ratified a new Constitution in 1970, a refined version of Section 5 was included.[35]

3. The Legacy of the "Inadequacy of Legal Remedy" Rule After the Merger of Law and Equity

As a result of the merger of law and equity, the "inadequacy of legal remedy" rule no longer serves to define a court's jurisdiction.[36] Instead, the inadequacy rule now serves as a remedial consideration to aid in the determination of whether the court *ought* to exercise its extraordinary equitable jurisdiction.[37]

B. Equitable Jurisdiction of the Illinois Supreme Court

The Illinois Supreme Court's equitable jurisdiction must be defined in light of the broad jurisdictional grant in the Constitution. Well-established equity maxims, such as "equity considers that as done which ought to be done," supply authority for the supreme court's exercise of equitable jurisdiction in Illinois.[38]

Consistent with the broad grant of equitable jurisdiction, the supreme court is not limited in the remedy it can award. Equitable principles dictate that courts should not be "bound by formulas or

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tained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided that, *except as to equitable issues*, the Supreme Court shall reexamine cases brought to it by appeal from the Appellate Courts, as to questions of law only.

Id. (emphasis added).

34. ILL. CONST. of 1870, art. VI, § 5 (amended 1964) (permitting appeals "by leave of the Supreme Court" without any limiting reference to legal or equitable matters); *see supra* note 32 (setting out the relevant text of § 5).

35. ILL. CONST. art. VI, § 4. Article VI, § 4 provides in pertinent part:

The Supreme Court may provide by rule for appeals from the Appellate Court in other cases.

ILL. CONST. art VI, § 4. For a summary of Art. VI, § 4, *see infra* note 44. *See generally* DAVID F. ROLEWICK, A SHORT HISTORY OF THE ILLINOIS JUDICIAL SYSTEMS 29 (Rev. ed. 1971).

36. Stieglitz, Note, *supra* note 7, at 684-89.

37. *Id.* at 686-87; *see* DOBBS, *supra* note 2, § 2.5; Loughlan, *supra* note 12, at 134-35 ("[J]udges in equity view their obligation as one of 'selecting the decision that is best on the whole, all things considered.' " (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 71 (1977))).

38. *See, e.g.*, Ward v. Sampson, 70 N.E.2d 324, 331 (Ill. 1946).

restrained by any limitation that tend to trammel the free and just exercise of discretion."[39] Accordingly, a court may fashion a remedy to meet the demands of justice.[40] For example, in Illinois, a prayer for general relief is an appeal to the court to evaluate the allegations and proof and then to grant such relief as the equities of the case require.[41] In essence, the court has the power to enter whatever final judgment the record demonstrates should have been entered by the lower court.[42] Such power, however, should not be considered limitless.

When the court has assumed jurisdiction for the purpose of granting equitable relief, it may determine all the issues presented by the case, whether legal or equitable.[43] There are, however, constitutional, statutory, and common law limitations that may preclude a court from deciding any or all of the issues of a particular case, even on equitable grounds.

1. Implicit Constitutional and Common Law Limitations

Although the Illinois Constitution does not explicitly limit the supreme court's jurisdiction to cases and controversies,[44] Illinois courts are prohibited from rendering advisory opinions or conducting proceedings with insufficient legal standing.[45] Jurisdiction is restricted to cases that present an actual controversy; the court

39. Cesena v. Du Page County, 582 N.E.2d 177, 180 (Ill. 1991); City of Aurora v. YMCA, 137 N.E.2d 347, 353 (Ill. 1956); County of Du Page v. Henderson, 83 N.E.2d 720, 728 (Ill. 1949).

40. *See, e.g.*, Hoyne Savings & Loan Ass'n v. Hare, 322 N.E.2d 833, 836 (Ill. 1974); Pope v. Speiser, 130 N.E.2d 507, 513 (Ill. 1955).

41. ILL. REV. STAT. ch. 110, para. 2-604 (1989). Section 2-604 provides in pertinent part:

> [T]he prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise.

Id.; *see* ILL. REV. STAT. ch. 110A, para. 366 (1989) (setting forth the powers of Illinois reviewing courts).

42. *See, e.g.*, *City of Aurora*, 137 N.E.2d at 353.

