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## Commercial Law

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# COMMERCIAL LAW

*Jodi Landsman Kornfeld\**  
*and Therese Meyer\*\**

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## I. INTRODUCTION

The majority of commercial law cases decided during the *Survey*

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year did not establish new doctrines of law, but instead clarified or expanded previously established principles. This article reviews *Survey* year cases concerning business associations,<sup>1</sup> securities regulations,<sup>2</sup> commercial transactions,<sup>3</sup> contracts,<sup>4</sup> products liability,<sup>5</sup> and consumer protection.<sup>6</sup> Additionally, legislation passed during the *Survey* year, including the Revised Uniform Limited Partnership Act,<sup>7</sup> amendments to the Business Corporation Act of 1983,<sup>8</sup> securities regulations,<sup>9</sup> and amendments to the Illinois Bank Hold Company,<sup>10</sup> is discussed.

## II. BUSINESS ASSOCIATIONS

### A. Agency

In *Bachewicz v. American National Bank*,<sup>11</sup> the court reaffirmed, in dicta, the long-standing principle that a co-owner of real estate attempting to sell the entire property must comply with the Statute of Frauds. Pursuant to the Statute of Frauds, a co-owner attempting to sell property must document the co-owner's authority to sell in a writing signed by the other co-owner.<sup>12</sup>

In *Bachewicz*, two partnerships, Associates and Statesman, co-owned property.<sup>13</sup> The defendant, American National Bank, held legal title to the property as trustee of an Illinois land trust. The dispute arose after Associates and Statesman agreed to operate a building on the property as a joint venture. The joint venture agreement contained a deadlock provision<sup>14</sup> that would become ef-

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1. See *infra* notes 11-137 and accompanying text.

2. See *infra* notes 138-181 and accompanying text.

3. See *infra* notes 182-286 and accompanying text.

4. See *infra* notes 287-394 and accompanying text.

5. See *infra* notes 395-440 and accompanying text.

6. See *infra* notes 441-444 and accompanying text.

7. See *infra* notes 445-548 and accompanying text.

8. See *infra* notes 549-595 and accompanying text.

9. See *infra* notes 596-668 and accompanying text.

10. See *infra* notes 669-718 and accompanying text.

11. 111 Ill. 2d 444, 490 N.E.2d 680 (1986).

12. ILL. REV. STAT. ch. 59, para. 2 (1983).

13. *Bachewicz*, 111 Ill. 2d at 446, 490 N.E.2d at 681. See also *infra* notes 64-66.

14. *Bachewicz*, 111 Ill. 2d at 446, 490 N.E.2d at 681. A deadlock provision operates when parties fail to reach agreement upon a matter. *Id.* In *Bachewicz*, the provision became operative only when it was clear that one party wanted to sell the property and the other party did not. The deadlock provision stated:

In the event an offer is received for the purchase of the entire apartment building, and the parties cannot agree whether to accept said offer, the party who desires to accept said offer shall so advise the other party in writing. Thereafter, said other party shall have thirty (30) days within which to either consent to the sale as proposed by such third party or may, within said thirty (30) day period,

fective only if a third party offered to purchase the property. Under the deadlock provision, when the co-owners disagreed about whether to sell, a co-owner's consent to sell was presumed if he failed to buy out the other co-owner's interest in the property.

The plaintiff, B & B Investment Co., offered to purchase the property from Associates and Statesman. Both co-owners rejected this offer. Subsequently, B & B tendered a second offer to Associates. Associates accepted this offer conditioned upon Statesman's consent to the sale. Statesman neither accepted B & B's offer nor purchased Associates's interest in the property. Nonetheless, B & B continued in its efforts to purchase the property, and claimed that the parties formed a contract for the sale of property. Associates and Statesman, however, denied that a valid contract existed. Subsequently, Statesman acquired Associates's interest in the property and sold the building to a third party. B & B responded by instituting an action for specific performance of the contract, claiming that the deadlock provision vested Associates with the authority to accept the offer for Statesman, thereby creating a valid sale of the property.<sup>15</sup>

The trial court dismissed B & B's specific performance complaint. The appellate court reversed and remanded, noting that an action for damages could be sustained.<sup>16</sup> On remand, the trial court awarded B & B damages based upon its finding that an enforceable, valid contract existed. The appellate court affirmed, but modified the damage award.<sup>17</sup>

The supreme court asserted that a timely application of the deadlock provision could authorize Associates to bind Statesman to the sale.<sup>18</sup> The court, however, held that no agency relationship existed because Statesman did not have an opportunity to reject the second offer.<sup>19</sup> The court reasoned that Statesman could not be bound by Associates's acceptance because B & B had attempted to

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elect in writing to purchase the interest of the party desiring to sell for an amount equal to the proportionate share of the offer which would have been received by the party, desiring to sell its interest in the apartment building. Failure to make an election within the thirty (30) day period shall be deemed to be a consent to such proposed sale, and the parties shall thereafter proceed to consummate such sale, and both parties agree to execute all necessary documents to complete such sale.

*Id.* at 448, 490 N.E.2d at 682.

15. *Id.* at 446-447, 490 N.E.2d at 681.

16. *Id.* at 447, 490 N.E.2d at 681.

17. *Bachewicz v. American National Bank*, 126 Ill. App. 3d 298, 466 N.E.2d 1096 (1st Dist.1984), *rev'd*, 111 Ill. 2d 444, 490 N.E.2d 680 (1986).

18. *Bachewicz*, 111 Ill. 2d 444, 490 N.E.2d 680.

19. *Id.*

invoke the deadlock provision prematurely.<sup>20</sup> The deadlock provision could be invoked only if Statesman rejected B & B's second offer before Associates's conditional acceptance. *Bachewicz* thus illustrates that an agency relationship can be created pursuant to a timely invocation of a deadlock provision assuming the agreement satisfies the Statute of Frauds.<sup>21</sup>

Three Illinois appellate courts also confronted significant aspects of agency law during the *Survey* year. In *Kouba v. East Joliet Bank*,<sup>22</sup> the Illinois Appellate Court for the Third District suggested a new development in agency law. In two decisions, the Illinois Appellate Court for the Third District reiterated axiomatic principles of agency and applied them to new fact patterns.

The issue raised in *Kouba* was whether section 9-507 of the Uniform Commercial Code (the "U.C.C."),<sup>23</sup> which governs remedies, applies to secured parties when an independent contractor is charged with committing a breach of peace in violation of section 9-503 of the U.C.C.<sup>24</sup> In *Kouba*, defendant East Joliet Bank, held a security interest in a truck purchased by the plaintiffs, Walter and Acelia Kouba. When the plaintiffs defaulted on their monthly loan payments, the bank contracted with Leroy Campbell to repossess the truck. Defendants Mau, Sullivan, and Schroll, who were hired by Campbell, went to the plaintiffs' residence to recover the truck. Subsequently, Mau grabbed Acelia Kouba by the neck, threw her to the ground and took the truck by force.<sup>25</sup> The police arrived shortly after the repossessioners set the truck on fire and dropped it off a truck hoist. A subsequent fire at defendant Keister's garage destroyed the vehicle.<sup>26</sup>

The plaintiffs appealed an order of summary judgment entered in favor of defendants East Joliet Bank and Dave Keister, owner of Keister's Garage.<sup>27</sup> Three issues were decided on appeal.<sup>28</sup> First,

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20. *Id.*

21. ILL. REV. STAT. ch. 59, para. 2 (1983).

22. 135 Ill. App. 3d 264, 481 N.E.2d 325 (3rd Dist.1985).

23. ILL. REV. STAT. ch.26, para. 9-507 (1983).

24. *Kouba*, 135 Ill. App. 3d at 264, 481 N.E.2d at 325 (citing ILL. REV. STAT. ch. 26, para. 9-503 (1985)). Paragraph 9-503 provides that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ." ILL. REV. STAT. ch. 26, para. 9-503 (1985).

25. *Id.* at 265, 481 N.E.2d at 327.

26. *Id.*

27. *Id.* Defendants Sullivan and Schroll had never been found for service of summons and were dismissed by plaintiffs. A default judgment was entered against defendants Mau and Campbell. *Id.*

28. *Id.*

the court affirmed the summary judgment in favor of the bank because the holding did not contradict the intent of the U.C.C.<sup>29</sup> The bank contended that, as a matter of law, it was relieved of all liability because the reposseors were independent contractors.<sup>30</sup> In contrast, the plaintiffs asserted that the bank was statutorily liable pursuant to Article 9 of the U.C.C.<sup>31</sup> and that common law agency principles should have been ignored.<sup>32</sup> The court refused to accept the plaintiffs' argument and held that because the plaintiffs had failed to specifically plead a statutory remedy under section 9-507 of the U.C.C., only the common law remedies for wrongful repossession were available.<sup>33</sup> Accordingly, the court did not decide the issue of whether section 9-507 applies to secured parties when an independent contractor, rather than an employee, is charged with committing a breach of peace in violation of section 9-503 of the U.C.C.<sup>34</sup>

The court found no issue of fact regarding the bank's vicarious liability for the tortious conduct of the reposseors because the reposseors were independent contractors.<sup>35</sup> Finally, the court held that the plaintiffs had a cause of action against Dave Keister and Keister's Garage as third-party beneficiaries of the bailment contract between the bank and Keister.<sup>36</sup>

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29. *Id.*

30. *Id.* at 266, 481 N.E.2d at 327.

31. ILL. REV. STAT. ch. 26, paras. 9-101, 9-507 (1985).

32. *Kouba*, 135 Ill. App. 3d at 266, 481 N.E. 2d at 327. Under the plaintiffs' theory, section 9-503 permitted the bank to take possession of the truck following default without judicial process if repossession could be accomplished without a breach of peace. In *Kouba*, there was no dispute that the reposseors hired by the bank caused a breach of peace. *Id.* Thus, the plaintiffs had a remedy in section 9-507, which has been construed as granting statutory relief for any violation of Article 9, part 5. See also WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE § 26-14 (2d ed. 1985).

33. *Kouba*, 135 Ill. App. 3d at 266, 481 N.E.2d at 328 (citing ILL. REV. STAT. ch. 26, para. 9-507 (1985)). If the collateral is consumer goods, the debtor may recover the credit service charge plus 10% of the principal amount of the debt, and 10% of the cash price. ILL. REV. STAT. ch. 26, para. 9-507 (1985). The secured party also can be denied a deficiency judgment. *Id.* The common law remedies would be available only after a determination of whether the bank was responsible under the law of agency for the acts of the reposseors. *Kouba*, 135 Ill. App. 3d at 266, 481 N.E.2d at 328. The bank's responsibility depends on whether the court found the reposseors to be independent contractors. *Id.*

34. *Kouba*, 135 Ill. App. 3d at 266, 481 N.E.2d at 328.

35. *Kouba*, 135 Ill. App. 3d at 267, 481 N.E.2d at 328. The court then concluded that the bank could not be liable for the reposseors actions because the reposseors were independent contractors. Finding no genuine issue of fact regarding the bank's liability, the court affirmed the order of summary judgment entered in favor of the bank. *Id.*

36. *Id.* at 268, 481 N.E.2d at 329. The *Kouba* court also noted that the plaintiffs had failed to establish an exception to the general rule insulating an employer from liability

In a dissenting opinion,<sup>37</sup> Justice Stouder argued that, under section 9-503,<sup>38</sup> the bank was liable for the damages to the truck by virtue of the wrongful nature of the repossession.<sup>39</sup> Justice Stouder stated that plaintiffs' failure to specifically plead a remedy under section 9-507 of the U.C.C.<sup>40</sup> should not preclude relief under the section.<sup>41</sup> According to Justice Stouder, the inappropriateness of the remedy should not have affected the bank's liability.<sup>42</sup> He argued that the majority should have relied upon principles of law and equity to supplement the provisions of the U.C.C. rather than on the common law theory of agency.<sup>43</sup>

The Illinois Appellate Court for the First District decided two other agency cases during the *Survey* year. In *Advance Mortgage v. Concordia*,<sup>44</sup> the court reiterated a well-established axiom of agency: a principal conferring an agent with the express authority to perform a duty implicitly authorizes the agent to perform other acts necessary to effectuate that duty.<sup>45</sup>

The plaintiff, Advance Mortgage ("Advance"), entered into a Purchase and Service Agreement<sup>46</sup> with the defendant Concordia, whereby Advance agreed to sell Concordia certain mortgages. Under the agreement, Advance was required to collect all pay-

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for the acts of an independent contractor. There was no allegation that the bank had negligently hired the reposseors or directed the tortious act. *Id.* at 267, 481 N.E.2d at 328. Finally, the court considered whether defendant Keister was entitled to summary judgment concerning the allegation that he was negligent in failing to take reasonable care of the truck. The court held that the plaintiffs pleaded a valid claim against Keister, thereby reversing the circuit court dismissal and remanding the issue for further consideration. The *Kouba* court relied on the principle that a debtor should have a right of action against a third party who damages the collateral following default and repossession to the extent of the debtor's property or insurable interest in the collateral. The court indicated that a debtor's rights and responsibilities with regard to collateral after default permitted a debtor to maintain an action against a third party who negligently damaged the collateral after default and repossession by the secured party. The *Kouba* court thus held that the plaintiffs were entitled to maintain their cause of action against Keister. *Id.* at 269, 481 N.E.2d at 329-30.

37. *Kouba*, 135 Ill. App. 3d at 270, 481 N.E.2d at 330 (Stouder, J., dissenting).

38. ILL. REV. STAT. ch. 26, para. 9-503 (1985).

39. *Kouba*, 135 Ill. App. 3d at 270, 481 N.E.2d at 330 (Stouder, J., dissenting).

40. ILL. REV. STAT. ch. 26, para. 9-507 (1985).

41. *Kouba*, 135 Ill. App. 3d at 270, 481 N.E.2d at 330 (Stouder, J., dissenting). Section 9-507 is available "if it is established that the secured party is not proceeding in accordance with the provisions of this Part [part 5]." *Id.*

42. *Id.*

43. *Id.* (citing ILL. REV. STAT. ch. 26, para. 1-103 (1985)). Paragraph 1-103 provides that "unless displaced by the particular provision of the Act, the principles of law and equity shall supplement the provisions." ILL. REV. STAT. ch. 26, para. 1-103 (1985).

44. 135 Ill. App. 3d 477, 481 N.E.2d 1025 (1st Dist. 1985).

45. *Id.* at 481, 481 N.E.2d 1029.

46. *Id.* at 479, 481 N.E.2d 1027.

ments due, make diligent efforts to insure the mortgaged premises, and pay any corresponding taxes.<sup>47</sup> When the mortgagor defaulted, Advance withdrew its own funds to pay taxes and insurance premiums on the mortgaged premises. An escrow overdraft resulted. Subsequently, Concordia instituted foreclosure proceedings and submitted its payoff letter into the closing escrow without including a demand for those funds paid by Advance. The Circuit Court of Cook County granted Advance's motion for summary judgment in an action for reimbursement of the funds it paid for taxes and insurance.<sup>48</sup>

In affirming the circuit court ruling, the appellate court reasoned that the agency relationship between Advance and Concordia gave Advance the implied authority to employ any legal means necessary to effectuate the act it was expressly authorized to perform.<sup>49</sup> Accordingly, Advance had the authority to choose the manner in which it caused the mortgaged premises to be insured and the taxes to be paid.<sup>50</sup>

The second significant agency case decided by the Illinois Appellate Court for the First District during the *Survey* period also expounded axiomatic principles of agency law. In *Tripi v. Landon*,<sup>51</sup> the court awarded the plaintiff damages based upon the agency relationship between the defendant and his employee.<sup>52</sup> The parties in *Tripi* had been conducting business with each other for nine years. During this time, plaintiff Tripi was unaware that he was conducting business with a corporation, because defendant Landon did not purport to be anything other than an individual.<sup>53</sup> When Landon moved his business, he told Tripi that Landon's orders would be placed by Earl Gabrielson. Within two months, Tripi sent invoices and three sets of goods ordered by Gabrielson to Landon's new place of business. Landon refused to pay the bills and failed to attend a meeting he scheduled with Tripi for the purpose

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47. *Id.*

48. *Id.*

49. *Id.* at 482, 481 N.E.2d at 1024. In construing the agreement, the court also dismissed the idea that Advance was a mere stranger or volunteer. The court further noted that even assuming that Advance acted outside of its authority, the circuit court judgment would be affirmed on the theory that Concordia's retention of the benefit of Advance's actions constituted a ratification. *Id.* at 483-84, 481 N.E.2d at 1030-31.

50. *Id.* at 482, 481 N.E.2d at 1029.

51. 140 Ill. App. 3d 230, 488 N.E.2d 610 (1st Dist. 1986).

52. *Id.* at 235, 488 N.E.2d at 613.

53. *Id.* at 231-32, 488 N.E.2d at 611. Landon was officer and director of F. Landon Cartage Company, F. Landon Trucking Company, Landon Truck Leasing Company, and Landon Truck Leasing Limited. *Id.*

of discussing the unpaid bills. Tripi then filed an action to recover the cost of goods sold. At trial, Landon admitted that he occasionally gave Gabrielson a check to buy parts, but denied the existence of an agency relationship. The trial court awarded Tripi the cost of goods sold.<sup>54</sup>

On appeal, Landon argued that the trial court had incorrectly found him liable under an alter ego theory of liability.<sup>55</sup> The appellate court, however, stated that Landon had misconstrued the trial court's finding.<sup>56</sup> The reviewing court noted that the trial court had not considered Landon's liability under a corporate alter ego theory, but instead had found him liable under the common law theory of agency.<sup>57</sup> Because Landon conducted his business with Tripi as an individual and not as a corporation,<sup>58</sup> the appellate court reasoned that Landon could not have been liable upon an "alter ego" theory of liability.<sup>59</sup> Thus, because the trial court clearly had resolved the agency issue by finding the existence of a principal-agent relationship between Landon and Gabrielson,<sup>60</sup> the appellate court affirmed the award of the cost of goods sold.<sup>61</sup>

### B. Partnerships

The Illinois Supreme Court decided only one case concerning partnership law during the *Survey* period,<sup>62</sup> although several partnership issues were resolved at the appellate level.<sup>63</sup> In *Bachewicz v. American National Bank*,<sup>64</sup> the supreme court held that one co-owner's acceptance of an offer to sell did not bind the other co-owner to the sale.<sup>65</sup> The *Bachewicz* court thus reaffirmed that partnership principles govern joint ventures because joint ventures are

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54. *Id.* at 231, 488 N.E.2d at 611. The amount of the award was \$4,057.22. *Id.*

55. *Id.* at 234, 488 N.E.2d at 613.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 235, 488 N.E.2d at 613. Landon originally argued that the agency action should have been barred by the Statute of Frauds. Landon, however, omitted any mention of the Statute of Frauds in his answer to Tripi's second amended complaint. Thus, because no subsequent attempt was made to raise the Statute of Frauds defense in the trial court, the issue was waived. *Id.* at 233, 488 N.E.2d at 612.

61. *Id.* at 235, 488 N.E.2d at 613.

62. See *infra* notes 64-66 and accompanying text.

63. See *infra* notes 67-89.

64. 111 Ill. 2d 444, 490 N.E.2d 680 (1986). For a recitation of the facts and a discussion of the agency issues in *Bachewicz*, see *supra* notes 13-21 and accompanying text.

65. *Bachewicz*, 111 Ill. 2d at 448, 490 N.E.2d at 682.

essentially partnerships conducted for a single enterprise.<sup>66</sup>

Several appellate court decisions considered issues of partnership law.<sup>67</sup> In *Ellerby v. Speizer*,<sup>68</sup> the Illinois Appellate Court for the Second District considered the distribution of profits from contingent fee cases pending at the time a law partnership was dissolved. The court held that, absent a provision in the oral partnership agreement pertaining to the distribution of such profits, the Uniform Partnership Act controlled profit distributions.<sup>69</sup> In *Ellerby*, plaintiff Ellerby, and defendants Speizer and Thorsen formed a law partnership by oral agreement. Years later, following the dissolution of the partnership, the parties disagreed about distribution of post-dissolution profits from contingent fee cases. Ellerby filed a motion alleging an improper distribution of profits. The trial court ruled that the profits were to be distributed in conformity with a detailed schedule set forth by the trial court.<sup>70</sup>

Ellerby appealed the order for distribution of profits,<sup>71</sup> contending it was inconsistent with the terms of the oral partnership agreement.<sup>72</sup> Speizer cross-appealed, advancing a similar argument.<sup>73</sup> Speizer first claimed that the attorney for a particular case was entitled to the total fee less the value of services rendered prior to dissolution. Speizer also contended that the Uniform Partnership Act<sup>74</sup> permitted compensation for work performed by a partner in the partnership's business.<sup>75</sup>

Relying on the Uniform Partnership Act,<sup>76</sup> the appellate court

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66. *Id.* at 454, 490 N.E.2d at 685.

67. One partnership case arose from the Second District during the *Survey* period. The dispute in *Gromer, Wittenstrom & Meyer v. Strom*, 140 Ill. App. 3d 349, 489 N.E.2d 370 (2d Dist. 1986), surfaced after the dissolution of a law partnership between Wittenstrom, Meyer and the defendant, Strom. Following the dissolution, Wittenstrom and Meyer became sole shareholders of the plaintiff corporation. In affirmatively ruling on a motion to vacate a confession judgment, the Illinois Appellate Court for the Second District refused to recognize the corporation as an entity separate from its shareholders. The court reasoned that the separate recognition would result in sanctioning an action that could otherwise not be maintained by the shareholders individually. *Id.*

68. 138 Ill. App. 3d 77, 485 N.E.2d 413 (2nd Dist. 1985).