43. *See, e.g.*, McLeod v. Lambdin, 174 N.E.2d 869, 872 (Ill. 1961).

44. Article IV, § 4 does not explicitly state that the jurisdiction of the Illinois Supreme Court is limited to cases and controversies. Section 4(a) grants the court original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus; § 4(b) grants appellate jurisdiction from circuit court decisions imposing sentence of death; and § 4(c) grants appellate jurisdiction for decisions of the appellate courts if a question under the Constitution of the United States or of Illinois arises for the first time in appellate courts or if the appellate court certifies a case because the question involved is of great importance. The supreme court may also provide by rule for appeals from the appellate court in other cases. ILL. CONST. art. VI, § 4.

45. *See* People *ex rel.* Partee v. Murphy, 550 N.E.2d 998, 1001 (Ill. 1990); *see also* People *ex rel.* Black v. Dukes, 449 N.E.2d 856, 857 (Ill. 1983) (explaining that Illinois

may not issue an advisory opinion on moot or abstract questions of law.[46] An advisory opinion results if the court resolves a question of law that is not presented by the facts of the case.[47]

2. Statutory Limitations on Equitable Jurisdiction

Statutory enactments place further restrictions on Illinois courts. For example, a court has the authority to issue a declaratory judgment only in particular situations.[48] The Illinois Declaratory Judgment Act[49] permits declaratory relief only in justiciable cases and only when an actual controversy exists.[50] Illinois courts have defined "actual controversy" as requiring " 'a showing that the underlying facts and issues of the case are not moot or premature.' "[51] Absent such proof, the court would be passing judgment on abstract propositions of law, rendering advisory opinions, and giving legal advice as to future events—actions going beyond the scope of jurisdiction granted under the Illinois Constitution.[52] Thus, there must be "a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof."[53] The ultimate grant or denial of declaratory relief, however, falls within the discretion of the court.[54]

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courts should not decide cases when the judgments rendered would be ineffectual for lack of subject matter and would have advisory effect only).

46. *Murphy*, 550 N.E.2d at 1001; *see Dukes*, 449 N.E.2d at 857; *In re* Marriage of Wright, 434 N.E.2d 293, 293 (Ill. 1982); Underground Contractors Ass'n v. City of Chicago, 362 N.E.2d 298, 300 (Ill. 1977).

A case is considered moot when it does not present or involve an actual controversy, interest, or right of a party or parties, or when issues cease to exist. People v. Boclair, 519 N.E.2d 437, 439 (Ill. 1987); People v. Redlich, 83 N.E.2d 736, 741 (Ill. 1949).

47. *Murphy*, 550 N.E.2d at 1001; *see* Slack v. City of Salem, 201 N.E.2d 1309 (Ill. 1964).

48. ILL. REV. STAT. ch. 110, para. 2-701 (1989); *see, e.g.*, Township High School Dist. 203 v. Village of Northfield, 540 N.E.2d 365 (Ill. 1989) (dismissing a declaratory judgment because the plaintiff's interests would be adversely affected only if some future possibility did or did not occur).

49. ILL. REV. STAT. ch. 110, para. 2-701 (1989).

50. *Id.*

51. Howlett v. Scott, 370 N.E.2d 1036, 1038 (Ill. 1977) (quoting Underground Contractors Ass'n v. City of Chicago, 362 N.E.2d 298, 300 (Ill. 1977)).

52. *Underground Contractors Ass'n*, 362 N.E.2d at 300; *see supra* notes 44-47 and accompanying text.

53. *Underground Contractors Ass'n*, 362 N.E.2d at 300.

54. *Howlett*, 370 N.E.2d at 1038-39.

III. *CESENA V. DU PAGE COUNTY*[55]

The attorney-client privilege, an age-old common law doctrine, is firmly imbedded in our legal system.[56] With its underlying purpose of encouraging the free and open communication between the client and the attorney, the privilege is critical to the furtherance of a litigant's rights.[57] The practical effect of the privilege may be threatened by the limitless exercise of judicial equitable discretion. This is what the Illinois Supreme Court did in *Cesena v. Du Page County*.