69. *Id.*

70. *Id.* at 79, 485 N.E.2d at 415.

71. *Id.*

72. *Id.*

73. *Id.* at 80, 485 N.E.2d at 415. The *Ellerby* court refused to consider the contention that the trial court's distribution of profits was inconsistent with the terms of the oral partnership agreement. Instead, the court held that Speizer failed to plead the inconsistent distribution in his answer and therefore effected a waiver of that claim. *Id.*

74. ILL. REV. STAT. ch. 106½, para. 18 (1985).

75. *Ellerby*, 138 Ill. App. 3d at 79, 485 N.E.2d at 415.

76. ILL. REV. STAT. ch. 106½, para. 31(b) (1985).

reasoned that either unilateral action or mutual consent of the parties could properly and effectively dissolve the partnership because there was no provision in the oral partnership agreement pertaining to dissolution.<sup>77</sup> The court further stated that the partnership did not terminate upon dissolution. The court concluded that the parties remained partners until the completion of all of their partnership affairs,<sup>78</sup> including the winding up of pending cases handled on a contingent fee basis.<sup>79</sup> Therefore, the *Ellerby* court held that fees from the pending cases constituted assets of the partnership. This necessitated that their distribution be in conformity with the provisions of the Uniform Partnership Act.<sup>80</sup>

Next, the court addressed Speizer's cross-appeal. Speizer claimed a right to entire fees from cases he was handling less a partnership claim for the reasonable value of services rendered prior to dissolution. The court denied that claim.<sup>81</sup> The court commented that Speizer had a duty to complete unfinished business.<sup>82</sup> Thus, the court rejected Speizer's alternative contention that certain clients discharged the partnership and hired Speizer individually.<sup>83</sup> Additionally, the court ruled that completing the pending cases did not entitle a partner to compensation for working on them.<sup>84</sup> Instead, each partner was entitled to a reimbursement for any reasonable and necessary overhead expenses attributable to winding up the partnership's business.<sup>85</sup> Therefore, the court deemed the trial court's distribution of profits erroneous, reversed the lower court's ruling, and remanded the cause to be

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77. *Ellerby*, 138 Ill. App. 3d at 80, 485 N.E.2d at 416.

78. *Id.* at 81, 485 N.E.2d at 416 (citing *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 217, 194 Cal. Rptr. 180, 190 (1983)).

79. *Ellerby*, 138 Ill. App. 3d at 81, 485 N.E.2d at 416.

80. *Id.*

81. *Id.* at 81-82, 485 N.E.2d at 416-17.

82. *Id.* at 81, 485 N.E.2d at 416 (citing ILL. REV. STAT. ch. 106½, paras. 30, 33, 35(1)(a) (1985)).

83. *Ellerby*, 138 Ill. App. 3d at 81-82, 485 N.E.2d at 416-17. The court also noted that allowing a partner compensation for completing pending cases would encourage case-chasing by attorneys in partnerships pending dissolution. *Id.*

84. *Id.* at 82, 485 N.E.2d at 417 (citing ILL. REV. STAT. ch. 106½, para. 18(f) (1985)). Paragraph 18(f) provides: "[N]o partner is entitled to remuneration for acting in the partnership business." The *Ellerby* court noted that the one exception to the provision of 18(f), to allow reasonable compensation for the services of a surviving partner winding up the affairs of a partnership dissolved by the death of a partner, did not apply to the instant case. *Id.*

85. *Id.* at 83, 485 N.E.2d at 417. Furthermore, the formula in effect at the time of dissolution remained in effect and bonuses were provided because Speizer had waived introducing evidence of the oral agreement. *Id.* at 83, 485 N.E.2d at 418.

decided in accordance with the Uniform Partnership Act.<sup>86</sup>

One final appellate court decision, *Hofner v. Glenn Ingram & Co.*,<sup>87</sup> bears upon a procedural aspect of partnership law. In *Hofner*, the Illinois Appellate Court for the First District held that section 2-1008 of the Code of Civil Procedure indicates that a partnership's general appearance is distinguishable from each partner's individual appearance, although the law does not recognize a partnership as an entity apart from the partners.<sup>88</sup> The *Hofner* court ruled that a plaintiff filing a claim against an individual partner must seek leave to amend his complaint if the original complaint names only the partnership as the defendant.<sup>89</sup>

### C. Corporations

The Illinois Supreme Court ruled on only one significant case involving corporation law during the *Survey* period.<sup>90</sup> Because that case was a taxpayer action, it is more appropriately discussed in the State and Local Government section of this *Survey*. At the

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86. *Id.* at 84, 485 N.E.2d at 418 (citing ILL. REV. STAT. ch. 106½, para. 40(b) (1985)).

87. 140 Ill. App. 3d 874, 489 N.E.2d 311 (1st Dist. 1985).

88. *Id.* at 885, 489 N.E.2d at 318 (citing 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 20 (rev. perm. ed. 1983)).

89. *Hofner*, 140 Ill. App. 3d at 885, 489 N.E.2d at 318. In *Hofner*, the plaintiff, a certified public accountant, signed a partnership agreement and became a partner of the defendant accounting firm. Partners' salaries were based on estimated future earnings for the subsequent fiscal year and were paid in twelve allotments. Subsequently, the plaintiff expressed doubt regarding the firm's ability to make the earnings projected for the following fiscal year and told a senior partner that he would resign if he could not earn his \$40,000 projected salary. The plaintiff alleged that the senior partner then orally assured him he would receive a minimum salary of \$40,000. The firm failed to meet its projected earnings, but the plaintiff was still reassured of his salary and no other partners expressly or implicitly rescinded the proposed minimum income. When the plaintiff resigned, the same senior partner assured him that his remaining salary due would be based on the \$40,000 figure. When plaintiff later requested the balance of his yearly income, the defendant firm denied that he was entitled to the allegedly promised \$40,000 yearly salary. The suit followed. The trial court found that the plaintiff was bound to the partnership agreement and dismissed his complaint for failure to state a cause of action. The plaintiff appealed. On appeal, the court applied common law theories of agency and partnership and concluded that the trial court had erred in dismissing the complaint. *Hofner*, 140 Ill. App. 3d 874, 489 N.E.2d 311.

90. *Feen v. Ray*, 109 Ill. 2d 339, 487 N.E.2d 619 (1985). The court in *Feen* elucidated that both taxpayer actions and corporate shareholder suits are based on two causes of action. For the taxpayer suit, one action lies against public officials for failing to sue and the other lies against the alleged wrongdoer based upon the cause of action belonging to the governmental body. Similarly, for the corporate shareholder suit, one action lies against the corporate director for failing to sue and the other lies against the alleged wrongdoer based upon the cause of action belonging to the corporation. In both types of derivative suits the court noted the corporation or the governmental body is a necessary party because recovery runs in favor of it. *Id.*

appellate court level, two fiduciary duty cases and one trade secret case illustrate developments in corporation law during the *Survey* period.

In *Callier v. Callier*,<sup>91</sup> the Illinois Appellate Court for the Fifth District analyzed the fiduciary duties of shareholders in close corporations. The *Callier* court held that a fifty percent shareholder in a close corporation did not breach his fiduciary duty to the other fifty percent shareholder by winding down the business when disharmony among the two shareholders was affecting management-employee relationships and the plaintiff shareholder refused to help manage the business.<sup>92</sup>

Scott and Leo Callier were both fifty percent shareholders in All Steel Pipe & Tube, Inc., ("All Steel"). The board of directors at All Steel consisted of Leo Callier, who also served as president, and Felix Callier, who was Scott's nominee.<sup>93</sup> Leo handled the daily management of All Steel while Scott's participation in the management was limited to occasional visits to the St. Louis headquarters.

The relationship between Scott and Leo eventually became strained. After negotiations on redemption failed, Scott informed Leo that liquidation was the only viable alternative, that employees unnecessary to "wind down" the business should be terminated, and that Leo should begin winding down the business. Scott subsequently changed his mind and informed Leo that he should continue running the business, although Scott refused to participate in the management.<sup>94</sup> During the "wind down", both Scott and Leo started businesses in competition with All Steel. Only one of these, Leo's corporation, Callier Pipe and Tube, Inc., was in operation at the time of the *Callier* litigation. Leo did not officially resign as officer and director of All Steel prior to his incorporation of Callier. The trial court ordered Leo Callier to transfer certain shares of his stock in All Steel to Scott Callier as damages for breach of fiduciary duty.<sup>95</sup>

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91. 142 Ill. App. 3d 407, 491 N.E.2d 505 (5th Dist. 1986).

92. *Id.*

93. *Id.* at 410, 491 N.E.2d at 507. Felix, who was deceased at the time of the action, took no active role in the management of the company and acted only as Scott's representative. *Id.*

94. *Id.* at 411, 491 N.E.2d at 507.

95. *Id.* at 409, 491 N.E.2d at 506. Defendant All Steel Pipe and Tube, Inc. is incorporated in Illinois. The circuit court heard the case on remand from the Illinois Appellate Court for the Fifth District. Prior to the remand, the circuit court had entered a judgment ordering liquidation of the assets and business of All Steel. The appellate court reversed that judgment. In its reversal, the court indicated that pursuant to section 86(a)(1) of the Business Corporation Act of 1933 (ILL. REV. STAT. ch. 32, para.

The appellate court<sup>96</sup> considered whether Leo acted improperly in closing All Steel and whether he breached a fiduciary duty owed to Scott.<sup>97</sup> The court suggested that Leo's actions prevented unnecessary loss and damage because Scott refused to assume management responsibility for All Steel and Leo had no legal obligation to participate.<sup>98</sup> Furthermore, the court stressed that Leo did not take any of All Steel's assets, trade secrets, or confidential customer or supplier lists when he started his own competing business.<sup>99</sup> Based upon the foregoing analysis, the court concluded that a damage award to Scott contradicted the manifest weight of the evidence and the trial court's finding that Leo's actions were neither malicious nor fraudulent.<sup>100</sup>

Finally, the court dispensed with the issue of whether Leo breached fiduciary duties he owed to All Steel.<sup>101</sup> The court concluded Leo had not breached his duties, stressing the dissension between Leo and Scott and the resultant dissatisfaction among All Steel employees, who threatened to quit if Scott did not resign.<sup>102</sup> The court further noted that pursuant to the Close Corporation Act,<sup>103</sup> All Steel would have been a prime candidate for dissolution. The appellate court in *Callier* then remanded the case to the trial court with orders that distributions be made consistent with its opinion.<sup>104</sup>

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157.86(a)(1)(1985)), Leo had failed to prove the deadlock in management or a threat of irreparable injury requisite for mandating liquidation of assets and business of All Steel. *Callier*, 142 Ill. App. 3d at 410, 491 N.E.2d at 507.

96. *Callier*, 142 Ill. App. 3d 407, 491 N.E.2d 505. On appeal, the court confronted the award of damages to Scott and All Steel. Initially the court reviewed the trial court's determination of the going-concern value of All Steel. On that matter, it stated that the trial court's conclusion was not against the manifest weight of the evidence, and would therefore stand. Relying on that finding, the court observed that Scott did not sustain damage as a result of the loss of his going-concern value interest because the going-concern value of All Steel was less than its actual cash value in the hands of the receiver. *Id.*

97. *Id.*

98. *Id.* at 419, 491 N.E.2d at 513.

99. *Id.* at 420, 491 N.E.2d at 513.

100. *Id.* at 419, 491 N.E.2d at 513. Scott did not prove that he sustained damages. His allegations were speculative and not the result of Leo's actions. Moreover, the attorneys' fees sought were not recoverable and Scott's testimony negated the possibility of an award of punitive damages. *Id.*

101. *Id.* at 420, 491 N.E.2d at 514.

102. *Id.*

103. ILL. REV. STAT. ch. 32, para. 1201-1216 (1985). The court noted that the events of the case predated the Act, but that using the Act as a standard, All Steel might have been dissolved. *Callier*, 142 Ill. App. 3d at 420, 491 N.E.2d at 514.

104. *Callier*, 142 Ill. App. 3d at 421, 491 N.E.2d at 515. The court also quickly dispensed with the issue of who should bear the costs of receivership, stating that they should be charged against the assets of the corporation. *Id.*

In a similar case, *Smith-Shrader v. Smith*,<sup>105</sup> the Illinois Appellate Court for the First District held that a breach of fiduciary duty existed when a prior employee exploited his position at a company for his own economic benefit and to the detriment of the company. In *Smith-Shrader*, two fifty percent shareholders, Smith and Shrader, owned Smith-Shrader ("S.S.").<sup>106</sup> After years of disagreement as to how the business should be run, Smith resigned as officer, director, and employee of S.S. and formed a competing business known as R.S. Valve. Nonetheless, Smith retained his fifty percent holding of S.S.. Prior to his resignation, Smith informed one of S.S.'s main customers of his planned resignation and asked for its business.<sup>107</sup> Smith made similar requests to additional S.S. customers. Moreover, he indirectly solicited employees of S.S. to work at R.S. Valve.<sup>108</sup> Shortly after Smith's resignation and incorporation of R.S. Valve, the solicited customers terminated their contracts with S.S. and initiated business with R.S. Valve. Additionally, three employees of S.S. resigned and went to work for R.S. Valve. As a result of these events, S.S.'s yearly gross commissions dropped drastically.<sup>109</sup>

In holding that Smith breached his fiduciary duty to Shrader and S.S. as officer, director, and shareholder,<sup>110</sup> the court relied on axioms of corporate law developed in *H. Vincent Allen and Associates, Inc. v. Weis*.<sup>111</sup> In *H. Vincent Allen*, the appellate court held

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105. 136 Ill. App. 3d 571, 483 N.E.2d 283 (1st Dist. 1985).

106. *Id.* at 573, 483 N.E.2d at 285. Smith-Shrader was engaged in business as a manufacturers' representative for companies which produced industrial valves, fittings, and related items. *Id.*

107. *Id.* at 574, 483 N.E.2d 286. Conbraco was one of Smith-Shrader's five principal manufacturers and accounted for approximately 70% of Smith-Shrader's commissions. *Id.* at 576, 483 N.E.2d at 287.

108. *Id.* at 575, 483 N.E.2d at 286. Smith's sales representative, William Reid, contacted S.S. employees and told them to contact Smith concerning their possible employment at R.S. Valve. *Id.*

109. *Id.* at 576, 483 N.E.2d at 287. Prior to the employees' resignation, gross commissions were as follows: 1980 — \$642,439; 1981 — \$531,702. Following the resignation the gross commissions were as follows: 1982 — \$50,000; until the date of trial in 1983 — \$25,000. *Id.*

110. *Id.* at 577, 483 N.E.2d at 288.

111. 63 Ill. App. 3d 285, 379 N.E.2d 765 (1st Dist. 1978). In *H. Vincent Allen*, the court indicated that (1) officers and directors of a corporation cannot actively exploit their positions within the corporation for their own personal benefit; and (2) the activities of officers and directors may not hinder or defeat the ability of the corporation to continue the business for which it was developed. *Id.* The facts in *H. Vincent Allen* are similar to those in *Smith-Shrader*. After being terminated from his employment at an art studio, Weis started his own business and eventually employed 13 former artists of H. Vincent Allen. H. Vincent Allen's gross profit dropped. The court concluded that Weis had breached his fiduciary duty even though he had not approached H. Vincent Allen's

that an individual breached his fiduciary duty to a prior employer even though he had not solicited his prior employer's employees until after his termination.<sup>112</sup> As in *H. Vincent Allen*, Smith exploited his position at S.S. for his own economic benefit and to the detriment of S.S..<sup>113</sup> The court also stressed that Reid's position as the initial contact with employees of S.S. failed to neutralize Smith's follow-up solicitation.<sup>114</sup> The court therefore found his actions not justified even though Reid contacted the employees after Smith's resignation.<sup>115</sup>

Next, the court affirmed the trial court's finding that Smith tortiously interfered with the business relations of S.S..<sup>116</sup> The court ruled that Smith defeated his claim of privilege by breaching a fiduciary duty and soliciting S.S.'s key employees.<sup>117</sup> Furthermore, the court disagreed with Smith's contention that the trial court erred in awarding punitive damages and attorneys' fees based upon a finding of malice.<sup>118</sup> The court reasoned that Smith-Shrader had the burden of proving that Smith acted intentionally and without just cause.<sup>119</sup> Even a "subtle third party conduct" which induced one employee to repudiate and breach his or her contract would be sufficient.<sup>120</sup> The court did not disturb the lower court's finding because it believed S.S. clearly sustained that burden. Finally, the court concluded that the evidence in the case supported the trial court's finding that Smith forfeited his right to all compensation,<sup>121</sup>

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employees until after his termination. *H. Vincent Allen and Associates, Inc. v. Weis*, 63 Ill. App. 3d 285, 379 N.E.2d 765 (1st Dist. 1978).

112. *Id.*

113. *Smith-Shrader*, 136 Ill. App. 3d at 577, 483 N.E.2d at 288.

114. *Id.* at 578, 483 N.E.2d at 288.

115. *Id.* at 578, 483 N.E.2d at 289 (quoting *H. Vincent Allen & Associates, Inc. v. Weis*, 63 Ill. App. 3d 285, 292, 379 N.E.2d 765, 770 (1st Dist. 1978)). "The constructive trust imposed upon officers and directors applies as well to transactions completed after the termination of the party's association with the corporation if the transactions began during the existence of the relationship, or were founded on information or knowledge acquired during the relationship," (quoting *Mile-O-Mo Fishing Club, Inc. v. Noble*, 62 Ill. App. 2d 50, 57, 210 N.E.2d 12, 15 (1965)).

116. *Smith-Shrader*, 136 Ill. App. 3d at 579-80, 483 N.E.2d at 289-90. The reviewing court concluded that the trial court's finding was not against the manifest weight of the evidence. See also RESTATEMENT (SECOND) OF TORTS § 766 (1977).

117. *Smith-Shrader*, 136 Ill. App. 3d at 580, 483 N.E.2d at 290.

118. *Id.*

119. *Id.* (citing *Getschow v. Commonwealth Edison Co.*, 111 Ill. App. 3d 522, 444 N.E.2d 579 (1st Dist. 1982)).

120. *Smith-Shrader*, 136 Ill. App. 3d at 580, 483 N.E.2d at 290 (quoting *Hannigan v. Sears Roebuck & Co.*, 410 F.2d 285 (7th Cir. 1969)).

121. *Smith-Shrader*, 136 Ill. App. 3d at 581, 483 N.E.2d at 291. The trial court adopted the rationale expressed in *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 838, 413 N.E.2d 1299, 1315 (1st Dist. 1980):

and dismissed Smith's counterclaim for dissolution based on shareholder deadlock.<sup>122</sup>

Another important corporations case decided during the *Survey* year involved trade secrets. In *Junkunc v. S.J. Advanced Technology and Manufacturing Corp.*,<sup>123</sup> the Illinois Appellate Court for the First District held that General Machinery's process for manufacture of a jet seal did not constitute a protectable trade secret. In *Junkunc*, the plaintiffs filed a motion for a preliminary injunction, seeking to enjoin the defendants, S.J. Advanced Technology and Manufacturing Corporation, from making any use of the manufacturing process developed by General Machinery to manufacture fuel nozzle seals. The trial court denied the motion and the plaintiffs appealed.<sup>124</sup>

Initially, the appellate court focused on the general authority of courts to grant preliminary injunctions.<sup>125</sup> On this matter, the court relied upon the well-founded standard that the party seeking a preliminary injunction must establish the existence of the following factors by a preponderance of the evidence: "a certain and clearly ascertained right needs protection, irreparable injury will occur without the injunction, no adequate remedy at law exists, and there is a probability of success on the merits of the case."<sup>126</sup> The court stated that a reviewing court should only consider substantive issues when a trial court has abused its discretion.<sup>127</sup> Further, the appellate court indicated that it would not disturb the trial court's findings unless the findings were against the manifest weight of the evidence.<sup>128</sup>

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"[W]ithin the actual period of tortious conduct, salary forfeiture is required because the agent's services are not being properly performed . . . . As a matter of public policy . . . , one who breaches fiduciary duties has no entitlement to compensation during a willful or deliberate course of conduct adverse to the principal's interests." *Id.*

122. *Smith-Shrader*, 136 Ill. App. 3d at 582, 483 N.E.2d at 291. The *Smith-Shrader* court relied on the 1978 appellate court decision of *Callier v. Callier*, 61 Ill. App. 3d 1011, 378 N.E.2d 405 (5th Dist. 1978), which preceded the *Callier* appellate court decision, discussed *supra* notes 91-104 and accompanying text. "[T]he evidence shows . . . two equal shareholders who were unable to get along and unable to reach agreement . . . as to the redemption of one's shares by the other or to the terms of voluntary dissolution. This is not equivalent to an inability of the corporation to perform the functions for which it was created." The *Smith-Shrader* court thus concluded that Smith failed to prove the existence of a legitimate shareholder deadlock. *Smith-Shrader*, 136 Ill. App. 3d at 582, 483 N.E.2d at 291.

123. 149 Ill. App. 3d 114, 498 N.E.2d 1179 (1st Dist. 1986).

124. *Id.* at 115, 498 N.E.2d at 1180-81.

125. *Id.* at 117-18, 498 N.E.2d at 1182.

126. *Id.*

127. *Id.*

128. *Id.* at 118, 498 N.E.2d at 1182. The appellate court noted:

The only issue on appeal was whether the trial court erred in holding that the plaintiffs did not possess a protectable trade secret for the manufacture of jet seals.<sup>129</sup> Accordingly, the appellate court began its analysis by defining a trade secret as "a plan or process, tool, mechanism, compound, or information data utilized by a person in business operations and known only to that person and such limited other persons to whom it may be necessary to confide it".<sup>130</sup> The appellate court then listed several factors to be considered in determining whether information is a trade secret,<sup>131</sup> but examined only the extent of the measures that General Machinery took to guard the secrecy of the seal manufacturing process.<sup>132</sup> In addressing this single factor, the court stressed that only this factor was determinative of whether a trade secret exists.<sup>133</sup> Upon reviewing the record,<sup>134</sup> the appellate court stated that the trial court's denial of the preliminary injunction was not against the manifest weight of the evidence.<sup>135</sup>

In a dissenting opinion, Justice Jiganti argued that General Ma-

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The trial court found that (1) no certain and clearly ascertained right existed; (2) no irreparable injury would occur without the injunction, because plaintiffs ha[d] already been competing with others and [would] continue to do so whether or not the court [issued] the injunction; (3) plaintiffs failed to establish that no adequate remedy at law existed; and (4) no likelihood of success on the merits existed, because the evidence failed to reveal a trade secret.

*Id.* at 118, 498 N.E.2d at 1183.

129. *Id.* at 119, 498 N.E.2d at 1182.

130. *Id.* (citing *ILG Industries, Inc. v. Scott*, 49 Ill. 2d 88, 93, 273 N.E.2d 393 (1971); RESTATEMENT (SECOND) OF TORTS § 757, Comment b, at 6 (1939)).

131. *Junkunc*, 149 Ill. App. 3d at 119, 489 N.E.2d at 1183. The court set forth the following six factors:

(1) the extent to which the information is known outside of the business, (2) the extent to which it is known by employees and others involved in the business, (3) the extent of measures taken to guard the secrecy of the information, (4) the value of the information to the business and to its competitors, (5) the amount of effort or money expended to develop the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.* (citing *ILG Industries, Inc. v. Scott*, 49 Ill. 2d 88, 93, 273 N.E.2d 393 (quoting RESTATEMENT (SECOND) OF TORTS § 757, Comment b, at 6 (1939))).

132. *Junkunc*, 149 Ill. App. 3d at 119, 489 N.E.2d at 1183.

133. *Id.*

134. *Id.* The appellate court acknowledged that General Machinery presented evidence that only they and one of the individual defendants knew the total manufacturing process. The court, however, also indicated that the defendant produced evidence that conflicted with General Machinery's. *Id.*

135. *Junkunc*, 149 Ill. App. 3d at 120, 489 N.E.2d at 1183. Concerning the relationship between General Machinery and one of the individual defendants, a son of one of the four founding fathers of General Machinery, the *Junkunc* court stated that the relationship illustrated that any of General Machinery's secrecy measures directed toward company employees did not apply to the individual defendant. *Id.*

chinery demonstrated the existence of a trade secret for its manufacture of jet seals.<sup>136</sup> Justice Jiganti stressed that each of the several factors elucidated by the majority must be weighed equally in determining the existence of a trade secret and that the majority erred in only addressing the extent of the measures taken to guard the secrecy of the information. Therefore, after evaluating each factor independently, Justice Jiganti concluded that General Machinery established the existence of a trade secret.<sup>137</sup>

### III. SECURITIES REGULATION

The Illinois Supreme Court did not decide any securities regulation cases during the *Survey* period.<sup>138</sup> Two appellate court decisions regarding securities regulation, however, are significant. In *Conroy v. Andeck Resources*,<sup>139</sup> the Illinois Appellate Court for the First District ruled that futures contracts based on financial instruments are not securities as defined by the Illinois Securities Law and that mere registration with the Securities and Exchange Commission (the "SEC") as a broker-dealer does not put an individual within the definition of a dealer. In *Conroy*, the plaintiffs, Conroy, O'Donnell, Burrell, and Gorman purchased units in an oil and gas limited partnership sold by the defendant Andeck Resources through a private security offering. Each of the plaintiffs belonged to the Chicago Board of Trade (the "CBOT"), a registered futures exchange and contract market,<sup>140</sup> and O'Donnell and Burrell also were registered with the SEC. In addition, O'Donnell once made a series of securities trades from his own account on the Chicago Board Options Exchange (the "CBOE").

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136. *Junkunc*, 149 Ill. App. 3d at 120-21, 489 N.E.2d at 1184 (Jiganti, J., dissenting).

137. *Id.* Justice Jiganti noted several factors in support of his conclusion that General Machinery possessed a protectable trade secret. First, Justice Jiganti indicated that only five people knew the entire process of manufacturing the seals. Also, he relied upon the fact that over a nine-year period, General Machinery spent \$1,700,000 to develop the manufacturing process. Finally, Justice Jiganti stated that the six factor test was satisfied because no competitor had successfully duplicated General Machinery's seal. *Id.*

138. *Rockford Life Insurance Co. v. Department of Revenue*, 112 Ill. 2d 174, 492 N.E.2d 1278 (1986), discussed in the *State and Local Tax* article of this issue, is relevant to the securities regulation. In *Rockford*, the court held that "Ginnie Mae" securities were not exempt from state and local taxes merely because they were guaranteed by, as opposed to issued by, an agency of the federal government. *Rockford Life Insurance* involved a personal property tax imposed on the company's capital stock in 1978, the last year such taxes were collected. The securities were issued by private investors based on pools of mortgages assembled by them and guaranteed by the Government National Mortgage Association. *Id.*

139. 137 Ill. App. 3d 375, 484 N.E.2d 525 (1st Dist. 1985).

140. *Id.* at 377, 484 N.E.2d at 528.

Subsequent to the purchase of the limited partnership units, the plaintiffs discovered that the units had never been registered in Illinois as required by state securities rules.<sup>141</sup> Relying on section 13 of the Illinois Securities Law of 1953 (the "Law"),<sup>142</sup> the plaintiffs elected to rescind the sale and tender the limited partnership units back to Andeck. Accordingly, they initiated a suit seeking rescission and alternative relief.<sup>143</sup> Following the trial court's dismissal of the claim against Andeck, the appellate court confronted the issue of whether the plaintiffs were entitled to the statutory remedy of rescission set forth in section 13 of the Law.<sup>144</sup> The court's initial inquiry in determining this issue was whether the plaintiffs were "dealers" under the Illinois Securities Law.<sup>145</sup> Sales to dealers are exempt from the Law's registration requirements.<sup>146</sup> The determinative factor was whether the plaintiffs engaged in the securities dealing activity<sup>147</sup> contemplated by the Law.<sup>148</sup> The court advanced several considerations to aid in this determination.

First, the court noted that, pursuant to the legislative history of the Commodity Futures Trading Commission Act (the "CFTC"),<sup>149</sup> the definition of a commodity includes futures con-

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141. *Id.*

142. ILL. REV. STAT. ch. 121½, para. 137.13 (1985).

143. *Conroy*, 137 Ill. App. 3d at 378, 484 N.E.2d at 429. Originally, Andeck's attorney, McAfee, was included as a defendant in the case. Counts against McAfee were dismissed by the trial court for lack of personal jurisdiction. The plaintiffs requested an interlocutory appeal on this issue and the appellate court affirmed the trial court decision. *Id.*

144. *Id.* at 379, 484 N.E.2d at 529 (citing ILL. REV. STAT. ch. 121½, para. 137.13 (1985)).

145. *Conroy*, 137 Ill. App. 3d at 379, 484 N.E.2d at 529.

146. *Id.*

147. *Id.* The trial court concluded that the plaintiffs had engaged in securities dealing based on the following facts: (1) plaintiffs had dealt with financial futures contracts in the past; (2) plaintiffs were members of the CBOT and they were members or had an automatic right to belong to and trade on the CBOE; and (3) plaintiffs were registered with the SEC as "broker-dealers." *Id.*

148. *Id.* (quoting ILL. REV. STAT. ch. 121½, para. 137.2-7 (1981)). Paragraph 137.2-7 provides in relevant part:

'Dealer' means any person, other than a salesperson, or controlling person and other than a bank organized under the banking laws of this State or of the United States or other than a trust company organized under the laws of this State, who engages in this State, either for all or part of his or her time, directly or indirectly, as agent, broker or principal, in the business of offering, selling, buying and selling, or otherwise dealing or trading in securities issued by another person.

ILL. REV. STAT. ch. 121½, para. 137.2-7 (1985) (emphasis in original).

149. *Conroy*, 137 Ill. App. 3d at 380, 484 N.E.2d at 530. In 1974, the CTFC extensively amended the Commodity Exchange Act (the "CEA") of 1936. One of the purposes of the amendment was to enlarge the definition of commodity to encompass the

tracts based on financial instruments.<sup>150</sup> The court emphasized that the Illinois Securities Law specifically exempted from its definition of security any commodity futures contracts offered or sold to the public on a registered contract market.<sup>151</sup> Pursuant to the Law, the regulation of futures contracts was not dependent upon the underlying commodity on which the futures contract was written.<sup>152</sup> The court thus concluded that the commodity futures trading activities conducted at the CBOT did not fall within the definition of securities trading.<sup>153</sup> Instead, the plaintiffs traded futures contracts on the CBOT, a registered contract market.<sup>154</sup>

Next, the court determined that the plaintiffs were not dealers in securities under the Illinois Securities Law. Although membership in the CBOT gives members an automatic right to join the CBOE, a national securities exchange,<sup>155</sup> the court held that mere membership in the CBOT or mere exercise of the automatic right to membership is not equal to actual trading on the CBOE.<sup>156</sup> Only one plaintiff, O'Donnell, exercised his membership right and actually traded at the CBOE. Because O'Donnell's situation involved a difficult factual determination, the court remanded to the trial court the issue of whether O'Donnell qualified as a "dealer" or simply as an investor or trader.<sup>157</sup>

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futures markets expected to expand to cover non-traditional goods and services like futures contracts based on financial instruments. S. REP. NO. 850, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2087, 2101. The Amendment also was enacted to "provide a uniform regulatory structure covering all futures trading in both the regulated or conventional and previously unregulated or nonconventional commodities." S. REP. NO. 850, 95th Cong., 2d Sess. 10, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2087, 2098. The court stated that the legislative history of the CEA and its amendments clearly suggested that all futures contracts, regardless of the underlying commodity, were to be regarded and treated as commodities rather than securities. *Id.*

150. *Id.*

151. *Id.* at 383, 484 N.E.2d at 531 (citing ILL. REV. STAT. ch. 121<sup>1</sup>/<sub>2</sub>, para. 137.2-1 (1985)).

152. *Conroy*, 137 Ill. App. 3d at 383, 484 N.E.2d at 532.

153. *Id.*

154. *Id.*

155. *Id.* at 384, 484 N.E.2d at 533.

156. *Id.* at 384-85, 484 N.E.2d at 533 (citing ILL. REV. STAT. ch. 121<sup>1</sup>/<sub>2</sub>, para. 137.2-7 (1985)).

157. *Conroy*, 137 Ill. App. 3d at 387-88, 484 N.E.2d at 534-35 (quoting 2 LOSS, SECURITIES REGULATIONS, ch. 8B, at 1296-97 (2d ed 1961).) The distinction between a private investor and a dealer has been articulated as follows:

[A dealer] ordinarily tries to obtain a regular clientele. He is apt to transact a substantial portion of his business directly with investors rather than with other dealers or through exchange members . . . . A dealer ordinarily holds himself out as one engaged in buying and selling securities at a regular place of business. And his business . . . is ordinarily characterized by a regular turnover, whereas a trader's transactions are generally more irregular in both volume and time. A

Finally, the *Conroy* court noted that mere registration with the SEC is insufficient to establish status as a dealer because an individual conceivably could register but never deal directly in securities on the CBOE.<sup>158</sup> Therefore, the court held that the plaintiffs were entitled to a trial on their claim.<sup>159</sup>

Another *Survey* period decision relevant to securities regulation involved investment contracts. In *Boldon v. Chiappa*,<sup>160</sup> the Illinois Appellate Court for the Fourth District held that the Illinois Securities Law governed investment contracts and that the tender requirement contained in the Law could be fulfilled during the trial of an action for rescission. On July 22, 1980, the plaintiff and defendants entered into a written contract whereby the plaintiff made a five thousand dollar "non-refundable investment" in the defendants' business, Firearms Unlimited. Under the contract, the plaintiff received a commission of two and one-half percent of the monthly gross profits and discounts on guns and ammunition while in the defendants' employ. The contract also recited other duties the plaintiff agreed to perform.<sup>161</sup> Pursuant to the contract, the plaintiff purchased guns and ammunition. On July 23, 1982, the plaintiff gave notice of rescission of the contract because the employment relationship had deteriorated. Subsequently, the plaintiff filed suit seeking recovery of the amount paid under the contract plus interest and attorneys' fees. He sought rescission of the investment contract based upon the defendants'<sup>162</sup> failure to comply with the filing requirements of section 4(G) of the Illinois Securi-

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trader, on the other hand, does not handle other people's money or securities; he does not 'make a market'; and he does not furnish the services which are usually provided by other dealers . . . . Needless to say, a person does not have to exhibit all or any given number of these dealer characteristics in order to be considered a dealer.

2 LOSS, *supra*, at 1297.

158. *Conroy*, 137 Ill. App. 3d at 385, 484 N.E.2d at 533.

159. *Id.* at 391, 484 N.E.2d at 537. O'Donnell's case was remanded for further hearing on the issue of whether he engaged in the business of securities trading or dealing. *Id.*

160. 140 Ill. App. 3d 913, 489 N.E.2d 6 (4th Dist. 1986).

161. *Id.* at 915, 489 N.E.2d at 8. The contract contained the following language:

In consideration hereof, the employee is entitled to the following benefits:  
(1) All currently produced firearms on a pre-ordered, pre-paid basis at dealer's costs plus handling and sales tax. Handling costs shall include among other costs such items as shipping costs, long distance telephone calls, etc. (2) All currently made related items in the gun field at dealer's costs plus handling and sales tax on a pre-ordered, pre-paid basis. Related items include ammunition, cleaning kits, gun cases, etc.

*Id.*

162. *Id.* at 913, 489 N.E.2d at 6. The defendants were cited as Sam Chiappa et al., d/b/a Firearms Unlimited, a Partnership. *Id.*

ties Law.<sup>163</sup> The plaintiff appealed after the dismissal of his second amended complaint.<sup>164</sup>

The appellate court first stated that no securities had been issued.<sup>165</sup> Rather, the dispute arose after dissatisfaction with an investment contract.<sup>166</sup> Nonetheless, the court observed that under the Illinois Securities Law, "security" was defined to include investment contracts.<sup>167</sup> The court thus proceeded to apply the filing requirement of section 4(G) and the tender requirement of section 12(D).<sup>168</sup> In doing so, the court concluded that the defendants violated Illinois Blue Sky Laws by failing to file a mandatory report with the Secretary of State<sup>169</sup> indicating that the statutory notice and tender requirements were met.<sup>170</sup>

The defendants sought retroactive application of the amended section 4(G), which would eliminate a filing requirement.<sup>171</sup> The court refused to apply the section retroactively, asserting that the defendants had waived this defense by not including it in their answer before trial.<sup>172</sup> The court further noted that, even absent a finding of waiver, the applicable law was the law that existed prior to the amendment, at the time of the alleged action.<sup>173</sup> Finally, the court considered whether the plaintiff had met the jurisdictional requirement of tender included in section 12(D) of the Law.<sup>174</sup> The

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163. ILL. REV. STAT. ch. 121½, para. 137.4(G) (1985).

164. *Boldon*, 140 Ill. App. 3d at 916, 489 N.E.2d at 8. In the complaint, plaintiff alleged that no securities were received from the transaction, that he thereby tendered his only copy of the contract to the court, and that he derived no income or interest from the securities in question. The plaintiff admitted however, that he had purchased from the defendants various guns and ammunition under the agreement. Consequently, the plaintiff indicated that he had retained all the guns and ammunition purchased from the defendants under the agreement and was ready, willing, and able to tender the guns and ammunition to the court in return for the payment of the purchase prices by the defendants. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* (citing ILL. REV. STAT. ch. 121½, para. 137.2-1 (1985)).

168. ILL. REV. STAT. ch. 121½, para. 137.12(A) (1985).

169. *Boldon*, 140 Ill. App. 3d at 916-17, 489 N.E.2d at 9 (citing ILL. REV. STAT. ch. 121½, para. 137.4(G) (1985)). In Illinois, securities regulation laws commonly are referred to as Blue Sky Laws.

170. ILL. REV. STAT. ch. 121½, paras. 137.13(A), (B) (1985).

171. *Boldon*, 140 Ill. App. 3d at 917, 489 N.E.2d at 29 (citing ILL. REV. STAT. ch. 121½, para. 137.4(G) (1985)). Amended section 4(G) was not effective until January 1, 1984.

172. *Boldon*, 140 Ill. App. 3d at 917-18, 489 N.E.2d at 9-10 (citing *Downes Swimming Pool, Inc. v. North Shore National Bank*, 124 Ill. App. 3d 457, 462, 464 N.E.2d 761, 765 (1st Dist. 1984)).

173. *Boldon*, 140 Ill. App. 3d at 918, 489 N.E.2d at 10.

174. *Id.*

*Boldon* court stated that section 12(D) requires a purchaser to tender to the seller or the court the securities sold.<sup>175</sup> When no securities are involved, the court asserted that the purchaser must tender the contract of sale.<sup>176</sup> The court maintained that, although notice of election to rescind must be made within six months of learning that the sale is voidable,<sup>177</sup> a similar time limit did not constrain the tender requirement.<sup>178</sup> The court held that the plaintiff complied with the Law by tendering his copy of the investment contract to the court.<sup>179</sup> Moreover, the court ruled that guns and ammunition were not securities for the purposes of the Law<sup>180</sup> and, even assuming they were securities, dismissal of the case would be premature because tender of them could have been made during trial.<sup>181</sup>

#### IV. COMMERCIAL TRANSACTIONS

##### A. Debtors and Creditors

The Illinois Supreme Court decided one case during the *Survey* period that significantly affected debtor-creditor law.<sup>182</sup> In *P.A. Bergner & Co. v. Lloyd Jewelers*,<sup>183</sup> the court held that a dated letter agreement entered into by a creditor department store and a

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175. *Id.* at 919, 489 N.E.2d at 10.

176. *Id.*

177. ILL. REV. STAT. ch. 121½, para. 137.13(B) (1985).

178. *Id.* at para. 137.13(A).

179. *Boldon*, 140 Ill. App. 3d at 920, 489 N.E.2d at 11. The *Boldon* court stated:

The statute establishes no time limit on tender as it does on notice. Tender must be made of the identical shares purchased (*Printenney v. Mantel*, 234 Ill. App. 137 (1924)), and all shares purchased (*Glen v. Dodson*, 344 Ill. 473, 180 N.E. 393 (1932)). Tender may be made to the seller before trial (*Gowdy v. Richter*, 20 Ill. App. 3d 514, 314 N.E.2d 549 (1974)), or at trial (*Morrison v. Farmers Elevator Co.*, 319 Ill. 372, 150 N.E. 330 (1925); (*Weisbrod v. Lowitz*, 282 Ill. App. 252 (1935)). Once made, it must be held open up to the time of judgment (*Tobey v. Sundling*, 25 Ill. App. 3d 205, 323 N.E.2d 30 (1974)). Of course, the tender need not be made to the seller at all but may be made directly to the court. ILL. REV. STAT. ch. 121½, para. 137.13(A) (1981).

*Boldon*, 140 Ill. App. 3d at 920, 489 N.E.2d at 11 (quoting *Bultman v. Bishop*, 120 Ill. App. 3d 138, 142, 457 N.E.2d 994, 997 (5th Dist. 1983)).

180. *Bolden*, 140 Ill. App. 3d at 920, 489 N.E.2d at 11.

181. *Id.* at 920-21, 489 N.E.2d at 11.

182. *In re Thebus*, 108 Ill. 2d 255, 256, 483 N.E. 2d 1258 (1985), a professional ethics case, is significant to debtor and credit principles to the extent that it established the following principle: An action for conversion of funds may not be maintained to satisfy a mere obligation to pay money when the relationship of debtor and creditor exists, and an action for conversion will not lie for money represented by a general debt or obligation, since at all times the funds belonged to the plaintiff although the defendant converted them to his own use. *Id.* at 260-61, 483 N.E.2d at 1260-61.