A. The Facts of Cesena

On September 28, 1987, "John Doe," while driving an automobile on an interstate highway, struck and killed a pedestrian, Timothy Golden, without stopping at the scene of the accident.[58] Approximately one hour and forty-five minutes after the accident, John Doe met his attorney, Jeffrey Fawell, at Fawell's office.[59] Fawell explained to his client that failure to stop at the scene of the accident constituted a misdemeanor under Chapter 11 of The Illinois Vehicle Code ("Hit and Run Statute" or "Statute").[60] Furthermore, under the Statute's reporting provision, John Doe had only 3 hours from the time of the accident to file an accident report to avoid being subject to criminal felony charges.[61]

Shortly after the accident, Fawell and Doe went to the Du Page County Sheriff's Office to file an accident report pursuant to section 11-401(b) of the Statute.[62] Since the accident occurred on an interstate highway, the Sheriff's deputy informed Fawell that the

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55. 582 N.E.2d 177 (Ill. 1991).

56. *See* 8 JOHN H. WIGMORE, EVIDENCE § 2291 (McNaughton rev. ed. 1961).

57. *Id.*; *see* Dickerson v. Dickerson, 153 N.E. 740, 743 (Ill. 1926); People *ex rel.* Hofp v. Barger, 332 N.E.2d 649, 658 (Ill. App. Ct. 2d Dist. 1975).

58. Cesena v. Du Page County, 582 N.E.2d 177, 179 (Ill. 1991).

59. *Id.*

60. *Id.* (citing ILL. REV. STAT. ch. 95 1/2, para. 11-401(b) (1989)). Illinois's Hit and Run Statute provides in pertinent part:

> Any person who has failed to stop or comply with [the hit and run statute] *shall within 3 hours after such motor vehicle accident*, . . . report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station or sheriff's office near the place where such accident occurred. No report made as required under this paragraph shall be used, directly or indirectly, as a basis for the prosecution of any violation of [this statute].

ILL. REV. STAT. ch. 95 1/2, para. 11-401(b) (1989) (emphasis added).

61. *Cesena*, 582 N.E.2d at 179.

62. *Id.*

report must be filed with the Illinois State Police Department.[63] In the interest of time, Fawell attempted to convince the deputy to accept the report, but was unsuccessful.[64] The deputy then erroneously informed Fawell that time was not a pressing issue, telling Fawell that Doe had forty-eight hours to file the accident report with the Illinois State Police.[65] Fawell and Doe left the Du Page County Sheriff's Office without either filing the report or revealing John Doe's true identity.[66]

Back at his office, Fawell called the Illinois State Police to inform them, for "humanitarian reasons," of the location and time of the accident.[67] Fawell, however, never disclosed the identity of his client.[68] Soon after, Fawell received several telephone calls: one from the Illinois State Police and two from Du Page County Assistant State's Attorneys, all requesting disclosure of his client's identity.[69] Fawell refused to comply with these requests, asserting that his client made a timely accident report in full compliance with the reporting provisions of the Statute.[70] If Fawell disclosed John Doe's identity at that time, his client would have been subject to felony charges due to the failure to file a timely accident report.[71]

The Du Page County State's Attorney commenced a grand jury investigation and issued a subpoena compelling Fawell to reveal details of the accident, to reveal the identity of his client, and to submit the written statement that he had attempted to file at the sheriff's office.[72] Fawell filed a motion to quash the subpoena, asserting that the communications between him and his client fell within the attorney-client privilege.[73] The trial court granted his motion.[74]

On September 28, 1988, the plaintiff, the administrator of Timothy Golden's estate, filed a suit against Du Page County and the Sheriff and Deputy Sheriff of Du Page County alleging negligence in failing to accept John Doe's accident report.[75] The failure

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 182.
72. *Id.* at 179-80.
73. *Id.* at 180.
74. *Id.*
75. *Id.*

to file the accident report left Doe's identity unknown, thus denying the estate of Timothy Golden the ability to pursue its legal rights.[76] During a discovery deposition taken in connection with this litigation, Fawell continued to refuse to answer questions relating to his client's identity and the accident report, consistently asserting the attorney-client privilege.[77]

On August 28, 1989, after the plaintiff filed motions to compel, the trial court ordered Fawell to respond to the deposition questions.[78] The next day, after Fawell refused and the court denied his motion to reconsider, the court found him in contempt, incarcerated him, and fined him $1,000 per day until he responded to the questions.[79]