183. 112 Ill. 2d 196, 492 N.E.2d 1288 (1986).

debtor jewelry company constituted an account stated regarding the sums owed as of that date. The plaintiff, Bergner, operated a chain of retail department stores. The defendant, Lloyd, maintained a retail jewelry business. In 1967, the parties entered into a "Departmental Lease" in which Lloyd agreed to operate the jewelry department in Bergner's Peoria store.<sup>184</sup> A subsequently executed Master Department Lease contained identical provisions. The agreement provided for a minimum guaranteed rental and for additional rental based on a percentage of Lloyd's net sales. Other provisions required delivery of cash receipts to Bergner's cashier by the close of each business day and processing of charge accounts and installment payments through Bergner's credit department.<sup>185</sup> Additionally, Bergner agreed to receive and hold in trust all sums collected until an accounting was made. The agreement did not oblige Bergner to segregate these funds but did require him to settle each monthly account with Lloyd on or before the last day of the next month. Bergner agreed to deduct charges due it and pay the balance to Lloyd after it made an accounting to Lloyd of Lloyd's business for the preceding month.<sup>186</sup>

In January of 1977, Robert Congress, president and sole shareholder of Lloyd, and officer of Bergner, signed a letter agreement. Pursuant to the letter agreement, Lloyd became indebted to Bergner for \$161,220.39 in excess rentals and \$125,361.00 for fixtures, with the fixture expenses due February 28, 1977.<sup>187</sup> Bergner also agreed to deduct from Lloyd's statement monthly payments of \$10,000 on the excess rental and to review the matter on April 30, 1977 for the purpose of accelerating the principal payments.<sup>188</sup>

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184. *Id.* at 199, 492 N.E.2d at 1289.

185. *Id.* at 199, 492 N.E.2d at 1289-90.

186. *Id.* at 199-200, 492 N.E.2d at 1289-90. A Master Department Lease executed on January 21, 1975 contained the same provisions. *Id.* The provision stated:

Lessor shall receive and hold in trust until an accounting is made in respect thereto, all sums collected, including cash sales and approved credit sales of merchandise or services rendered by the Lessee, but shall not be obligated to segregate said funds or keep them in a separate account. Accounting and settlement shall be made by lessor with lessee for each calendar month's business on or before the last day of the next succeeding month. Each month as the Lessor makes an accounting to the Lessee of the business of the Lessee for the preceding calendar month, it shall, after deducting its proper charges and any and all sums due from Lessee to Lessor, pay over to the Lessee the balance due to it through and including the last day of the preceding calendar month.

*Id.* Bergner consistently failed to deduct fixture costs and excess rentals in its accounting to Lloyd. Nonetheless, Lloyd's financial statements for 1972-1976 indicated liabilities for accrued rent. *Id.*

187. *Id.*

188. *Id.*

Congress, in his capacity as officer, executed a promissory note payable to Bergner for each debt. On July 31, 1977, Bergner withheld the entire monthly sum due Lloyd because Lloyd failed to pay the fixture and rent charges.<sup>189</sup> Bergner notified Lloyd by letter of the withholding and advised Lloyd of the balance remaining on each indebtedness. Bergner further indicated that it would terminate Lloyd's lease if the entire amount was not paid within thirty days.<sup>190</sup> Bergner also withheld Lloyd's sales proceeds for two months and applied them to the amounts due.<sup>191</sup> On October 14, 1977, Lloyd vacated the premises and notified Bergner that it considered the lease agreement terminated. Subsequently, Bergner brought suit against Lloyd seeking \$82,292.72 based upon the letter agreement as an account stated. Bergner also sought judgment against Congress in the amounts of the balances due on the notes.<sup>192</sup>

Following extensive lower court proceedings,<sup>193</sup> the supreme court declared the letter agreement of January 1977 an account stated for the sums owed as of that time.<sup>194</sup> The court held that Bergner's forbearance in enforcing collection of the sums due at that time constituted consideration for the two notes executed by Congress.<sup>195</sup> Furthermore, the *Bergner* court concluded that Congress executed the notes in his capacity as sole shareholder and president.<sup>196</sup> Accordingly, the court ruled in favor of Bergner on its claims and remanded to the trial court the issue of the amount of damages.<sup>197</sup>

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189. *Id.*

190. *Id.* at 201, 492 N.E.2d at 1290.

191. *Id.* Bergner released some money to Lloyd for the purpose of making payments to other creditors. *Id.*

192. *Id.* Lloyd counterclaimed, seeking damages for breach of contract. The counterclaim also included an allegation of tortious interference with contractual relationships against two corporations affiliated with Bergner. *Id.* at 198, 492 N.E.2d at 1289. An account stated "arises where there have been transactions between a debtor and a creditor resulting in the creation of matured debts and the parties agreement compute a balance which the debtor promises to accept in full payment for items of account. BLACK'S LAW DICTIONARY 17 (5th ed. 1979).

193. *Bergner*, 112 Ill. 2d at 198-99, 492 N.E.2d at 1289. The jury awarded a verdict of \$670,000 in favor of Lloyd on the counterclaim against Bergner and was in favor of the affiliated corporations on the tortious interference count. The circuit court then directed a verdict in favor of Bergner on the letter agreement count and allowed a new trial on the issue of damages. On appeal, the appellate court reversed the judgment entered on Lloyd's breach of contract counterclaim. Bergner then petitioned for leave to appeal. *Id.*

194. *Id.* at 202, 492 N.E.2d at 1291.

195. *Bergner*, 112 Ill. 2d at 202, 492 N.E.2d at 1291.

196. *Id.*

197. *Id.* at 203-04, 492 N.E.2d at 1291-92. The Illinois Supreme Court stated that the manner in which the verdicts had been returned by the trial court did not disclose

The Illinois Appellate Court for the Second District addressed a significant bankruptcy issue in *In re Marriage of Lueck*.<sup>198</sup> In *Lueck*, the court held that a sentence imposed as a sanction for failure to pay child support was subject to an automatic stay under the Bankruptcy Act.<sup>199</sup> The defendant Lueck divorced his wife and subsequently failed to make child support payments for a number of years. Subsequently, the court held him in contempt and sentenced him to thirty days in jail.<sup>200</sup> Twenty days later, and prior to serving his sentence, Lueck filed a voluntary chapter 13 petition in bankruptcy with a plan that provided for one hundred percent payment of the child support arrearage. Lueck also moved for a stay of his jail sentence until the dismissal or completion of his bankruptcy petition. The trial court denied Lueck's motion and the appellate court reversed.<sup>201</sup>

The appellate court concluded that Lueck established a right to an automatic stay of his jail sentence pursuant to section 362(a) of the Federal Bankruptcy Act.<sup>202</sup> The court clarified that the trial court had issued the contempt order to ensure the payment of the

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whether the jury intended to award Bergner \$36,688.33 or a greater amount. Furthermore, the court indicated that Lloyd and Congress had the burden of proving that the amount due under the agreement was erroneous. The court dismissed Lloyd's counterclaim for breach of contract. After comparing the facts to the unambiguous language of the contract and the clearly defined contractual obligations of the parties, the court stated that Bergner strictly adhered to the provisions of the contract. In its concluding remarks, the court dispensed with Lloyd's allegation that Bergner violated its implied obligation of good faith. The *Bergner* court determined that the allegation did not warrant a breach of contract award. The court noted that, assuming the question of good faith had been appropriate, Bergner's act of allowing the indebtedness to grow so large did not prevent Lloyd from retaining the money for later payments. *Id.*

198. 140 Ill. App. 3d 836, 489 N.E.2d 443 (2nd Dist. 1986).

199. 11 U.S.C. § 362 (Supp. III 1979). Filing of a petition under chapter 13 of the Act operates as a stay of the following actions:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other pending against the debtor that was or could have been commenced before the commencement of the case under this title; (2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or property from the estate; . . . .

*Id.* One of the exceptions to the automatic stay set out in section 362(b) involves "the collection of alimony, maintenance, or support from property that is not the property of the estate." *Id.*

200. *Lueck*, 140 Ill. App. 3d at 837, 489 N.E.2d 444. The issuance of a mittimus by the clerk was stayed for three weeks, to allow for payment of the child support arrearage by the defendant, and, thus, the purging of the contempt. *Id.*

201. *Id.*

202. 11 U.S.C. § 362(a) (Supp. III 1979). See *supra* note 199.

child support arrearage<sup>203</sup> and not, as the plaintiff suggested, to uphold the dignity of the court.<sup>204</sup>

The court also determined that the automatic stay provision applied even though the trial court entered the contempt order before Lueck filed his bankruptcy petition.<sup>205</sup> The court buttressed its position by analyzing the interaction between sections 362(b)(2) and 362(a)(2) of the Federal Bankruptcy Act.<sup>206</sup> The court reasoned that, pursuant to section 362(b)(2), proceedings to collect child support from property not part of the estate are exempt from the automatic stay.<sup>207</sup> The court then stated that, for purposes of a chapter 13 bankruptcy, section 1306(a)(2) provides that property of the estate includes earnings from services performed by the debtor after the commencement of the bankruptcy case but before its dismissal or closing.<sup>208</sup> The court reasoned that, although section 362 does not bar an action against non-estate property to collect arrearages in child support, Lueck had no non-estate property against which to proceed.<sup>209</sup> Therefore, the court granted Lueck's motion to stay the prior contempt order against the property of the estate.<sup>210</sup>

### B. Banks and Banking

The most significant *Survey* period cases affecting banks and banking addressed the transfer of jointly-held property. The Illinois Supreme Court considered the transfer of funds held in joint bank accounts. An appellate court case also addressed the transfer of an undivided joint tenancy interest in investment securities. Read together, the cases illustrate that, in an action challenging a purported transfer of jointly-held property, the nature of the property involved determines the applicable law.

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203. *Lueck*, 140 Ill. App. 3d at 838, 489 N.E.2d at 445.

204. *Id.* If the contempt order had been invoked to uphold the dignity of the court, the proceeding would have been exempt from the automatic stay provision of section 362(a). *Id.* (citing *In re Dumas*, 19 Bankr. 676 (9th Cir. 1982); *David v. Hooker, Ltd.*, 560 F.2d 412 (9th Cir. 1977)). The *Lueck* court, however, stated that the purpose of Lueck's contempt order was to compel expenditure of money from his estate. *Id.*

205. *Lueck*, 140 Ill. App. 3d at 838-39, 489 N.E.2d at 445. The court cited the Federal Bankruptcy Act, *supra* note 202, and asserted that the language clearly supported granting the automatic stay. *See also In re Thayer*, 24 Bankr. 491 (W.D. Wis. 1982) (attorney and wife held in contempt of bankruptcy court for seeking to enforce state court's pre-bankruptcy finding of contempt for failure to pay child support).

206. *Lueck*, 140 Ill. App. 3d 838-39, 489 N.E.2d at 445.

207. *Id.* at 839, 489 N.E.2d at 445.

208. *Id.*

209. *Id.*

210. *Id.*

The Illinois Supreme Court decision of *Pescetto v. Colonial Trust and Savings Bank*<sup>211</sup> elucidated a critical development in laws affecting the transfer of funds in joint savings accounts. In *Pescetto*, the court held that although jointly-held property is generally subject to the laws of joint tenancy, the contract between a bank and its depositors governs joint bank accounts.<sup>212</sup> The case involved a wife's action to establish her right to funds held jointly with her deceased husband in a Colonial Trust savings account. A relevant portion of the signature card provided that the bank was authorized to recognize any of the signatures on the card for payment of funds or for any business transaction regarding the account. The depositors agreed that the sums deposited by either or both of the joint depositors were owned by them jointly, with a right of survivorship. Moreover, the sums were subject to the order or receipt of either of them. Finally, payment on the order of either of the joint depositors or to the survivor was valid and discharged the bank from liability.<sup>213</sup>

Without Mrs. Pescetto's knowledge, Mr. Pescetto took out loans with the bank and pledged the savings account as collateral. Subsequently, Mr. Pescetto died leaving the loans in default. The bank enforced its security interest in the savings account. Mrs. Pescetto then instituted an action to establish her right to the jointly-held funds. The trial court granted summary judgment for Mrs. Pescetto.<sup>214</sup> On appeal, the trial court decision was reversed and summary judgment was entered for the bank.<sup>215</sup> Mrs. Pescetto then appealed to the Illinois Supreme Court.<sup>216</sup>

Mrs. Pescetto argued that the 1984 Illinois Supreme Court decision of *Harms v. Sprague*<sup>217</sup> controlled the case and mandated that the bank's security interest be held invalid. In *Harms*, two joint tenants held a parcel of real estate. When one of the tenants mortgaged his interest and subsequently died, the mortgagee claimed an interest in the real estate. The court held that a mortgage executed by less than all joint tenants does not sever the joint tenancy.<sup>218</sup> Instead, the court concluded that the mortgage created a lien on

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211. 111 Ill. 2d 314, 489 N.E.2d 1365 (1986).

212. *Pescetto v. Colonial Trust and Savings Bank*, 111 Ill. 2d 314, 489 N.E.2d 1365 (1986).

213. *Id.* at 315-16, 489 N.E.2d at 1366.

214. *Id.*

215. *Id.*

216. *Id.* at 315, 489 N.E.2d at 1366.

217. 105 Ill. 2d 215, 473 N.E.2d 930 (1984).

218. *Id.*

only the interest of the mortgaging party.<sup>219</sup> Accordingly, upon the death of the mortgaging tenant in *Harms*, the surviving tenant took the entire interest free and clear of the lien because the mortgaging tenant's interest ceased to exist.<sup>220</sup>

The Illinois Supreme Court disagreed with Mrs. Pescetto's application of *Harms* to the *Pescetto* case.<sup>221</sup> The court distinguished the two cases based upon the type of jointly owned property.<sup>222</sup> *Harms* involved a joint tenancy in real property, whereas *Pescetto* involved a joint bank account.<sup>223</sup> The court rejected the *Harms* rationale and held that a joint bank account is subject to the provisions of the contract between the bank and its depositors;<sup>224</sup> a determination that necessitated an interpretation of the signature card. The court then held that the contract clearly authorized the bank to honor the signature of either depositor in transactions involving the interests of both joint tenants.<sup>225</sup> Accordingly, Mr. Pescetto's signature was deemed sufficient to pledge the entire account as collateral for the loan and the bank possessed an enforceable security interest against the funds.<sup>226</sup>

In *Walsh v. First National Bank of Joliet*,<sup>227</sup> the Illinois Appellate Court for the Third District addressed an issue similar to that in *Pescetto* but reached a different conclusion. In *Walsh*, the court considered whether an undivided joint tenancy interest in investment securities was capable of being pledged despite the failure to join, and without the knowledge of, the other joint tenant. The court held that the joint tenant, having knowledge of the transaction, effectively pledged his undivided one-half interest in the securities.<sup>228</sup>

Robert Walsh, owner of Joliet Blacktop, Inc., gave four promissory notes to First National Bank of Joliet. The notes included the signatures of Robert and Helen Walsh, as officers and in their individual capacities. As security for the notes, Walsh pledged 1,110 shares of First National. The signatures of both Robert and Helen appeared on the stock power. Subsequently, Robert Walsh disappeared without paying the notes. When First National notified

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219. *Id.* at 223, 473 N.E.2d at 934.

220. *Id.* at 224, 473 N.E.2d at 934.

221. *Pescetto*, 111 Ill. 2d at 316-17, 489 N.E.2d at 1366.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 316-17, 489 N.E.2d at 1366-67.

227. 140 Ill. App. 3d 689, 489 N.E.2d 337 (3rd Dist. 1986).

228. *Id.* at 692, 489 N.E.2d at 339.

Helen of its intention to sell Robert's one-half interest in the First National shares pursuant to its security agreement, Helen informed the bank that she had signed neither the notes nor the stock power and that her signature was a forgery.<sup>229</sup>

At the appellate level, the court considered whether Robert Walsh had pledged an undivided joint tenancy interest in the investment securities despite his failure to join and without the knowledge of Helen Walsh.<sup>230</sup> The court concluded that the bank acquired an enforceable security interest in Robert's undivided one-half interest in the stock.<sup>231</sup>

In contrast, the court then noted that all joint tenants must join in the endorsement of an entire interest.<sup>232</sup> The court further observed, however, that the drafters of the U.C.C. anticipated that, under certain circumstances, a joint tenant could transfer or assign less than a whole interest in investment securities.<sup>233</sup> As a result, the court held that the transfer would be effective to the extent of the endorsement and that Robert Walsh effectively had pledged a security interest in his undivided one-half interest in the stock.<sup>234</sup>

In a concurring opinion, Justice Heiple presented an alternative rationale for the decision.<sup>235</sup> Justice Heiple suggested that the majority's reliance on the U.C.C. was misplaced because the U.C.C. does not deal with the right to transfer or pledge a security interest when less than all of the interest holders sign the transfer.<sup>236</sup> He further noted that the U.C.C. fails to resolve the situation where, in an attempt to pledge an entire security, a joint tenant signs the

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229. *Id.* at 690-91, 489 N.E.2d at 338. The circuit court granted a preliminary injunction against the sale and certified the case for interlocutory appeal. *Id.* The circuit court premised its decision on section 8-308 of the U.C.C. *Id.* (citing ILL. REV. STAT. ch. 26, para. 8-308 (1985)). The court interpreted "appropriate person" in section 8-308(1) and concluded that Robert alone was not an appropriate person to create any security interest in favor of the bank but noted the signatures of both joint tenants were necessary. Accordingly, the court held that the bank had no enforceable security interest and could not force a sale of even Robert's individual one-half interest. *Id.*

230. *Walsh*, 140 Ill. App. 3d at 692, 489 N.E.2d at 339.

231. *Id.* (citing *Ogilvie v. Idaho Bank and Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978)). In *Ogilvie*, the Idaho Supreme Court considered a similar factual situation and held that an undivided interest in investment securities was capable of being pledged. The *Walsh* court criticized the circuit court and the dissenting opinion in *Ogilvie* for their reliance on section 8-308 of the U.C.C. *Walsh*, 140 Ill. App. 3d at 691, 489 N.E.2d at 339.

232. *Walsh*, 140 Ill. App. 3d at 691, 489 N.E.2d at 339.

233. *Id.* at 691-92, 489 N.E.2d at 339.

234. *Id.* at 692, 489 N.E.2d at 339 (quoting ILL. REV. STAT. ch. 26, para. 8-308(5) (1985)).

235. *Walsh*, 140 Ill. App. 3d at 689, 489 N.E.2d at 339 (Heiple, J., concurring).

236. *Id.*

transfer himself and also fraudulently forges another joint tenant's signature.<sup>237</sup> Interestingly, Justice Heiple relied on the decision in *Harms v. Sprague*<sup>238</sup> to conclude that a mortgage by a joint tenant exists as a lien on his interest in the joint tenancy property while he is living but that the lien does not sever the joint tenancy and, therefore, is extinguished upon his death.<sup>239</sup> Applying that principle to *Walsh*, Justice Heiple recognized the validity of Robert's pledge on his own signature of an undivided one-half interest in the stock.<sup>240</sup>

### C. Secured Transactions<sup>241</sup>

During the *Survey* year, Illinois case law in the area of secured transactions primarily reemphasized already standing Illinois Law. One Illinois Supreme Court decision, however, did clarify the principle of waiver of security interests. At the appellate court level, one case is significant for its treatment of beneficial interests in land trusts, and another for its application of the U.C.C. Those decisions are reviewed in this section.

In *Sexton v. Smith*,<sup>242</sup> the Illinois Supreme Court held that a party effectively waives a prior security interest in a chattel by voluntarily agreeing to allow a bank to acquire a preferred claim. The

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237. *Id.* at 692, 489 N.E.2d at 339-40 (Heiple, J., concurring).

238. 105 Ill. 2d 215, 473 N.E.2d 930 (1984).

239. *Walsh*, 140 Ill. App. 3d at 693, 489 N.E.2d at 340 (Heiple, J., concurring).

240. *Id.*

241. Cases involving creditors' rights and homestead exemptions and fraudulent conveyances also are relevant to a review of commercial transactions cases. Two cases decided during the *Survey* period examined creditors' rights and homestead exemptions. See *Bank of Illmo v. Simmons*, 142 Ill. App. 3d 741, 492 N.E.2d 207 (5th Dist. 1986) (amended homestead exemption statute in effect at the time of a judgment foreclosing on a trust deed, as applied to remedy of judgment creditor for collection of a debt, entitled to retroactive application to the date of execution because it did not result in an unjustified impairment of the creditor's rights); *Willard v. Northwest National Bank of Chicago*, 137 Ill. App. 3d 255, 484 N.E.2d 823 (1st Dist. 1985) (homestead exemption benefits not only the householder, but the family, and affords the householder's spouse a veto-like power where alienation or encumbrance of the homestead are concerned).

Three Illinois decisions examined fraudulent conveyances. See *People ex rel. Hartigan v. Gaby's Apparel*, 113 Ill. App. 3d 343, 478 N.E.2d 1043 (1st Dist. 1985) (security agreement executed between president of a corporation and close friend constituted a fraudulent conveyance); *Kardynalski v. Fisher*, 135 Ill. App. 3d 643, 482 N.E.2d 117 (2d Dist. 1985) (defendant's conveyance in an attempt to avoid liability for worker's compensation claim was fraud-in-law); *Superior Partners v. Professional Education Network*, 138 Ill. App. 3d 226, 485 N.E.2d 1218 (1st Dist. 1985) (Illinois rule that a transfer of personal property, unaccompanied by a corresponding change of possession, is fraudulent per se and void as to creditors and subsequent bona fide purchasers does not apply to those who have prior notice of the sale).