B. The Appellate Court Decision

The Second District Illinois Appellate Court decision focused on the attorney-client privilege and its applicability to the facts of the case.[80] The appellate court held that an attorney-client privilege existed between Fawell and his client.[81] The court, however, acknowledged that this privilege was not absolute.[82]

After a thorough analysis of the exceptions to the attorney-client privilege,[83] the appellate court held that John Doe's identity was protected by the privilege because if his identity were disclosed, he would suffer undue prejudice.[84] However, this conclusion did not end the appellate court's analysis. The issue of waiver of the attorney-client privilege became the factor determinative of Fawell's fate.[85]

The waiver issue focused on whether, by attempting to file a re-

76. *Id.*
77. *Id.*
78. *Id.*
79. Cesena v. Du Page County, 558 N.E.2d 1378, 1382 (Ill. App. Ct. 2d Dist. 1990). Fawell was later released on his own recognizance, but the appellate court affirmed the trial court's contempt finding. *Id.* at 1390. The appellate court, however, did reduce the fine to $100 per day. *Id.*
80. *Id.* at 1338.
81. *Id.*
82. *Id.* The court proposed that the client's expectation that the communications would remain confidential must be balanced with the public's interest in the disclosure of the evidence. *Id.* The court also recognized that a client's identity generally is not protected by the attorney-client privilege unless the protection of the client's identity is in the public interest or if the disclosure of the client's identity will prejudice the client in "some substantial way." *Id.* at 1384.
83. *Id.* at 1383-84.
84. *Id.* at 1384.
85. *Id.* at 1385.

port pursuant to the Statute,[86] John Doe intended to waive his attorney-client privilege by disclosing his identity to a third party, the Du Page County Deputy Sheriff.[87] Fawell, however, maintained that because the Statute compelled John Doe to disclose his identity in order to avoid criminal prosecution, the disclosure was involuntary and, therefore, did not constitute a waiver of the privilege.[88] The appellate court rejected this argument and held that John Doe did not intend, at least on the night in question, to keep his name confidential.[89]

C. *The Illinois Supreme Court Decision*

The Illinois Supreme Court granted Fawell's petition for leave to appeal.[90] The court reversed and remanded the case with instructions, setting aside both the trial court's and the appellate court's orders finding Fawell in contempt and imposing fines.[91]

The supreme court's decision rested on the injustice that would result to both John Doe and the plaintiff-estate if the case were resolved according to the lower courts' rationale.[92] If Fawell were required to reveal John Doe's identity due to a waiver of the attorney-client privilege as held by the appellate court, then John Doe would be subject to felony charges for failing to file a timely accident report.[93] If Fawell did not disclose his client's identity, the plaintiff-estate would be unable to exercise its legal right to maintain a civil action against John Doe.[94] Therefore, the supreme court held that the equities of the case required the exercise of its equitable jurisdiction.[95] The court intended to place all parties in the positions they would have occupied had the Sheriff's Deputy accepted the accident report.[96] In essence, Doe would be subject only to misdemeanor charges rather than criminal felony charges,

86. *See supra* notes 58-66 and accompanying text.

87. *Cesena*, 558 N.E.2d at 1385.

88. *Id.* at 1386.

89. *Id.* at 1387. The court's discussion then focused on whether, in consideration of the *Code of Professional Responsibility*, it would have been ethical for Fawell to reveal the identity of his client. *Id.* The appellate court ultimately affirmed the Du Page County Circuit Court's contempt ruling and ordered Fawell to answer the deposition questions. *Id.* at 1390.

90. Cesena v. Du Page County, 564 N.E.2d 835 (Ill. Dec. 4, 1990) (Table).

91. Cesena v. Du Page County, 582 N.E.2d 177, 182 (Ill. 1991).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*; *see supra* notes 38-54 and accompanying text (discussing the Illinois Supreme Court's equitable jurisdiction).

96. *Cesena*, 582 N.E.2d at 182. The court has long held that equity has jurisdiction

and the plaintiff-estate would be informed of Doe's identity, thus allowing any civil claims resulting from Timothy Golden's death to proceed.