242. 112 Ill. 2d 187, 492 N.E.2d 1284 (1986).

plaintiff in *Sexton* agreed to sell his farm and the cattle and machinery located on the farm to Hampton. Riedemann, the president of the Bradford National Bank, offered to finance the sale of the cattle and machinery on the condition that Sexton and Hampton arranged for financing the sale of the farm. Riedemann testified that he told both Sexton and Hampton that the bank would require proper security.<sup>243</sup>

Later the same month, Smith, representing Sexton, prepared a contract, deed, and escrow agreement for the sale of the property. The contract provided for a \$50,000 down payment by Hampton with the balance payable in installments over a twenty-five year period. Under the contract, Sexton retained title to the property until final payment was made, though Hampton could take possession of the property and commence farm operations the day the contract was executed.<sup>244</sup> In order to finance the purchase of the farm, Hampton obtained a \$44,600 loan from Bradford National Bank and signed a note, a security agreement, and a financing statement giving the bank a first lien on the cattle and machinery.<sup>245</sup>

Subsequently, Hampton defaulted on the note and Bradford National Bank sought to enforce its lien. Judgment was entered in favor of the bank.<sup>246</sup> As a result, Sexton brought an action for malpractice against Smith alleging that Smith failed to protect his security interest in the cattle and machinery. The trial court ruled in favor of Sexton.<sup>247</sup> This decision was affirmed on appeal. The appellate court then granted Smith's petition for leave to appeal.<sup>248</sup>

On appeal, Smith argued that Sexton voluntarily waived his security interest and thereby relieved Smith of any malpractice liability.<sup>249</sup> The court agreed.<sup>250</sup> The court looked to Article 9 of the

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243. *Id.* at 189-90, 492 N.E.2d at 1285.

244. *Id.* at 190, 492 N.E.2d at 1285. The record did not indicate that any discussion transpired regarding Sexton's retaining a security interest in the cattle and machinery. The following month, Hampton paid Sexton \$50,000. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 189, 492 N.E.2d at 1285.

248. *Id.* at 192, 492 N.E.2d at 1286. The trial court found that Smith was negligent in failing to file a financing statement which would protect Sexton's security interest in the cattle and machinery and thus entered judgment in favor of Sexton. The court also determined that Sexton had not agreed to the bank's taking a prior security interest in the property. Thus, Smith was the proximate cause of Sexton's loss of a secured interest. A divided panel of the appellate court issued a Rule 23 opinion affirming the trial court. The Illinois Supreme Court then granted Smith's petition for leave to appeal. *Id.*

249. *Id.* at 193, 492 N.E.2d at 1287.

250. *Id.* (citing *Pelham v. Griesheimer*, 92 Ill. 2d 13, 440 N.E.2d 96 (1982); *Cook v.*

U.C.C. which provides for the creation of security interests in personal property or fixtures.<sup>251</sup> In interpreting the Article, the court stressed the importance of filing a financial statement<sup>252</sup> and further noted that Article 9 is intended to protect a creditor's interest in secured property and place others on notice of possible adverse claims against the property.<sup>253</sup> Notwithstanding that purpose, the court ruled that a creditor may waive his right to a security interest.<sup>254</sup> The court then concluded that the plaintiff waived his prior security interest in the cattle and machinery by voluntarily agreeing to the bank's acquisition of a preferred claim.<sup>255</sup>

Sexton argued that section 9-105 (1)(d) of the U.C.C.<sup>256</sup> requires a third party to sign both a security agreement and a financing statement. The *Sexton* court agreed that absence of a third party owner's signature may be evidence of a lack of waiver, but nevertheless held that the facts convincingly showed that Sexton had waived his security interest in favor of the bank.<sup>257</sup>

At the appellate level, two significant secured transactions cases were decided. In *Commercial National Bank of Chicago v. Hazel Manor Condominiums, Inc.*,<sup>258</sup> the Illinois Appellate Court for the First District resolved any uncertainty concerning the nature of a beneficial interest in a land trust.<sup>259</sup> In *Commercial National Bank,*

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Gould, 109 Ill. App. 3d 311, 440 N.E.2d 448 (3d Dist. 1982); *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1st Dist. 1974)). The trial court indicated that "the plaintiff must prove that the defendant attorney owed plaintiff a duty of due care arising from the attorney-client relationship, that the defendant breached that duty, and that as a proximate result, the plaintiff suffered injury." *Id.*

251. *Id.* (citing ILL. REV. STAT. ch. 26, para. 9-102(a) (1985)).

252. *Sexton*, 112 Ill. 2d at 193, 492 N.E.2d at 1287.

253. *Id.*

254. *Id.* (quoting *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 475 N.E.2d 872 (1985); *Vermilion County Production Credit Association v. Izzard*, 111 Ill. App. 3d 190, 249 N.E.2d 352 (4th Dist. 1969)). The supreme court defined waiver as an "intentional relinquishment of a known right" and further observed that waiver can be "express or implied, and arise from acts, words or conduct of the one waiving the right." *Id.*

255. *Sexton*, 112 Ill. 2d at 194-95, 492 N.E.2d at 1287-88. The court also applied the long-established axiom that a reviewing court will not disturb the finding of the trial court unless it is against the manifest weight of the evidence. In reaching the determination, the court relied extensively on witness testimony. Testimony that Sexton knew the necessity of the bank's acquisition of a lien on the property and that he voluntarily relinquished his security interest in favor of the bank greatly influenced the outcome of the case. *Id.*

256. *Id.* at 195, 492 N.E.2d at 1288 (citing ILL. ANN. STAT. ch. 26, para. 9-112, Illinois Code Comment, at 91 (Smith-Hurd 1974); ILL. REV. STAT. ch. 26, para. 9-105 (1)(d) (1985)).

257. *Sexton*, 112 Ill. 2d at 196, 492 N.E.2d at 1288.

258. 139 Ill. App. 3d 644, 487 N.E.2d 1145 (1st Dist. 1985).

259. *Id.*

the court held that a beneficial interest in a land trust constituted a personal property interest and not an interest in real estate.<sup>260</sup>

The dispute in *Commercial National Bank* arose after four individuals<sup>261</sup> entered into a joint venture agreement for the purchase of an apartment building. They subsequently incorporated the building in Illinois as Hazel Manor Condominiums, Inc. Following the execution of a trust agreement, the company conveyed title to the property to the Commercial National Bank of Chicago. As trustee, the bank held one hundred percent of the beneficial interest in the land trust. Two of the company's shareholders retained the power of direction. Commercial National Bank, in its individual capacity, agreed to make various loans to itself as trustee for the trust. The loans were secured by trust deeds and the trustee's collateral assignments of the beneficial interest in the trust. Also, demand notes evidenced the loans.<sup>262</sup>

Subsequently, the defendants defaulted on the notes. The bank voluntarily agreed not to foreclose on the properties or to pursue its remedies under the U.C.C. after the defendants agreed to sell the property and satisfy the debts. The defendants failed to consummate a sale and consequently the bank attempted to foreclose. The bank published a notice of public sale of the beneficial interest prior to the foreclosure action and the defendants petitioned to enjoin the sale.<sup>263</sup> The trial court denied the petition and the bank sold the collateral.<sup>264</sup> On appeal, the defendants sought to have the U.C.C. sale voided. They contended that the trial court denied them their rights under the Illinois Mortgage Foreclosure Act by failing to recognize the equitable mortgage nature of the collateral assignment.<sup>265</sup>

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260. *Id.* at 647-48, 487 N.E.2d at 1148.

261. *Id.* at 645, 487 N.E.2d at 1146. The four individuals involved were Thomas and Nancy Lee Joyce and Arnold and Wilma Anderson. The Joyces, in addition to Hazel Manor Condominiums, were named as defendants. The Joyces owned and controlled one-half of the corporation's stock, and the Andersons owned and controlled the other half. *Id.*

262. *Id.* at 645, 487 N.E.2d at 1146-47. The notes also were secured by assignments of the beneficial interests in other land trusts. *Id.*

263. *Id.* The trial court denied the petition. The bank postponed the sale while the defendants took an interlocutory appeal seeking a reversal and an order voiding the sale. The appellate court affirmed the trial court's decision. *Id.*

264. *Id.* at 646, 487 N.E.2d at 1147.

265. *Id.* (citing ILL. REV. STAT. ch. 110, para. 15-001 (1985)). The defendants also argued that the bank's prior election to institute foreclosure proceedings precluded them from denying the existence of an equitable mortgage. Further, they contended that they were entitled to a judicial foreclosure of the real estate because of the real estate mortgages on the property. *Id.*

The appellate court affirmed the trial court's decision.<sup>266</sup> The court stated that a lien upon the beneficial interest in a land trust generally does not constitute a lien upon the real estate itself.<sup>267</sup> Therefore, the court ruled that the assignment of a beneficial interest to secure a note did not convert the property into real estate and thereby permit the right of redemption.<sup>268</sup> The court noted that the Illinois Supreme Court previously had held that a security interest in a beneficial interest in a land trust was personal property.<sup>269</sup> To determine the nature of a particular interest, the previous court garnered the intent of the parties from the trust agreements.<sup>270</sup>

Applying a similar analysis, the appellate court made several observations. First, the court noted that the defendants executed the notes after the creation of the land trust.<sup>271</sup> Second, the assignments of the beneficial interests in other land trusts secured the payment of the notes,<sup>272</sup> a fact which supported the plaintiff's contention that the assignments were distinct from the creation of the trust. The court then asserted that the language in the collateral assignment was most critical.<sup>273</sup> Accordingly, the court observed that the language specifically stated that, upon default, the secured lender possessed the rights of a secured party under the U.C.C.<sup>274</sup> Moreover, the court noted that the trust agreement did not provide for the sale of the real estate upon default.<sup>275</sup> Based upon the aforementioned findings,<sup>276</sup> the court concluded that the security arrangements were personal property interests and that the bank validly sold the collateral without instituting judicial foreclosure

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266. *Commercial National Bank*, 139 Ill. App. 3d at 646, 487 N.E.2d at 1147.

267. *Id.*

268. *Id.* (citing *Melrose Park National Bank v. Melrose Park National Bank*, 123 Ill. App. 3d 282, 285-86, 462 N.E.2d 741 (1st Dist. 1984); *American National Bank & Trust Co. v. Ryan*, 106 Ill. App. 3d 434, 436 N.E.2d 37 (1st Dist. 1982)).

269. *Commercial National Bank*, 139 Ill. App. 3d at 646-47, 487 N.E.2d at 1147 (citing *Horney v. Hayes*, 11 Ill. 2d 178, 142 N.E.2d 94 (1957)).

270. *Commercial National Bank*, 139 Ill. App. 3d at 647, 487 N.E.2d at 1147-48 (citing *Melrose Park*, 123 Ill. App. 3d at 287, 462 N.E.2d at 744). In *Horney*, the court considered (1) whether the land trust was created merely as security for a debt, (2) whether the assignment of the beneficial interest occurred subsequent to the creation of the trust, (3) whether the beneficial interest had been pledged as security, and (4) whether the trust agreement provided for the sale of the real estate upon default.

271. *Commercial National Bank*, 139 Ill. App. 3d at 647, 487 N.E.2d at 1148.

272. *Id.*

273. *Id.* at 648, 487 N.E.2d at 1148.

274. *Id.*

275. *Id.*

276. *Id.* at 647-48, 487 N.E.2d at 1148. The record was ambiguous as to whether the trust was created for the sole purpose of securing loans. *Id.*

proceedings.<sup>277</sup>

Another significant secured transactions case involved applications of the U.C.C.. In *Executive Commercial Services, Ltd. v. Vapor Corporation*,<sup>278</sup> the Illinois Appellate Court for the First District held that a creditor is not barred from recovering a deficiency from a debtor when the creditor fails to notify the debtor of the collateral's sale. In *Executive Commercial Services*, the plaintiff creditor sold collateral without notice to the defendant debtor after default. The creditor then sought a deficiency judgment to recover the difference between the debt and the proceeds from the sale. The trial court granted the defendant debtor's motion for summary judgment.<sup>279</sup>

On appeal, the appellate court ruled that the trial court erred in granting the debtor's motion for summary judgment and remanded the case for a determination of whether the sale was commercially reasonable.<sup>280</sup> The court acknowledged that Section 9-504 of the U.C.C. controls the right of a secured party to dispose of collateral after default.<sup>281</sup> The court, however, stated that a creditor may sell the collateral after default, providing that the sale is commercially reasonable and that the debtor has reasonable notice of the sale.<sup>282</sup>

The court continued its analysis by considering an earlier Illinois Supreme Court decision.<sup>283</sup> The court interpreted that decision to mean that lack of notice to the debtor does not operate as an automatic bar to recovering a deficiency from the debtor.<sup>284</sup> Though there is a presumption that the value of the collateral sold is equal to the indebtedness, the court held that the creditor may rebut that

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277. *Id.* at 648-49, 487 N.E.2d at 1148-49. The appellate court also indicated that the plaintiff had not waived its right to relief under the U.C.C. by admitting that the assignment of the beneficial interest was a real estate mortgage. *Id.* (citing *Melrose Park*, 123 Ill. App. 3d at 289, 462 N.E.2d at 744). The court dismissed the defendants' argument that "the co-existence of real estate mortgages on the subject property entitle[d] them to judicial foreclosure proceedings, regardless of the nature of the security interests at issue." *Id.* The defendants cited no authority in support of this contention. *Id.*

278. 134 Ill. App. 3d 558, 481 N.E.2d 16 (1st Dist. 1985).

279. *Id.* at 559, 481 N.E.2d at 17. The trial court granted the defendants' motion based on the "absolute bar" view which precludes a secured creditor from bringing a deficiency action against the debtor unless the debtor was given notice of the proposed sale of collateral. *Id.* at 560, 481 N.E.2d at 17.

280. *Id.* at 562, 481 N.E.2d at 19.

281. *Id.* at 560, 481 N.E.2d at 17 (citing ILL. REV. STAT. ch. 26, para. 9-504 (1985)).

282. *Executive Commercial Services*, 134 Ill. App. 3d at 560, 481 N.E.2d at 17-18 (citing ILL. REV. STAT. ch. 26, para. 9-504(3) (1985)).

283. *Executive Commercial Service*, 134 Ill. App. 3d at 562, 481 N.E.2d at 19 (citing *First Galesburg National Bank & Trust Co. v. Joannides*, 103 Ill. 2d 294, 299, 469 N.E.2d 180, 182 (1984)).

284. *Executive Commercial Services*, 134 Ill. App. 3d at 562, 481 N.E.2d at 19.

presumption by showing that the value of the collateral was less than the indebtedness and that the sale was commercially reasonable.<sup>285</sup> Thus, the court remanded the case for a finding of whether the collateral was worth less than the debt.<sup>286</sup>

## V. CONTRACTS<sup>287</sup>

### A. Contract Formation

At the appellate court level, two Illinois contract formation cases expanded the law of contracts. In *Board of Directors of Carriage Way Property Owners Association v. Western National Bank of Cicero*,<sup>288</sup> the court held that it would neither imply a contractual duty to pay for the maintenance, nor render a quasi-contractual obligation to pay the assessments although the defendant apartment owners received a benefit from the maintenance of the common areas.<sup>289</sup> The board imposed common assessments against the owners which were not paid. As a result, the board instituted an action to recover the payments due.<sup>290</sup>

On appeal, the court stated that an implied promise to pay for services exists only when the performing party entertains a reasonable expectation of payment by the benefitted party.<sup>291</sup> The *Carriage Way* court ruled that the plaintiff could not have entertained a reasonable expectation of remuneration for their continued rendering of services because the defendants clearly expressed dissent

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285. *Id.* at 561, 481 N.E.2d at 18.

286. *Id.* at 562, 481 N.E.2d at 19.

287. The law governing sales contracts remained virtually unchanged throughout the *Survey* period. The Illinois Supreme Court did not decide any cases developing sales contract law. Furthermore, few of the appellate court decisions addressing sales contract disputes advanced the law of sales contracts. Three sales contract appellate decisions, however, do present timely issues. See *Rebaque v. Forsythe Racing, Inc.* 134 Ill. App. 3d 778, 480 N.E.2d 1338 (1st Dist. 1985) (buyer's counterclaim for a set-off limited to claims arising out of same contract); *Shippey v. Traub*, 138 Ill. App. 3d 434, 485 N.E.2d 1173 (3d Dist. 1985) (installment contract held voidable by the purchaser when seller failed to comply with the statutory requirements concerning notification of building code violations); *Bodine Sewer, Inc. v. Eastern Illinois Precast, Inc.*, 143 Ill. App. 3d 920, 493 N.E.2d 705 (4th Dist. 1986) (express warranty prevailed over inconspicuous disclaimer notwithstanding alleged exclusion of all warranties by the custom of the concrete pipe trade).

288. 139 Ill. App. 3d 542, 487 N.E.2d 974 (1st Dist. 1985).

289. *Id.* at 547-49, 487 N.E.2d at 978-79. The defendants included Western National Bank, as trustee under a trust, Carriage Way Apartments, an Illinois general partnership, and unknown individual owners. *Id.* at 544, 487 N.E.2d at 976.

290. *Id.*

291. *Id.* at 547, 487 N.E.2d at 978 (citing *Pope v. Speiser*, 7 Ill. 2d 231, 237-38, 130 N.E.2d 507, 510 (1955)).

by refusing to pay.<sup>292</sup> As such, the court held that an implied contract did not exist.<sup>293</sup>

The plaintiff also argued that the defendants had a quasi-contractual duty to pay for the maintenance of the common areas. The court rejected this argument and determined that the plaintiff's voluntary maintenance of the common areas in spite of the defendants' timely refusal to pay did not render the defendants unjustly enriched.<sup>294</sup> The court asserted that the mere retention of a benefit was insufficient to require restitution. Thus, because the court found no unjust enrichment, the plaintiff could not recover under a quasi-contract theory.<sup>295</sup>

Another decision of the Illinois Appellate Court for the First District dismissed a contract action for \$.83 after establishing the existence of an enforceable contract.<sup>296</sup> The plaintiffs in *Fineman v. Citicorp*, held Mastercards issued by the defendants Citicorp and Citibank. The Citibank Retail Installment Credit Agreement governed the use of the cards.<sup>297</sup> The agreement provided that Citibank could change the finance charge at any time and that failure to return a written rejection of the new terms within thirty days constituted acceptance of the changes.

The plaintiffs subsequently received notice of an increase in the annual rate. This notice included a description of additional services available to those who paid the increased fee. One of those additional services was "free \$100,000 common carrier travel insurance."<sup>298</sup> The notice also contained a clause similar to that in the Retail Installment Credit Agreement regarding rejection of the terms.<sup>299</sup> When Citibank received no written rejection of the terms

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292. *Carriage Way*, 139 Ill. App. 3d at 547, 487 N.E.2d at 978.

293. *Id.* at 548-49, 487 N.E.2d at 979.

294. *Id.*

295. *Id.* at 548, 487 N.E.2d at 978 (citing *Rutledge v. Housing Authority of the City of East St. Louis*, 88 Ill. App. 3d 1064, 1069, 411 N.E.2d 82, 86 (5th Dist. 1980)).

296. *Fineman v. Citicorp*, 137 Ill. App. 3d 1035, 1039, 485 N.E.2d 591, 593 (1st Dist. 1985).

297. *Id.* at 1037, 485 N.E.2d at 592. The credit agreement provided in relevant part: *Amendment.* We can change this Agreement including the *finance charge* and the *annual percentage rate* at any time. However, if we do we will mail you written notice at least 30 days before the beginning of the billing cycle in which the changes becomes effective. If you do not agree to the changes, you must notify us in writing and return the card cut in half within 30 days and pay us the balance . . . . Otherwise we will understand that you agree to the changes in the notice.

*Id.* (emphasis in original).

298. *Id.* at 1038, 485 N.E.2d at 592.

299. *Id.* The clause in the notice stated:

If you do not wish to agree to the new terms you must notify us *in writing* by

from the Finemans, it subtracted \$.83 from their credit balance as payment for the prorated portion of the increase in the annual fee.<sup>300</sup> The plaintiffs then instituted the action for recovery of the \$.83 based upon three theories. First, the plaintiffs argued that Citibank offered no consideration for the modification. Second, the plaintiffs alleged that the defendants engaged in deceptive practices in order to induce them to accept the modifications. And third, the plaintiffs contended that construing silence as acceptance violated the common law of contracts.<sup>301</sup> The trial court dismissed all three counts.<sup>302</sup>

On appeal, the appellate court affirmed.<sup>303</sup> The court reiterated the well-established principle that a hindsight determination of how the parties fare under the contract does not bear upon the adequacy of consideration.<sup>304</sup> Instead, adequacy of consideration must be evaluated as of the time of contract.<sup>305</sup> Thus, failure to receive insurance benefits did not render the insurance inadequate consideration for the modification.<sup>306</sup> Further, the court commented that the adequacy of consideration does not generally merit review unless the amount appears grossly inadequate and shocks the conscience of the court.<sup>307</sup> The court determined that in this situation the parties engaged in a fair bargain, and that the exchange of two months of \$100,000 of common carrier travel insurance coverage for \$.83 did not shock the conscience of the court. In rejecting the plaintiffs' claim that the defendants employed deceptive practices to induce acceptance of the modification, the court enumerated three reasons. First, the court concluded that the use of the word "free" to describe the travel insurance did not establish a deceptive trade practice because the notice clearly stated that the insurance was available only to those cardholders

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*March 2, 1982 [effective date of the increase] . . . . You can continue using your cards under the existing terms until the expiration date printed on your cards, even if you do notify us that you do not agree to the new terms.*

*Id.* (emphasis in original).