In reaching its decision, the Illinois Supreme Court considered two of the three jurisdictional sources of a court. First, the court justified its holding in light of its broad remedial power to fashion a remedy in equity. Second, it justified its decision in light of the statutory scheme and legislative history of the Illinois Vehicle Code, specifically the Hit and Run Statute.[97] The court, however, failed to consider the application and importance of the third source of jurisdiction, the common law, and, more specifically, the effect of its decision on the common law doctrine of the attorney-client privilege.

IV. ANALYSIS

Maxims of equity serve to define a court's equitable jurisdiction, jurisdiction that is characterized historically as a source of fairness and flexibility.[98] However, being theoretical and postulative, these maxims empower a court with limitless discretion. If the parameters of a court's equitable remedial powers remain limitless, there is the potential for a court to misuse its equitable jurisdiction under the guise of justice.

A. Does Equity Sanction a New Role For the Courts?

1. The Court as "Creator of Facts"

In keeping with the equitable maxim, "equity considers that as done that ought to be done,"[99] it seems that a court is licensed to do whatever is necessary to achieve a remedy that imparts "full and complete justice among all parties."[100] Axiomatically, equity tolerates a court's alteration of facts in the name of justice. This assessment should be considered in light of the common under-

to correct the mistake of a county ministerial officer. *See, e.g.*, Thornton, Ltd. v. Rosewell, 381 N.E.2d 249, 253 (Ill. 1978); Foster v. Clark, 79 Ill. 225, 227 (1875).

97. *Cesena*, 582 N.E.2d at 180-81 (citing ILL. REV. STAT. ch. 95 1/2, paras. 11-401, 11-403 (1989)). The legislative intent underlying the statute was to encourage a driver involved in a hit and run accident, to come forward and report the accident to the authorities. *Id.* at 181. To encourage this, the statute offers a trade-off: information on the accident within a certain period of time in exchange for a misdemeanor charge rather than a criminal felony charge. *Id.*

98. *See supra* notes 13-54 and accompanying text (discussing the historical context and significance of equitable jurisdiction).

99. *See, e.g.*, Ward v. Sampson, 70 N.E.2d 324, 331 (Ill. 1946).

100. *See, e.g.*, Alter v. Moellenkamp, 179 N.E.2d 4 (Ill. 1961).

standing that a court's function is to apply the law to a controversy or set of controversies brought before it to further the administration of justice.[101]

In *Cesena*, the issue was whether an attorney was obligated to disclose the name of his client despite assertion of the attorney-client privilege.[102] The court determined that the equities of the case did not require an interpretation of the extent of the attorney-client privilege, but rather, required a reassessment of the "real" issue: whether the Sheriff's deputy should have accepted the accident report that Fawell and John Doe attempted to file.[103] Essentially relying on its equitable jurisdiction to correct the mistake of a county ministerial officer, the court assumed, for purposes of fairness, that the deputy accepted the accident report.[104] Justice Bilandic, who wrote the opinion in *Cesena*, expressly justified the decision on the court's statutory authorization to shape a remedy that meets the demands of justice in all cases.[105]

Arguably, the decision promoted justice between the parties in this particular set of circumstances. At the same time, however, it sanctioned a new role for the Illinois Supreme Court, as "creator of facts." The court assumed that the accident report had been appropriately filed. By doing so, the court created a situation that never existed. Encouragement of such a role as "creator of facts," merely to accommodate a remedy, could jeopardize the whole notion of precedent and consistency in the law.

2. The Court as Legislature

Under the Illinois Constitution, the legislature is empowered to draft legislation with the goal of fostering or furthering a specific public policy.[106] The courts have authority to interpret those statutes, not to rewrite them.[107] In *Cesena*, the court's equitable resolution rested on the assumption that John Doe filed the accident report within the three hour time limitation set by the Statute. The Statute's language explicitly states that a person involved in a hit and run accident "*shall*, within 3 hours after such motor vehicle

101. *See* BLACK'S LAW DICTIONARY 352 (6th ed. 1990) (defining "court").
102. Cesena v. Du Page County, 582 N.E.2d 177, 180 (Ill. 1991).
103. *See supra* text accompanying notes 95-96.
104. *See supra* note 96 and accompanying text.
105. *Cesena*, 582 N.E.2d at 180.
106. ILL. CONST. art. IV; *see also* People *ex rel* Tuohy v. Chicago Transit Auth., 64 N.E.2d 4, 9 (Ill. 1946).
107. *See* ILL. CONST. art. VI; Droste v. Kerner, 217 N.E.2d 73, 79, (Ill. 1966), *appeal dismissed and cert. denied*, 385 U.S. 456 (1967); Fergus v. Marks, 152 N.E. 557, 559 (Ill. 1926); Parizon v. Granite City Steel Co., 218 N.E.2d 27, 36 (Ill. App. Ct. 5th Dist. 1966).

accident, . . . report."[108] This language requires an *actual* filing of an accident report; nowhere does it allow a hypothetical filing of a report to be considered in compliance with the statute's provisions.

It is not the role of the courts to add language or flexibility to a statute. If the legislature had intended to allow such flexibility, it would have indicated this in the Statute's language. Accordingly, the supreme court's remedial powers grounded in equity should not be utilized to expand the legislative grant when expansion was not intended. If they are so utilized, statutory authority is not only undermined, but superfluous.

B. The Requirement of an "Actual Controversy" May Preclude Fashioning a Remedy in Equity

Generally, it is not within a court's jurisdiction to issue advisory opinions.[109] Accordingly, a court is restricted to the resolution of the issues presented by the facts that are in "actual controversy."[110] Issues that are moot or that have not been presented to the court cannot be decided by the court.[111] Similarly, a judgment based on hypothetical facts or situations results in an advisory opinion.[112] Thus, equity cannot justify an advisory opinion when it would otherwise be prohibited.

The Illinois Supreme Court in *Cesena* did not decide the actual controversy presented. The issue before the court concerned the appellate court's ruling on the attorney-client privilege, particularly the issue of waiver of the privilege, as it applied to the facts of the case. Instead of resolving this issue, the court chose other facts remotely related to the immediate controversy.[113] Given the posture of the case, however, such facts were moot.[114] Therefore, the court essentially issued an advisory opinion on facts that were

108. *See supra* note 60 (giving relevant text of the reporting provision of the Illinois Hit and Run Statute, ILL. REV. STAT. ch 110, para. 11-401(b) (1989)).

109. *See, e.g.*, People *ex. rel.* Partee v. Murphy, 550 N.E.2d 998, 1001 (Ill. 1990); *supra* notes 44-54 and accompanying text.

110. *Murphy*, 550 N.E.2d at 1001; *see also supra* notes 50-54 and accompanying text.

111. *See supra* notes 44-54 and accompanying text.

112. *Murphy*, 550 N.E.2d at 1001; *see* Slack v. City of Salem, 201 N.E.2d 119, 121 (Ill. 1964).

113. Cesena v. Du Page County, 582 N.E.2d 177, 180 (Ill. 1991). Instead of focusing on the issue of the attorney-client privilege as pled by the litigants, the court chose to consider the issue of whether or not the accident report was filed appropriately and timely. *Id.*

114. The issue of whether the deputy made an error at the county level should have been considered moot for purposes of determining whether Fawell was correct in asserting the attorney-client privilege in order to avoid revealing the identity of his client.

characteristically hypothetical.[115] Interpreting equity to enable a court to alter facts allows the court to exceed its statutorily authorized power, thus rendering Illinois' declaratory judgment statute[116] meaningless.

C. Equity May Undermine the Common Law

The attorney-client privilege is one of the oldest privileges of confidential communication known at common law.[117] The purpose of the privilege is to encourage free and open consultation and communication between client and attorney without fear of compelled disclosure of the information.[118] In this regard, the privilege is essential to the proper and effective functioning of the adversary system.[119] While it is not an absolute privilege even when it applies,[120] the attorney-client privilege is a doctrine firmly imbedded in our common law and cannot be disregarded merely at the discretion of the court.

In *Cesena*, the court chose to ignore the issue of whether the communication between attorney and client, specifically the client's identity, should remain confidential. The appellate court's holding on the issues of whether the privilege existed and whether the client waived this privilege appeared inconsequential to the supreme court's determination. As a result, the court deemed the attorney-client privilege a secondary consideration.