300. *Id.*

301. *Id.* The trial court dismissed the plaintiffs' complaint and the plaintiffs appealed. *Id.*

302. *Id.*

303. *Id.* at 1039, 485 N.E.2d at 593.

304. *Id.*

305. *Id.* (quoting *Bonner v. Westbound Records, Inc.*, 76 Ill. App. 3d 736, 743, 394 N.E.2d 1303, 1308 (1st Dist. 1979)).

306. *Fineman*, 137 Ill. App. 3d at 1039, 485 N.E.2d at 593.

307. *Id.* (citing *Bonner v. Westbound Records, Inc.*, 76 Ill. App. 3d 736, 743, 394 N.E.2d 1303, 1308 (1st Dist. 1979)).

paying the higher fee.<sup>308</sup> Second, the court found that the defendants' omission of many material facts from the brochure describing the insurance did not render the brochure deceptive or confusing.<sup>309</sup> Third, the court indicated that the failure to state that the insurance remained available during the annual renewal period did not constitute a deceptive practice. The court noted that the defendants had no obligation to renew the credit cards after their expiration dates if, as cardholders they properly refused to pay the increased fee.<sup>310</sup> Finally, the *Fineman* court rejected the plaintiffs' contention that construing silence as acceptance violated the common law of contracts.<sup>311</sup>

### B. Contract Construction

Construction of restrictive covenants continues to be an unsettled area of contract law.<sup>312</sup> One Illinois appellate court decision

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308. *Fineman*, 137 Ill. App. 3d at 1041, 485 N.E.2d at 594. In reaching this conclusion, the court cited the Federal Trade Commission's leading case on the word "free" in advertising:

The use of the word "Free" . . . [is] an unfair or deceptive act or practice under the following circumstances: (1) When all of the conditions, obligations, or other prerequisites of the receipt and retention of the 'free' article, the offerer either (A) increases the ordinary and usual price; or (B) reduces the quality; or (C) reduces the quantity or size of such article of merchandise.

*Id.* at 1040-41, 485 N.E.2d at 599. (citing *Walter J. Black, Inc. Trading as the Classics Club & Detective Book Club*, 50 F.T.C. 225, 235-36 (1953)).

309. *Fineman*, 137 Ill. App. 3d at 1041, 485 N.E.2d at 594 (quoting ILL. REV. STAT. ch. 121½, para. 262 (1981)). The Consumer Fraud and Deceptive Business Practices Act states in relevant part:

unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, . . . misrepresentation or the . . . omission of any material fact, with intent that others rely upon the . . . omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act,' . . . in the conduct of any trade or commerce are hereby declared unlawful. . . . In construing this section, consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

ILL. REV. STAT. ch. 121½, para. 262 (1985). Section two of the Uniform Deceptive Trade Practices Act defines deceptive business practice as including any action taken in the course of business which "(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services; [or] . . . (12) . . . similarly creates a likelihood of confusion or of misunderstanding." ILL. REV. STAT. ch. 121 ½, para. 312 (1985).

310. *Fineman*, 137 Ill. App. 3d at 1041-42, 485 N.E.2d at 594.

311. *Id.*

312. One contract construction case meriting mention is *American Family Life Assurance Co. v. Tazelaar*, 135 Ill. App. 3d 1069, 482 N.E.2d 1072 (1st Dist. 1985). In *Tazelaar*, the Illinois Appellate Court for the First District refused to enforce a covenant not to compete because it lacked a territorial restriction. *Id.* at 1073, 482 N.E.2d at 1075.

considered restrictive covenants without geographical limitations. In *McRand, Inc. v. van Beelen*,<sup>313</sup> the Illinois Appellate Court for the First District enforced a restrictive covenant which lacked a geographical limitation. The restrictive covenant in *McRand* prohibited an employee, van Beelen, from soliciting past or current *McRand* clients for a period of two years following his termination. Additionally, the covenant restricted van Beelen from soliciting business from prospective *McRand* customers for a period of one year if van Beelen recorded business development time for the customer.<sup>314</sup> *McRand* designed and coordinated management and incentive award programs for major corporations and businesses.<sup>315</sup> Prior to any booking, each major account took one to three years and approximately \$200,000 to develop.<sup>316</sup> The company also maintained continued business relations with its cli-

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The *Tazelaar* court applied Georgia law because the plaintiff life insurance company had its home office in Georgia. The contract at issue in *Tazelaar* contained a severability clause and stated that Georgia law governed the agreement. The noncompetition clauses at issue provided that the employee would not "within the geographic area where [he had] sold and serviced policies for American . . . (1) [a]ttempt to induce other [employees] or sales agents of American Family to terminate their agreement with American Family or to become contracted or associated with another insurance company . . . [or] . . . (2) [a]ttempt to induce policyholders or accounts of American Family to relinquish their policies . . . ." *Id.* at 1070-71, 482 N.E.2d at 1073-74. The court held the clauses void for lack of any territorial limitation. *Id.* at 1073, 482 N.E.2d at 1075. The court further stated that while a covenant not to compete or solicit must only restrict an employee from soliciting those customers he actually served while employed. Lack of an express territorial restriction automatically invalidated the covenant. *Id.* at 1072-73, 482 N.E.2d at 1075. In *Tazelaar*, even though each defendant had a specific sales territory, the covenant did not expressly restrict solicitation within those specific areas. Therefore, the covenant was impermissibly vague and unenforceable. *Id.* at 1073, 482 N.E.2d at 1075.

313. 138 Ill. App. 3d 1045, 1057, 486 N.E.2d 1306, 1315 (1st Dist. 1985). At issue in *McRand* was a restrictive covenant that lacked a geographical limitation. The provision stated in relevant part:

For a period of two years following his termination of employment, the employee shall not solicit business relating to the services or products of the kind generally rendered or furnished by *McRand* . . . or render or furnish such services and products to any of *McRand*'s past or current clients for which *McRand* or its employees have rendered services billed to any such client at any time during the two-year period immediately prior to his termination of employment. For a period of one year following his termination of employment, the employee shall not solicit business from any of *McRand*'s prospective accounts for which he has, during the two-year period immediately prior to his termination of employment, recorded business development time.

*Id.* at 1049, 486 N.E.2d at 1309-10.

314. *Id.*

315. *Id.* at 1047, 486 N.E.2d at 1309. *McRand* was a Delaware corporation licensed to do business in Illinois. *Id.*

316. *Id.* at 1048, 486 N.E.2d at 1309.

ents.<sup>317</sup> The dispute in *McRand* emerged after two McRand employees, van Beelen and Nelson, resigned from McRand and started their own business, Gravel International Corporation.<sup>318</sup> Gravel directly competed with McRand and serviced McRand customers.<sup>319</sup> McRand brought an action for injunctive relief against van Beelen, Nelson, and Gravel International Corporation seeking to enforce the restrictive covenants in the employment agreement. The trial court denied McRand's motion for a preliminary injunction.<sup>320</sup>

On appeal, the court stated that the propriety of granting injunctive relief depended upon the enforceability of the restrictive covenant.<sup>321</sup> The court also observed that the enforceability of the restrictive covenant depended upon the existence of a protectable interest and upon whether the covenant was reasonably related to safeguarding that interest.<sup>322</sup>

In reaching the conclusion that McRand had a protectable interest,<sup>323</sup> the appellate court applied a two-prong test.<sup>324</sup> First, the court considered whether the employer maintained a near-permanent relationship with its customers.<sup>325</sup> Next, the court examined whether the employee would have had contact with the customers but for the employment.<sup>326</sup> The court considered numerous factors in evaluating whether a near-permanent relationship existed: the number of years it took McRand to develop its clientele<sup>327</sup> the

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317. *Id.*

318. *Id.* Van Beelen had held the positions of vice-president, stockholder, and director of McRand. Nelson was a program manager and later a senior accounts manager. Both employees had close contact with McRand customers and had detailed knowledge of the customers' history, structure, organization, key decision makers, and specialized needs and preferences. *Id.*

319. *Id.*

320. *Id.* at 1050, 486 N.E.2d at 1310. The trial court advanced several reasons for denying McRand's motion for a preliminary injunction. The trial court held that McRand lacked a protectable interest in its client relationships, that McRand had not suffered an irreparable injury, and that McRand had an adequate remedy at law. The court also noted that the agreements were unenforceable because the terms were unreasonable and lacked a geographic scope limitation. Moreover, there was no evidence of actual solicitation of McRand's customers by defendants. Lastly, the court concluded that the agreements were not supported by consideration and were contracts of adhesion. *Id.*

321. *Id.* at 1051, 486 N.E.2d at 1311 (citing *Booth v. Greber*, 48 Ill. App. 3d 213, 363 N.E.2d 6 (1st Dist. 1977)).

322. *McRand*, 138 Ill. App. 3d at 1051, 1056, 486 N.E.2d at 1311, 1314.

323. *Id.* at 1054, 486 N.E.2d at 1313.

324. *Id.* at 1051, 486 N.E.2d at 1311.

325. *Id.*

326. *Id.* (citing *Cockerill v. Wilson*, 51 Ill. 2d 179, 281 N.E.2d 648 (1972); *Canfield v. Spear*, 44 Ill. 2d 49, 254 N.E.2d 433 (1969)).

327. *McRand*, 138 Ill. App. 3d at 1051, 486 N.E.2d at 1311. Because it took approxi-

amount of money invested in developing a clientele,<sup>328</sup> the level of difficulty involved in developing clientele,<sup>329</sup> the amount of personal customer contact by van Beelen and Nelson,<sup>330</sup> the extent of their knowledge of McRand clients,<sup>331</sup> the length of time customers were associated with McRand,<sup>332</sup> and the continuity of the relationship with the customer.<sup>333</sup> Weighing these factors, the court concluded that McRand maintained a near-permanent relationship with its customers.<sup>334</sup> The court further ruled that McRand fulfilled the second prong of the test<sup>335</sup> because McRand had provided van Beelen and Nelson with the opportunity to develop close contacts with its customers and because neither employee had any experience in designing award incentive programs prior to working for McRand.<sup>336</sup>

The appellate court also determined that the restrictions were necessary to protect McRand's interest and reversed the trial court's finding that lack of geographic restriction made this covenant unenforceable.<sup>337</sup> The *McRand* court held that covenants containing no geographic limitation are valid "if their purpose is to protect an employer from losing clients to a former employee who gains special knowledge of the client's needs while employed."<sup>338</sup> Thus, the court stated that the covenant constituted an "activity

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mately three years to develop the clientele, the court determined that this was an indication of a near-permanent relationship. *Id.*

328. *Id.* at 1052, 486 N.E.2d at 1311. With each client costing approximately \$200,000, the amount of money invested revealed near-permanent customer relations. *Id.*

329. *Id.* The court observed that the development of clientele was complex and important to sustaining business. Accordingly, the court determined it was indicative of a near-permanent client-company relationship. *Id.*

330. *Id.* The court noted that van Beelen and Nelson worked closely with customers and McRand emphasized such close working relationships. *Id.*

331. *Id.* The court observed that van Beelen and Nelson each had detailed knowledge of McRand customers. *Id.*

332. *Id.* at 1053, 486 N.E.2d at 1312. The court considered the length of time McRand had been in business in addition to the number of contracts McRand had with a client over the relevant time period. The court concluded that McRand fulfilled this consideration. *Id.*

333. *Id.* The court determined that McRand's major customers brought their business to McRand on a regular basis. Hence, the court considered this indicative of a near-permanent relationship. *Id.*

334. *Id.*

335. *Id.* at 1053-54, 486 N.E.2d at 1312-13.

336. *Id.*

337. *Id.* at 1057, 486 N.E.2d at 1315.

338. *Id.* (citing *Lawter International, Inc. v. Carroll*, 116 Ill. App. 3d 717, 451 N.E.2d 1338 (1st Dist. 1983); *J.D. Marshall, Inc. v. Fradkin*, 87 Ill. App. 3d 118, 409 N.E.2d 4 (1st Dist. 1980); *Wolf & Co. v. Waldron*, 51 Ill. App. 3d 239, 366 N.E.2d 603 (1st Dist. 1977)).

covenant," a covenant designed to protect the employer's relationships rather than to prohibit competition, and that the lack of geographical limitation did not make the covenant void as a matter of law. Rather, the covenant evidenced an intent to protect McRand's customer relations wherever they existed.<sup>339</sup> Nonetheless, the court warned that approval of an activity restriction requires that the restriction reasonably relate to the employer's interest in protecting the customer relations that its employees developed as a direct result of employment.<sup>340</sup> Consequently, the court refused to enforce that portion of the covenant which restricted activities beyond those involving the customers with whom van Beelen and Nelson developed relationships.<sup>341</sup> Because the covenant terms were severable, the court remanded the case to the trial court for appropriate modification of the language in the activity restriction.<sup>342</sup>

### C. Contract Remedies<sup>343</sup>

During the *Survey* period, the Illinois Supreme Court considered three cases involving contract remedies and damages. In *Morrow v. L.A. Goldschmidt Associates, Inc.*,<sup>344</sup> the Illinois Supreme Court held that punitive damages are not recoverable for wilful and wanton breach of contract when plaintiffs allege only an economic loss.

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339. *McRand*, 138 Ill. App. 3d at 1057, 486 N.E.2d at 1315 (citing *J.D. Marshall Inc. v. Fradkin*, 87 Ill. App. 3d 118, 409 N.E.2d 4 (1st Dist. 1980)).

340. *McRand*, 138 Ill. App. 3d at 1057-58, 486 N.E.2d at 1315 (citing *Lawter International, Inc. v. Carroll*, 116 Ill. App. 3d 717, 451 N.E.2d 1338 (1st Dist. 1983); *Central Keystone Plating of Illinois, Inc. v. Hutchison*, 62 Ill. App. 2d 188, 210 N.E.2d 239 (4th Dist. 1965)).

341. *McRand*, 138 Ill. App. 3d at 1058, 486 N.E.2d at 1315-16.

342. *Id.* (citing *Donald McElroy, Inc. v. Delaney*, 72 Ill. App. 3d 285, 389 N.E.2d 1300 (1st Dist. 1979)). In addition to the issues considered in the text, the appellate court also concluded that failure to grant a preliminary injunction would result in irreparable injury to McRand and that McRand had no adequate remedy at law. *McRand*, 138 Ill. App. 3d at 1055, 986 N.E.2d at 1313. Additionally, the court held that continued employment for a substantial period beyond the signing of the contract was sufficient consideration for the restrictive covenant. *Id.* Finally, the court did not consider the employment agreement an adhesion contract. *Id.* at 1056, 986 N.E.2d at 1314.

343. One appellate court case not discussed in the text addressed the issue of specific performance. It is relevant here only to the extent that it held that a condominium is real property and a contract to purchase a condominium is subject to specific performance. See *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971, 483 N.E.2d 924 (1st Dist. 1985). In *Giannini*, the fact that a newly constructed building containing the subject unit had not been declared a condominium did not render the unit "nonexistent" so as to preclude the purchaser's claim for specific performance of the agreement for the purchase of the condominium unit in a specified building of the multi-building condominium construction project. *Id.* at 989, 483 N.E.2d at 939.

344. 112 Ill. 2d 87, 492 N.E.2d 181 (1985).

The plaintiffs in *Morrow* purchased four townhouses that were designed, constructed, and sold by the defendants. Subsequent to finding numerous defects in their townhouses, the plaintiffs named four defendants in an action for damages for breach of warranty. Three of the defendants were Leo A. Goldschmidt, a contractor and developer, L.A. Goldschmidt Associates, Inc., a construction corporation, and First Charter Service Corporation, a bank service corporation. These defendants conveyed title to the real estate to a fourth defendant, American National Bank, as trustee. The defendants, with the exception of American National Bank, formed the Commons of Palos Park (the "Commons"). The Commons planned, designed, and constructed the subject housing development.<sup>345</sup> At the time of each closing, the Commons expressly warranted a leak-free roof, a waterproof basement, and plumbing without defects.<sup>346</sup> The warranty also provided that the Commons would repair all structural defects caused by faulty construction and/or defective materials during the warranty period if given notice of the defects by the homeowner.<sup>347</sup> The plaintiffs found several defects in their townhomes which were never repaired. Consequently, the plaintiffs filed a complaint seeking damages for breach of both an express warranty and an implied warranty of habitability. The plaintiffs also requested punitive damages.

The circuit court dismissed with prejudice several of the plaintiffs' counts and the plaintiffs appealed.<sup>348</sup> The appellate court reversed and held that the plaintiffs had stated a cause of action.<sup>349</sup> The Illinois Supreme Court allowed the defendants' petition for leave to appeal.<sup>350</sup>

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345. *Id.* at 90-92, 492 N.E.2d at 182.

346. *Id.* at 92, 492 N.E.2d at 182.

347. *Id.* The warranty period in the contract was one year. *Id.*

348. *Id.* at 90, 292 N.E.2d at 182.

349. *Id.* at 91, 292 N.E.2d at 182.

350. *Id.* The plaintiffs filed an eleven count complaint. Counts one through seven concerned express and implied warranties. Those counts alleged improper floor support, nonfunctioning reverse osmosis water system and defective carpentry work, basement flooding, inoperative heating and cooling systems, an improperly installed sump pump, and numerous other defects. *Id.* at 92-93, 492 N.E.2d at 182-83. Counts eight through eleven requested punitive damages based on the defendants' inadequate supervision of the construction of the plaintiff's homes; the knowing employment of incompetent contractors, subcontractors and agents; their wanton, wilful, and reckless failure to inspect the homes; and their awareness of enumerated defects. *Id.* at 93-94, 492 N.E.2d at 183. The circuit court dismissed counts eight through eleven with prejudice. The plaintiffs appealed the dismissal of those counts, and the appellate court reversed, holding that the counts stated a cause of action for willful and wanton misconduct and punitive damages. The Illinois Supreme Court allowed the defendants' petition for leave to appeal. *Id.* at 90-91, 492 N.E.2d at 182.

The Illinois Supreme Court responded to plaintiffs' claims by holding that punitive damages are not recoverable for breach of contract.<sup>351</sup> The court stated that the plaintiffs could not recover punitive damages absent an allegation of an independent tort.<sup>352</sup> Having so determined, the court cited *Moorman Manufacturing Co. v. National Tank Co.*<sup>353</sup> and *Redarowicz v. Ohlendorf*,<sup>354</sup> to support its adoption of the economic-loss doctrine.<sup>355</sup> The *Morrow* court stressed that contract law, rather than tort law, appropriately governs recovery for solely economic losses.<sup>356</sup> The court characterized the harm alleged in *Morrow* as a mere disappointed expectation that would be measured only by economic losses.<sup>357</sup> Because tort claims were neither appropriate nor alleged, the court dismissed the counts requesting punitive damages.<sup>358</sup>

Finally, the court rejected the plaintiffs' attempt to distinguish the case from *Moorman* and *Redarowicz*.<sup>359</sup> The plaintiffs argued that the breach in *Morrow* was wilful and wanton whereas the breaches in *Moorman* and *Redarowicz* were not.<sup>360</sup> Nonetheless,

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351. *Id.* at 94, 492 N.E.2d at 183 (citing *Bank of Lincolnwood v. Comdisco, Inc.* 111 Ill. App. 3d 822, 829, 444 N.E.2d 657, 662 (1st Dist. 1982); *Kelsay v. Motorola, Inc.*, 74 Ill. App. 3d 172, 187, 384 N.E.2d 353, 360 (1978); *Hayes v. Moynihan*, 52 Ill. 423, 426 (1869); 11 S. WILLISTON, *CONTRACTS* § 1340 (3d ed. W. Jaeger 1968); 5 A. CORBIN, *CONTRACTS* § 1077 (1964); *Note, Punitive Damages in Contract Actions - Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980); (RESTATEMENT (SECOND) OF *CONTRACTS*, ch. 16 (introductory note) (1979)).

352. *Morrow*, 112 Ill. 2d at 95, 492 N.E.2d at 184 (citing *McIntosh v. Magna Systems, Inc.*, 539 F. Supp. 1185 (N.D. Ill. 1982) (applying Illinois law); *St. Ann's Home for the Aged v. Daniels*, 95 Ill. App. 3d 576, 420 N.E.2d 478 (1st Dist. 1981); RESTATEMENT (SECOND) OF *CONTRACTS* § 355 (1981)). *See also* *Bank of Lincolnwood v. Comdisco, Inc.*, 111 Ill. App. 3d 822, 829, 444 N.E.2d 657, 662 (1st Dist. 1982) (punitive damages are recoverable in breach of contract actions "where the breach amounts to an independent tort and there are proper allegations of malice, wantonness or oppression").

353. *Morrow*, 112 Ill. 2d at 96, 492 N.E.2d at 184. The *Morrow* court noted: "[W]hen the defect is a qualitative nature and the harm relates to the consumer's expectation that a product is of a particular quality so that it is fit for ordinary use, contract, rather than tort, law provides the appropriate set of rules for recovery." *Id.* at 96, 492 N.E.2d at 185 (citing *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 88 435 N.E.2d 443 (1982)).

354. *Morrow*, 112 Ill. 2d at 97, 492 N.E.2d at 185 (citing *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 491 N.E.2d 329 (1982)). The court in *Redarowicz* held that the economic loss-doctrine announced in *Moorman* applied when a homeowner sued a builder on the theory that the builder was negligent in constructing the plaintiff's home. *Redarowicz*, 92 Ill. 2d at 171, 441 N.E. 2d at 324.

355. *Morrow*, 112 Ill. 2d at 96-97, 492 N.E.2d at 185-86.

356. *Id.* at 96, 492 N.E.2d at 185.

357. *Id.* at 98, 492 N.E.2d at 185 (quoting *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 177, 441 N.E.2d 324, 327 (1982)).

358. *Morrow*, 112 Ill. 2d at 98, 492 N.E.2d at 185.

359. *Id.*

360. *Id.*

the court stated that a wilful and wanton breach of contract did not establish a tort.<sup>361</sup>

In a dissenting opinion, Justice Goldenhersh<sup>362</sup> opined that the plaintiffs in *Morrow* alleged facts of potentially life-threatening structural defects and actions on the part of the defendants which constituted a separate tort: wilful and wanton misconduct.<sup>363</sup> Further, Justice Goldenhersh maintained that, even in the absence of an allegation of a separate tort, the plaintiffs should have been able to recover punitive damages based upon an alternative theory<sup>364</sup> of wilful and wanton breach of contract.<sup>365</sup> Citing section 355 of Restatement Second of Contracts, he suggested that no rational reason existed for not discouraging wilful misconduct arising out of a breach of contract in the same manner as wilful misconduct resulting in a tort.<sup>366</sup>

The Illinois Supreme Court addressed another contract damages issue in *Bates & Rogers Construction v. Greeley*.<sup>367</sup> The *Bates* court held that the plaintiff subcontractors effectively waived their right to recover delay damages under a contract.<sup>368</sup> Bates & Rogers successfully bid on certain divisions of a construction project led by the North Shore Sanitary District ("North Shore"). Two other plaintiffs, Economy and Goldberg, subcontracted with Bates & Rogers, but had no direct contract with the defendant North Shore or with the defendant engineering firm, Greeley & Hansen.<sup>369</sup> The contract between Bates & Rogers and North Shore contained an exculpatory clause which barred Bates & Rogers from recovering damages due to delays.<sup>370</sup> After defendant Greeley negligently

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361. *Id.* (citing *Hunter Douglas Metals, Inc. v. Edward C. Mange Trading Co.*, 586 F. Supp. 926, 929 (N.D. Ill. 1984); *Tibbs v. National Homes Construction Corp.*, 52 Ohio App. 2d 281, 290-91, 369 N.E.2d 1218, 1225 (1977)).

362. *Morrow*, 112 Ill. 2d at 99, 492 N.E.2d at 186 (Goldenhersh, J., dissenting).

363. *Id.* The dissenting opinion suggested that the plaintiffs had alleged an independent tort. *Id.*

364. *Id.*

365. *Id.* at 100, 492 N.E.2d at 186. (Goldenhersh, J., dissenting).

366. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS, ch. 16 (introductory note) (1979)).

367. 109 Ill. 2d 225, 486 N.E.2d 902 (1985).

368. *Id.* at 229, 486 N.E.2d at 904.

369. *Id.* at 227, 486 N.E.2d at 904.

370. *Id.* at 229, 486 N.E.2d at 905. The exculpatory clause provided:

The Contractor agrees to make no claim for damages for delay in the performance of this Contract occasioned by any act of omission to act of the District or any of its representatives, or because of any injunction which may be brought against the District or its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein.

failed to service electricity to the worksite for more than a year after it was required, the plaintiffs filed suit to recover damages. The plaintiffs contended that Greeley's negligence caused a disruption in the sequence of their work and ultimately resulted in cost overruns and lost profits.<sup>371</sup> North Shore settled with Bates & Rogers, but the engineering firm and its individual partners refused to settle the negligence claims against them.<sup>372</sup>

The Illinois Supreme Court granted the plaintiffs' petition for leave to appeal. Thereafter, the court rejected the plaintiffs' claim for "delay damages."<sup>373</sup> Although the plaintiffs did not contract with Greeley, they were nevertheless bound by North Shore's contract which barred them from recovering "delay damages."<sup>374</sup> The court observed that the contract provisions extended to representatives of North Shore.<sup>375</sup> Further, the court noted that the contractual definition of representative expressly included engineers, and therefore, Greeley.<sup>376</sup> The court disagreed with the plaintiffs' argument that Greeley was not a third-party beneficiary to the contract,<sup>377</sup> and explained that because the contract was intended to confer a benefit upon Greeley, he qualified as a third-party beneficiary protected by the no-damages-for-delay clause.<sup>378</sup>

Finally, the court indicated that the exculpatory clause also bound the two subcontractors.<sup>379</sup> The court noted that the contract between the plaintiffs and North Shore required the contractor to insert appropriate provisions of their contracts with North Shore into their subcontracts.<sup>380</sup> Because the record did not include the subcontracts, the court presumed that the plaintiffs carried out their contractual duty to bind its subcontractors to the terms of the main contract.<sup>381</sup>

Another issue regarding recovery was addressed in the Illinois Supreme Court decision of *Lombard v. Elmore*.<sup>382</sup> In *Lombard*, the Illinois Supreme Court resolved a complex dispute in which the

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*Id.*

371. *Id.* at 228-29, 486 N.E.2d at 904.

372. *Id.* at 228, 486 N.E.2d at 904.

373. *Id.* at 229, 486 N.E.2d at 904.

374. *Id.*

375. *Id.*

376. *Id.* at 232-33, 486 N.E.2d at 906.

377. *Id.*

378. *Id.* at 234-35, 486 N.E.2d at 906.

379. *Id.* at 235, 486 N.E.2d at 907.

380. *Id.*

381. *Id.*

382. 112 Ill. 2d 467, 493 N.E.2d 1063 (1986).

defendant relied upon identical facts both in seeking a set-off against the plaintiffs' claim and in seeking damages for breach of contract under a counterclaim. The court held that this amounted to a double recovery and denied the set-off.<sup>383</sup>

The plaintiffs in *Lombard* formed a partnership with the defendant, Elmore, to operate a motel and banquet facility.<sup>384</sup> The plaintiffs, also officers of a construction company, agreed with the partnership to perform renovation work at the motel.<sup>385</sup> After making the agreement, the plaintiffs assigned their interests in the partnership to the defendant.<sup>386</sup> Under the assignment agreement, each plaintiff received a \$20,000 promissory note from the defendant, and was indemnified for any liabilities incurred by the operation of the partnership. The partnership paid the construction company an outstanding balance of approximately \$34,000 for construction work on the motel.<sup>387</sup>

The court consolidated the plaintiffs' separate actions for non-payment of the promissory notes. In an affirmative defense, Elmore sought a set-off against the amount due on the promissory notes, claiming that the plaintiffs only partially performed the assignment agreement.<sup>388</sup> Additionally, the defendant filed a counterclaim seeking \$74,851.45, for the plaintiffs' understatement of the partnership accounts, \$14,116.88 for the plaintiffs' misrepresentation of the construction costs, and \$59,584.26, for the plaintiffs' failure to properly renovate the motel.<sup>389</sup>

The Illinois Supreme Court addressed two separate issues before barring the defendant's attempt to obtain double recovery.<sup>390</sup>

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383. *Id.* at 472-73, 493 N.E.2d at 1065.

384. *Id.* at 469, 493 N.E.2d at 1064. Two other defendants at trial were not parties to the appeal. On appeal, there were two plaintiffs. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* The defendant subsequently acquired the partnership interest of the two defendants not parties to the appeal. *Id.*

389. *Id.*

390. *Id.* at 471-72, 493 N.E.2d at 1065. The procedural history of the case was complex. At the trial court level, the plaintiffs moved to dismiss the defendant's counterclaim. The first count of the counterclaim was dismissed due to the existence of an indemnity agreement in favor of the plaintiffs. The second and third counts were not dismissed. Before trial, the court also orally announced an entry of summary judgment in favor of the plaintiffs on the promissory notes. After trial, the jury returned a verdict in favor of the defendant on the counterclaim in the amount of \$46,750. On appeal, the trial court's grant of summary judgment in favor of the plaintiffs on the promissory notes was reversed. The appellate court also held that the trial court had erred in dismissing count one of the defendant's counterclaims. Finally, because a judgment entered on the verdict returned in favor of the defendant on his counterclaim was *nunc pro tunc*, the

First, the court affirmed the appellate court's conclusion that the appellate court had no jurisdiction to hear the plaintiffs' appeal of the order entered in favor of the defendant on his counterclaim.<sup>391</sup> The court disagreed, however, with the appellate court's reversal of the judgment entered against the defendant.<sup>392</sup> The court noted that the issues instruction submitted to the jury required the defendant to prove the same elements in his affirmative defense as in his counterclaim. Therefore, the court stated that the breach of the agreement could not absolve the defendant of liability on the note on a failure of consideration theory and also act as the basis of recovery of damages for breach of the agreement.<sup>393</sup> Further, the court noted that the counterclaim sought recovery of the same damages as were alleged in the affirmative defense. Thus, the court affirmed the judgment in favor of the plaintiffs on the notes, suggesting that a contrary holding would grant the defendant a double recovery for the plaintiffs' breach as a set-off on the notes and as damages for the breach.<sup>394</sup>

## VI. PRODUCTS LIABILITY<sup>395</sup>

### A. Duty to Warn

During the *Survey* period, three Illinois appellate decisions further defined when a manufacturer has a duty to warn of the dangerous propensities of a product. In *Van Dettum v. K Mart Corporation*,<sup>396</sup> the Illinois Appellate Court for the Third District held that, while a failure to warn can make a product unreasonably

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plaintiff's post-trial motion, filed more than thirty days after the entry of the order, was not timely filed. The appellate court therefore had no jurisdiction to hear the appeal. *Id.* at 70-71, 493 N.E.2d at 1064-65.

391. *Id.* at 471-72, 493 N.E.2d at 1065 (citing *Archer Daniels Midland Co. v. Barth*, 103 Ill. 2d 536, 538, 470 N.E.2d 290 (1984); ILL. REV. STAT. ch. 110, para. 2-1202 (1985)). While the judgment was appealable, the plaintiffs' failure to file the post-trial motion within thirty days of the entry of the order removed the court of jurisdiction to hear the appeal. *Lombard*, 112 Ill. 2d at 472, 493 N.E.2d at 1065.

392. *Lombard*, 112 Ill. 2d at 472, 493 N.E.2d at 1065.

393. *Id.*

394. *Id.* at 472-73, 493 N.E.2d at 1065.

395. Because products liability typically is considered a torts topic, the discussion of products liability in this article will be restricted to those cases relevant to the potential manufacturer or distributor defendant. The court in *Simpson v. General Motors Corporation*, 108 Ill. 2d 146, 483 N.E.2d 1 (1985), held that contributory negligence should not be considered in a products liability case, even though misuse and assumption of risk are available as damage-reducing factors. For a more thorough treatment of this case's facts and holding, see discussion in the Torts article of this *Survey* issue.

396. 133 Ill. App. 3d 861, 479 N.E.2d 1104 (3rd Dist. 1985) (citing RESTATEMENT (SECOND) OF TORTS § 402(A), comment j (1965)).

dangerous, there is no duty to warn when the product is not defectively designed or manufactured and when the possibility of injury results from a common propensity of the product which is open and obvious. The product at issue was an automobile seat cover manufactured by the defendant, Starlite Industries.<sup>397</sup> The plaintiff, Van Dettum, sought relief based upon strict liability, alleging that the seat cover was of an unreasonably dangerous condition.<sup>398</sup>

The appellate court affirmed the trial court's grant of summary judgment in favor of Starlite.<sup>399</sup> First, the court set forth the elements of a strict liability cause of action.<sup>400</sup> The court indicated that no duty to warn exists when the product is not defectively manufactured and an injury results from an open and obvious propensity of the product.<sup>401</sup> According to the *Van Dettum* court, products liability law compensates for product-caused injuries derived from a distinct defect that subjects persons exposed to the product to an unreasonable risk of harm.<sup>402</sup> In *Van Dettum*, the court indicated that Starlite did not defectively design the seat cover for its intended use. Further, the court held the seat cover not unreasonably dangerous as a matter of law because it was distributed without defects in its intended, functional design.<sup>403</sup> The court stated that any danger posed should have been obvious to any user and Starlite therefore had no duty to warn.<sup>404</sup>

Conversely, in *Hayes v. Kay Chemical Co.*,<sup>405</sup> the Illinois Appellate Court for the First District suggested that, under limited circumstances, a manufacturer's duty to warn may extend beyond labeling and packaging. The product in *Hayes* was a colorless, odorless, caustic liquid known as the McD Grill Cleaner, exclu-

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397. *Van Dettum*, 133 Ill. App. 3d at 862, 479 N.E.2d at 1105. Originally, the complaint named both the manufacturer, Starlite, and the seller, K Mart, as defendants. K Mart was dismissed in the trial court. *Id.*

398. *Id.* The trial court granted summary judgment in favor of Starlite. Van Dettum appealed. *Id.*

399. *Id.*

400. *Id.* at 863, 479 N.E.2d at 1105 (citing RESTATEMENT (SECOND) OF TORTS § 402(A) (1965); *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980)). The appellate court set forth the following three elements of a strict liability cause of action: (1) injury or damage resulting from a condition of the product; (2) the condition was an unreasonably dangerous one; and (3) the condition existed when the product left the manufacturer's control. *Van Dettum*, 133 Ill. App. 3d at 863, 479 N.E.2d at 1105.

401. *Van Dettum*, 133 Ill. App. 3d at 863, 479 N.E.2d at 1105 (citing *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976)).

402. *Van Dettum*, 133 Ill. App. 3d at 863, 479 N.E.2d at 1105-06 (citing *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978)).

403. *Van Dettum*, 133 Ill. App. 3d at 863-64, 479 N.E.2d at 1106.

404. *Id.* at 864, 479 N.E.2d at 1106.

405. 135 Ill. App. 3d 932, 482 N.E.2d 611 (1st Dist. 1985).

sively used by McDonald's Restaurants. The plaintiff, a McDonald's employee, wiped her hands and arms with a towel which, unknown to her, was saturated with the cleaner. She suffered severe and permanent burn injuries and scars.<sup>406</sup> In her complaint against the manufacturer, Hayes alleged that the manufacturer failed to adequately warn users of the caustic nature of the product.<sup>407</sup>

The court initially addressed whether the manufacturer had a duty to warn the plaintiff. The *Hayes* court considered that it was within the jury's province to determine the foreseeability of the plaintiff's use of the towel to wipe her hands.<sup>408</sup> The court proceeded to state that assuming the existence of a duty to warn, the paramount question then becomes whether the presence of a warning on the container fulfills that duty.<sup>409</sup> The *Hayes* court stated that it could not hold as a matter of law that the manufacturer's duty to identify the liquid caustic material did not extend beyond the original package.<sup>410</sup> Therefore, the court reversed and remanded the trial court's dismissal of the complaint,<sup>411</sup> suggesting that the manufacturer may have a duty "to take the reasonable precaution of adding coloration or some other distinctive characteristic to decrease the risks of its being mistakenly taken to be harmless water."<sup>412</sup>

In contrast, the Illinois Appellate Court for the Second District held that as a matter of law, the manufacturer of a football helmet had no duty to warn when the helmet was not defectively designed

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406. *Id.* at 933, 482 N.E.2d at 612.

407. *Id.*

408. *Id.* at 934, 482 N.E.2d at 612-13.

409. *Id.*

410. *Id.* at 934-35, 482 N.E.2d at 613.

411. *Id.* (quoting *Ziglar v. E.I. DuPont De Nemours & Co.*, 53 N.C. App. 147, 155, 280 S.E.2d 510, 516 (1981)). In analyzing a case factually similar to *Hayes*, the court in *Ziglar* stated:

The law requires a manufacturer to eliminate the dangerous character of goods to the extent that the exercise of reasonable care, considering all of the circumstances, enables him to do so. It is not without significance, therefore, that DuPont began bottling Vydete L in gray, opaque containers, on 24 May 1974, shortly after this tragic incident occurred, as requested by the State of North Carolina, and that it added amber coloration to the colorless poison in January 1975. Thus, on this record, a critical factual issue, and one not susceptible to disposition by summary judgment, was whether DuPont was negligent in manufacturing an inherently dangerous toxic substance without taking reasonable precautions to decrease the risk of its lethal confusion with ordinary, harmless drinking water.

*Ziglar*, 53 N.C. App. at 155, 280 S.E.2d at 516 (citations omitted).

412. *Hayes*, 135 Ill. App. 3d at 935, 482 N.E.2d at 613.

and the user knew of the possibility of injury.<sup>413</sup> In *Lister v. Bill Kelley Athletic, Inc.*<sup>414</sup> a jury verdict was entered in favor of the manufacturer and retail seller defendants. The plaintiff appealed. The issue on appeal was whether the plaintiff established as a matter of law the manufacturer's liability for failure to warn.<sup>415</sup>

The *Lister* court began its analysis by noting that the trial court's verdict in favor of the defendants implied the conclusion that the helmet did not contain a design or construction defect and that the helmet did not cause the plaintiff's back injury.<sup>416</sup> The plaintiff argued that the manufacturer of the helmet created an "illusion of protection" for the user which needed to be dispelled by a warning on the helmet. The court, however, distinguished between the inherent danger of a football helmet, a mere type of protective equipment, and that of asbestos products or prescription drugs which actually cause the alleged injury.<sup>417</sup> The court held that, only in cases involving the latter, could the plaintiff's duty to warn argument be persuasive. Finally, applying the doctrine enunciated in *Van Dettum*, the court concluded that the manufacturer had no duty to warn because the helmet was not defectively designed or manufactured and a warning would not have apprised the user of a previously unknown danger.<sup>418</sup>

### B. Manufacturer and Distributor Liability

Two appellate court decisions during the *Survey* period clarify issues of manufacturer and distributor liability. In a case of first impression, the Illinois Appellate Court for the First District in *Rothe v. Maloney Cadillac, Inc.*<sup>419</sup> held that absence of privity between a plaintiff and an automobile manufacturer does not bar a plaintiff's recovery from the manufacturer for economic loss suffered as a result of breach of implied warranties. The plaintiff in *Rothe* uncovered various defects in an automobile he purchased from the defendant dealer. The dealer never corrected the defects. The plaintiff therefore initially alleged that the manufacturer de-

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413. *Lister v. Bill Kelley Athletic, Inc.*, 137 Ill. App. 3d 829, 485 N.E.2d 483 (2nd Dist. 1985).

414. *Id.*

415. *Id.* at 834, 485 N.E.2d at 486.

416. *Id.* at 835, 485 N.E.2d at 487.

417. *Id.* at 835-36, 485 N.E.2d at 487.

418. *Id.* at 836, 485 N.E.2d at 487 (citing *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 477 N.E.2d 1293 (1st Dist. 1985)). *Zidek v. General Motors Corp.*, 66 Ill. App. 3d 982, 384 N.E.2d 509 (2d Dist. 1978); RESTATEMENT (SECOND) OF TORTS § 402(A), Comment j (1965).

419. 142 Ill. App. 3d 937, 492 N.E.2d 497 (1st Dist. 1986).

fendant, General Motors, breached an implied warranty of fitness for ordinary purpose. He claimed this action was justified under the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act. The trial court dismissed the claim.<sup>420</sup>

On appeal, the appellate court commenced its discussion by noting that the viability of the doctrine of privity of contract in Illinois controlled whether a manufacturer which dealt indirectly with the plaintiff was susceptible to liability.<sup>421</sup> Accordingly, the court was required to determine whether, absent a collision or impact, privity between an automobile manufacturer and the purchaser of its products through an independent dealer was a prerequisite to an action based upon a breach of implied warranty.<sup>422</sup> No Illinois court had previously addressed this issue. Therefore, the court relied on decisions from other states, and quoted the opinion of the Florida Supreme Court in *Manheim v. Ford Motor Co.*<sup>423</sup> Confronting the same issue, that court stated:

The world of merchandising is, in brief, no longer a world of direct contact; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communication media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of absence of technical privity.<sup>424</sup>

As further support for its finding, the court referred to similar precedent from California,<sup>425</sup> North Dakota,<sup>426</sup> and Texas.<sup>427</sup> Finally,

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420. *Id.* at 939, 492 N.E.2d at 498 (citing Magnuson-Moss Warranty — Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d)(1) (1982)). The trial court dismissed the counts against General Motors and Maloney for breach of implied warranty under both the Magnuson-Moss Act and U.C.C. The following issues were discussed on appeal: (1) whether the lack of contractual privity barred the plaintiff's actions against General Motors; and (2) whether the disclaimers contained in Maloney's sales contract barred the counts against him. With respect to counts against Maloney, the appellate court concluded that the U.C.C. warranty count properly was dismissed but that the trial court had erred in dismissing the Magnuson-Moss count. *Rothe*, 142 Ill. App. 3d at 939, 492 N.E.2d at 498.