Cesena directly undermines the attorney-client privilege under the guise of justice. It is unclear how this decision fosters justice

115. For purposes of equity, the court assumed that the Du Page County Sheriff's deputy accepted John Doe's accident report. However, as evident from the facts of the incidents occurring on the night in question, this was not the case. *Cesena*, 582 N.E.2d at 182.

116. ILL. REV. STAT. ch. 110, para. 2-701 (1989); *see supra* notes 48-54 and accompanying text.

117. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see* 8 WIGMORE, *supra* note 56, § 2290; Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1071 (1978).

118. People v. Adam, 280 N.E.2d 205 (Ill.), *cert. denied*, 409 U.S. 948 (1972); Knief v. Sotos, 537 N.E.2d 832 (Ill. App. Ct. 2d Dist. 1989).

119. United States v. Zolin, 491 U.S. 554, 562 (1989) (A "central concern [of the attorney-client privilege is] 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' " (quoting *Upjohn*, 449 U.S. at 389)).

120. The attorney-client privilege is not absolute. The appropriateness of its application in a given situation must be determined by weighing the interest in free and open communication between attorney and client without fear of compelled disclosure against the public's interest in obtaining evidence. Taylor v. Taylor, 359 N.E.2d 820, 821 (Ill. App. Ct. 5th Dist. 1977); *see also* People v. Adam, 280 N.E.2d. 205, 207 (Ill. 1972) (providing the definition, requirements for, and exceptions to the attorney-client privilege).

when it subverts one of the client's most critical and basic rights. The fair and effective functioning of a just legal system rests on the ability of clients and attorneys to communicate freely and openly.[121] In this regard, how can a court be justified in disregarding and minimizing the importance, essence, and foundation of the common law?

V. IMPACT

The Illinois Supreme Court's decision in *Cesena v. Du Page County* left undecided the issue of whether a law, such as the Hit and Run Statute,[122] can supersede the attorney-client privilege. While the appellate court attempted to resolve this issue, the supreme court ignored it, even though the facts of the case demanded its resolution.

The broad effect of the decision concerns the role and extent of a court's exercise of equitable jurisdiction. To allow a court, through the pretense of equity, to "rewrite" the facts of a case rather than to resolve the actual controversy in light of the law, is to sanction an entirely new role for the judicial system. Equity cannot be thought of as a "catch-all" source of power that can supersede the long-standing role of statutory and common law authority. If this were the case, then other principles, central to the functioning of litigation and the preservation of an individual's rights, are open to abuse by the courts under the guise of "equity."

VI. CONCLUSION

Courts should not be permitted to exercise their equitable jurisdiction to the exclusion of other principles grounded in our legal system. While equity seeks to do justice and accommodate fairness, the true sense of these ideals can be fostered only if the limitations on the court's discretion are defined. Simply, the three sources of a court's jurisdiction—common law, equity, and statute—must co-exist and be harmonized to the extent possible.

The purpose of equitable jurisdiction is to supply a remedy that will foster justice to all parties involved. However, the exercise of such jurisdiction, while discretionary in the court, should not be encouraged when an adequate remedy at law exists. While the existence of an adequate legal remedy is not fully decisive, it is a

121. *See supra* notes 56-57, 117-120 and accompanying text.

122. ILL. REV. STAT. ch. 95 1/2, para. 11-401(a)-(d) (1989); *see supra* note 60 and accompanying text.

consideration that the court should take seriously before utilizing its extraordinary powers. The failure of a court to do so may jeopardize the common law in later cases.

It is difficult to justify the "equitable" decision in *Cesena v. Du Page County* in light of the court's historical role and the existence of an adequate remedy at law.[123] Admittedly, the supreme court's decision was fair to the specific parties concerned. However, it sets a dangerous precedent for the resolution of future cases. *Cesena* expands the court's discretion to new levels, setting the stage for the court to undermine other common law doctrines. The Illinois Supreme Court's decision in *Cesena v. Du Page County* falls within the category of hard cases making bad law.

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123. In *Cesena*, the adequate remedy at law stemmed from a determination of whether John Doe waived the attorney-client privilege when he and Fawell attempted to file the accident report with the Du Page County Deputy Sheriff. Whether the privilege had been waived was determinative of whether Fawell would have been required to disclose his client's name to the plaintiff.