421. *Rothe*, 142 Ill. App. 3d at 940, 492 N.E.2d at 499.

422. *Id.* at 942, 492 N.E.2d at 500.

423. *Id.* (quoting *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967)).

424. *Rothe*, 147 Ill. App. 3d at 942, 492 N.E.2d at 501.

425. *Id.* at 942-43, 492 N.E.2d at 501. (citing *Werber v. Mercedes-Benz of North America, Inc.*, 152 Cal. App. 3d 1039, 199 Cal. Rptr. 765 (1984) (exception to the privity rule applied to the purchase of an automobile due to changing economic conditions and concepts of justice)).

426. *Rothe*, 142 Ill. App. 3d at 943-44, 492 N.E.2d at 501-02. The court stated:

It is perfectly clear, therefore, that where a sale is made under a trade name and where the manufacturer has conducted a national advertising campaign and

the court indicated that policy considerations mandated protecting a consumer from a defective product and placing the burden of loss on the party responsible.<sup>428</sup> Thus, the court concluded that lack of privity did not preclude the action against General Motors.<sup>429</sup>

With regard to distributor liability, the Illinois Appellate Court for the First District held in *Skarski v. Ace-Chicago Great Dane Corp.*<sup>430</sup> that a plaintiff may recover damages from a distributor under a products liability theory.<sup>431</sup> The defendant distributor in *Skarski* bought a refrigerated trailer, intending to later resell it. A servicer of refrigeration units employed the plaintiff as a mechanic to repair a freon leak in the defendant's unit. The refrigeration unit fell from the trailer and the plaintiff sustained injuries.<sup>432</sup> The trial court granted summary judgment in favor of the defendant and the plaintiff appealed.

In its analysis, the appellate court stated that all persons in the distributive chain had potential liability for injuries resulting from

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sales are accomplished through local dealers, the demand for such products is created by the advertising of the manufacturer. The purpose of the advertising conducted by such manufacturer is to cultivate the ultimate consumer. Thus, where the article sold as a new article is defectively manufactured, the interests of the ultimate consumers can be protected only by eliminating the requirement of privity between the manufacturer and his dealers and the expected ultimate consumer. It would be unreasonable to hold that, if a buyer purchases, for example, a 'Ford' or 'Chevrolet' or 'Cadillac' or 'Chrysler' or any other make of automobile, no implied warranty of merchantable quality can be asserted by the purchaser against the manufacturer even though the particular car delivered as a new automobile is in such bad condition and so defective in materials or construction that it cannot be operated at all and is wholly useless or unsatisfactory for the ordinary purposes which such automobile is designed to serve.

Accordingly, under modern marketing conditions, when a manufacturer puts a new truck-tractor or other new product into the stream of trade and promotes its sale to the public, an implied warranty that it is reasonably fit and suitable for use, as such, accompanies such new vehicle into the hands of the ultimate buyer. Absence of privity between the manufacturer and the buyer is immaterial.

*Id.* (quoting *Lang v. General Motors Corp.*, 136 N.W. 2d 805, 809-10 (N.D. 1965)).

427. *Rothe*, 142 Ill. App. 3d at 944, 492 N.E.2d at 502 (quoting *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W. 2d 77, 81-82 (Tex. 1977)). The court in *Nobility Homes* stated "To hold [that lack of privity precludes action against manufacturers] would encourage manufacturers to employ 'thinly capitalized collapsible corporations to sell their commercially inferior products leaving no one for the buyer to sue for his economic loss.' "

428. *Rothe*, 142 Ill. App. 3d at 945, 492 N.E.2d at 502.

429. *Id.*

430. 138 Ill. App. 3d 301, 485 N.E.2d 1312 (1st Dist. 1985).

431. *Id.* at 306, 485 N.E.2d at 1315.

432. *Id.* at 304, 485 N.E.2d at 1314.

a defective product.<sup>433</sup> In *Skarski*, the court disregarded the inference that no entity down the distributive chain had an identical duty to that of a manufacturer.<sup>434</sup> Instead, the court stressed the primary public policy concern of whether the injured user or the seller, should bear the loss.<sup>435</sup> The court weighed these competing interests and concluded that the more solvent seller should bear the loss because he could prevent the product from entering the stream of commerce.<sup>436</sup> Moreover, the court noted that the seller could employ inspection procedures to enhance the safety of the product.<sup>437</sup>

Finally, the court rejected the contention that the defendant escaped liability because the trailer had not entered the stream of commerce.<sup>438</sup> The court held that the defective trailer was in the stream of commerce at the time of the plaintiff's injury because the distributor attempted to repair the trailer in order to realize a profit upon sale.<sup>439</sup> Accordingly, the appellate court reversed the trial court's grant of summary judgment for the defendant.<sup>440</sup>

## VII. CONSUMER PROTECTION

The Illinois Supreme Court did not decide any significant cases in the area of consumer protection during the *Survey* year. One case, not fully litigated at the termination of the *Survey* year, *Kellerman v. MCI Telecommunications Corporation*<sup>441</sup> involved MCI's alleged violations of the Consumer Fraud and Deceptive Business Practices Act. To date, the *Kellerman* court has addressed only two issues. First, the court has considered whether the Federal

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433. *Id.* at 305, 485 N.E.2d at 1315 (citing *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 454 N.E.2d 210 (1983)).

434. *Skarski*, 138 Ill. App. 3d at 306, 485 N.E.2d at 1315 (citing *Simpson v. General Motors Corp.*, 118 Ill. App. 3d 479, 455 N.E.2d 37 (1st Dist. 1983), *aff'd*, 108 Ill. 2d 146, 493 N.E.2d 1 (1985)).

435. *Skarski*, 138 Ill. App. 3d at 306, 485 N.E.2d at 1315.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 307-08, 485 N.E.2d at 1316 (citing *Boddie v. Litton Unit Handling Systems*, 118 Ill. App. 3d 520, 530, 455 N.E.2d 142, 149 (1st Dist. 1983)). The court in *Boddie* asserted that to be considered in the stream of commerce, it is sufficient that the defendant is in the business of selling the product and markets it to a buyer. *Boddie*, 118 Ill. App. 3d at 530, 455 N.E.2d at 149.

440. *Skarski*, 138 Ill. App. 3d at 310, 485 N.E.2d at 1318. In response to the defendant's argument that it could not be liable in products liability because the plaintiff was not the ultimate user of the trailer, the court asserted that it was an issue of foreseeability, requiring a jury determination, and thus remanded that issue to the trial court. *Id.*

441. *See Kellerman v. MCI Telecommunications Corporation*, 112 Ill. 2d 428, 434, 493 N.E.2d 1045, 1047 (1986) (citing ILL. REV. STAT. ch. 121½, para. 261-272 (1985)).

Communications Act of 1934 preempted the plaintiff's state law action.<sup>442</sup> And second, the court determined whether it should stay the proceedings pending review of the claims by the Federal Communications Commission.<sup>443</sup> Thus the decisions bear no relevance to a survey of consumer protection law.<sup>444</sup>

## VIII. RECENT LEGISLATION

### A. *Partnership Legislation*

A recent public act, now codified, governs limited partnerships and corporations.<sup>445</sup> The new act creates the Revised Uniform Limited Partnership Act (the "Act") and repeals the Uniform Limited Partnership Act of 1917.<sup>446</sup> Furthermore, amendments to the Business Corporation Act of 1983 have been enacted.<sup>447</sup> Those amendments became effective January 1, 1987.<sup>448</sup> Additionally, the new Partnership Act is effective July 1, 1987.<sup>449</sup>

Article 1 of the Act contains general provisions regarding the Revised Uniform Limited Partnership Act,<sup>450</sup> including the short title and definitions pertinent to the Partnership Act.<sup>451</sup> Additionally, article 1 provides restrictions for naming a limited partnership.<sup>452</sup> Pursuant to article 1 the name must include the words "limited partnership" and must not include a limited partner's name unless the name is also that of a general partner or a corpo-

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442. *Kellerman*, 112 Ill. 2d at 434, 493 N.E.2d at 1047 (citing 47 U.S.C. § 151 (1982)).

443. *Kellerman*, 112 Ill. 2d at 434, 493 N.E.2d at 1047 (citing ILL. REV. STAT. ch. 110, para. 2-619(a)(3) (1985)). The court indicated that the state law actions were not preempted by the Federal Communications Act, nor should they have been stayed pending a review by the Federal Communications Commission. *Kellerman*, 112 Ill. 2d at 434, 493 N.E.2d at 1047.

444. Other appellate court determinations affecting consumer's rights more appropriately are labelled public utility cases and primarily involve statutory construction. See *Independent Voters of Illinois v. Illinois Commerce Commission*, 139 Ill. App. 3d 957, 487 N.E.2d 963 (2d Dist. 1985) (public utility rate fixing is a legislative function delegated to the Commission, not the judiciary); see also *Moenning v. Illinois Bell Telephone Co.*, 139 Ill. App. 3d 521, 487 N.E.2d 980 (1st Dist. 1985) (telephone company held statutorily exempt from the Consumer Credit Protection Act). See also *Fineman v. Citicorp*, 137 Ill. App. 3d 1035, 485 N.E.2d 591 (1st Dist. 1985), discussed *supra* at notes 296-311 and accompanying text.

445. ILL. REV. STAT. ch. 32, paras. 1.05, 1.80, 2.10, 6.25, 9.05, 12.25, 14.20, 14.25, 16.05, ch. 106½, paras. 151-1 to 160-5 (Supp. 1986).

446. *Id.*

447. *Id.*

448. *Id.*

449. ILL. REV. STAT. ch. 106½, paras. 151-1 to 160.5 (Supp. 1986).

450. *Id.* at paras. 151-1 to 151-9.

451. *Id.* at paras. 151-1 to 151-2.

452. *Id.* at para. 151-3.

rate general partner.<sup>453</sup> These name restrictions do not apply to limited partnerships formed under the Uniform Limited Partnership Act of 1917.<sup>454</sup>

Furthermore, article 1 provides that each limited partnership must maintain a registered agent and a registered office,<sup>455</sup> and that certain records be maintained at the registered office.<sup>456</sup> Among the required records is a writing setting forth the following information: the times for additional contributions;<sup>457</sup> the rights of any partner to receive or of any general partner to make distributions to a partner;<sup>458</sup> the rights of any limited partner to assign any part of his partnership interest;<sup>459</sup> and any events upon the happening of which the limited partnership is to be dissolved.<sup>460</sup> Finally, article 1 enumerates how to serve process on a limited partnership<sup>461</sup> and defines the "assumed name" of a limited partnership.<sup>462</sup>

Article 2 addresses the formation of limited partnerships.<sup>463</sup> It provides that a certificate of limited partnership must be executed and filed in the office of the Secretary of State in Springfield or Chicago.<sup>464</sup> Paragraph 158-1 of article 2 further specifies the necessary elements of a certificate of limited partnership.<sup>465</sup> These elements include the name, purpose, and address of the limited partnership.<sup>466</sup> Additionally, the certificate must contain the name and business address of each general partner.<sup>467</sup> Furthermore, the certificate must set forth the aggregate amount of cash and a description and statement of the aggregate agreed value of the other property or services contributed by the partners and which the partners have agreed to contribute.<sup>468</sup> Finally, the limited partnership certificate must describe the time or events whereby a partner

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453. *Id.*

454. *Id.*

455. *Id.* at para. 151-4.

456. *Id.* at para. 151-5.

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.* at para. 151-8.

462. *Id.* at para. 151-9. An assumed name is the equivalent of an alias, or another name by which the corporation is known to the public. BLACK'S LAW DICTIONARY 112 (5th ed. 1979).

463. *Id.* at paras. 152-1 to 152-9.

464. *Id.* at para. 152-1. Filing is no longer done by the County Recorder of Deeds. *Id.*

465. *Id.* at para. 152-1.

466. *Id.*

467. *Id.*

468. *Id.*

may terminate his membership<sup>469</sup> and specify the latest date upon which the limited partnership is to dissolve.<sup>470</sup> Article 2 also makes allowances for amendments to or cancellation of a limited partnership certificate.<sup>471</sup> Article 2 further provides that any person executing a false statement in the certificate<sup>472</sup> or any general partner having constructive notice thereof<sup>473</sup> may be liable to those suffering damages as a result of reliance on the false statement.<sup>474</sup>

Article 3 of the Revised Uniform Limited Partnership Act covers limited partners.<sup>475</sup> This article first addresses the subsequent admission of additional limited partners.<sup>476</sup> It provides that any person who directly acquires or who is an assignee of a partnership interest may be admitted as an additional limited partner. If the partnership agreement does not provide for the admission of additional limited partners, the current partners may admit the person pursuant to their unanimous written consent.<sup>477</sup> Furthermore, article 3 allows the partnership agreement to grant all or a specified group of limited partners the right to vote upon any matter.<sup>478</sup> It also defines a limited partner's liability to third parties.<sup>479</sup> Generally, a limited partner is not liable for the obligations of the limited partnership unless he or she is also a general partner.<sup>480</sup> Nevertheless, when a third party reasonably believes he is transacting business with a general partner, but is actually dealing with a limited partner, the limited partner may assume liability if he participates in the control of the business.<sup>481</sup> Article 3 concludes by listing types of conduct which do not constitute participation in control of the business.<sup>482</sup>

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469. *Id.*

470. *Id.*

471. *Id.* at paras. 152-2, 152-3.

472. *Id.* at para. 152-7.

473. *Id.*

474. *Id.*

475. *Id.* at paras. 153-1 to 153-6.

476. *Id.* at para. 153-1.

477. *Id.*

478. *Id.* at para. 153-2.

479. *Id.* at para. 153-3.

480. *Id.*

481. *Id.*

482. *Id.* The statute lists several types of conduct that do not constitute participating in control of the business. This conduct includes being a contractor for an agent or employee of the limited partnership or a general partner; consulting or advising a general partner as to the business of the partnership; acting as surety or guarantor for the partnership; taking action to bring or pursue a derivative action in the right of the partnership; offering, approving or disapproving certain types of proposals; winding up the

Article 4 contains provisions relating to general partners.<sup>483</sup> First, admission of additional general partners occurs in the same manner as does admission of additional limited partners.<sup>484</sup> Moreover, the article enumerates certain events of withdrawal which suffice to remove a general partner from the partnership.<sup>485</sup> Article 4 also provides that general partners have the liabilities of a partner in an ordinary partnership subject to exceptions set out in the Act.<sup>486</sup> Finally, article 4 provides that a partnership agreement may grant voting rights to general partners on any basis, either separately or to all or any class of the limited partners.<sup>487</sup>

Article 5 of the Revised Uniform Limited Partnership Act addresses financing of a limited partnership.<sup>488</sup> The article indicates that a partner's contribution may be in cash, property, services rendered, or a promissory note of some type.<sup>489</sup> Additionally, a limited partner's promise to contribute is enforceable only if it satisfies the Statute of Frauds.<sup>490</sup> An enforceable promise to contribute exists even if a partner cannot perform due to death, disability, or any other reason.<sup>491</sup> An obligation to contribute may be compromised only upon consent of all the partners.<sup>492</sup> Article 5 also states that profits and losses of a limited partnership are allocated among the partners, and among classes of partners, in the manner provided in the partnership agreement.<sup>493</sup> Absent such a provision in the partnership agreement, profits and losses are allocated on the basis of the value of the contributions made by each partner if the contributions have been received and not yet returned by the partnership.<sup>494</sup>

Article 6 pertains to distributions and withdrawal.<sup>495</sup> The article provides for interim distributions,<sup>496</sup> withdrawal of general and limited partners,<sup>497</sup> distribution upon withdrawal,<sup>498</sup> distribution in

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partnership; and exercising any rights afforded to limited partners under the Act. *Id.* at para. 153-3.

483. *Id.* at paras. 154-1 to 154-5.

484. *Id.* at para. 154-1.

485. *Id.* at para. 154-2.

486. *Id.* at para. 154-3.

487. *Id.* at para. 154-5.

488. *Id.* at paras. 155-1 to 155-4.

489. *Id.* at para. 155-1.

490. *Id.* at para. 155-2.

491. *Id.*

492. *Id.*

493. *Id.* at para. 155-3.

494. *Id.*

495. *Id.* at paras. 156-1 to 156-8.

496. *Id.* at para. 156-1.

497. *Id.* at paras. 156-2, 156-3.

498. *Id.* at para. 156-4.

kind,<sup>499</sup> right to distribution,<sup>500</sup> limitations on distribution,<sup>501</sup> and liability upon return of contribution.<sup>502</sup> Article 7 allows for assignment of partnership interests.<sup>503</sup> Article 7 states that a partnership interest is personal property.<sup>504</sup> The article also provides that, unless prohibited by the partnership agreement, a partnership interest is assignable in whole or in part.<sup>505</sup> The article notes that assignment does not operate to dissolve the partnership.<sup>506</sup> Moreover, following the assignment of his or her interest, the assignor is not released from liability to the limited partnership under certain sections of the Act.<sup>507</sup>

Dissolution of a limited partnership is governed by Article 8 of the Revised Uniform Limited Partnership Act.<sup>508</sup> Pursuant to that article, a partnership is dissolved and its affairs should be wound up if any one of the following events occurs:<sup>509</sup> the time specified in the certificate of limited partnership lapses;<sup>510</sup> all partners give written consent of dissolution;<sup>511</sup> a general partner withdraws and there are no other general partners or the remaining partners do not agree in writing to continue the partnership and appoint additional general partners;<sup>512</sup> or, a judicial dissolution is entered.<sup>513</sup> Article 8 also states that, except as otherwise provided in the partnership agreement, the general partners or limited partners who have not wrongfully dissolved a limited partnership, may wind up the limited partnership's affairs.<sup>514</sup>

Finally, Article 8 sets forth priority for distribution of assets upon dissolution.<sup>515</sup> Assets are distributed first to creditors, including partners who are creditors;<sup>516</sup> second to partners and former partners for interim distributions not constituting a return of

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499. *Id.* at para. 156-5.

500. *Id.* at para. 156-6.

501. *Id.* at para. 156-7.

502. *Id.* at para. 156-8.

503. *Id.* at paras. 157-1 to 157-5.

504. *Id.* at para. 157-1.

505. *Id.* at para. 157-2.

506. *Id.*

507. *Id.* at para. 157-4.

508. *Id.* at paras. 158-1 to 158-4.

509. *Id.* at para. 158-1.

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.* at para. 158-3.

515. *Id.* at para. 158-4.

516. *Id.*

contribution or distribution upon withdrawal;<sup>517</sup> third to partners for return of their contributions;<sup>518</sup> and fourth to partners for their partnership interests in the proportions in which they share in distributions.<sup>519</sup>

Article 9 concerns Foreign Limited Partnerships.<sup>520</sup> The article indicates that the laws of the state or other jurisdiction under which a foreign limited partnership is formed govern the business of the partnership.<sup>521</sup> To transact business in Illinois, a foreign limited partnership must be admitted to do so by the Secretary of State.<sup>522</sup> Admission may be granted only after the limited partnership files an application to the Secretary of State.<sup>523</sup> The application may be amended by filing a certificate of amendment.<sup>524</sup> Additionally, a foreign limited partnership transacting business in Illinois may not maintain a civil action until it is admitted to do business within the state.<sup>525</sup> Failure to acquire admission, however, does not impair any contract's validity. Neither does it impair the act of any foreign limited partnership or prevent foreign limited partnerships from defending any civil action in any Illinois court.<sup>526</sup> Finally, the article sets forth the procedure for service of process on a foreign limited partnership.<sup>527</sup>

Article 10 contains provisions governing derivative actions.<sup>528</sup> Fees and other matters are detailed in Article 11.<sup>529</sup> Article 12 contains provisions involving construction, application, and judicial review under the Administrative Review Law.<sup>530</sup> Lastly, Article 13 includes amendatory provisions and repealers.<sup>531</sup>

Article 14 of the new legislation amends the Business Corporation Act of 1983.<sup>532</sup> Article 14 specifically refines paragraphs 1.05, 1.80, 2.10, 6.25, 9.05, 12.25, 14.20, 14.25, and 16.05 of the 1983

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517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.* at paras. 159-1 to 159-11.

521. *Id.* at para. 159-1.

522. *Id.* at para. 159-2.

523. *Id.*

524. *Id.* at para. 159-5.

525. *Id.* at para. 159-7.

526. *Id.*

527. *Id.* at para. 159-9.

528. *Id.* at paras. 160-1 to 160-4.

529. *Id.* at paras. 161-1 to 161-6.

530. *Id.* at paras. 161-1 to 161-5.

531. *Id.* at para. 211.1.

532. ILL. REV. STAT. ch. 32, paras. 1.05, 1.80, 2.10, 6.25, 9.05, 12.25, 14.20, 14.25, 16.05 (Supp. 1986).

Act.<sup>533</sup> Paragraph 1.05 authorizes rulemaking by the Secretary of State<sup>534</sup> and repeals provisions relating to powers retained by the General Assembly.<sup>535</sup> Article 14 also amends the statutory definition of paid-in capital. In addition to its definition under the old act, paid-in capital includes "amounts added or transferred to paid-in capital by action of the board of directors or shareholders pursuant to a share dividend, share split, or otherwise, minus reductions from that sum effected by an acquisition of its own shares, to the extent of the amount of paid-in capital represented by such acquired shares."<sup>536</sup>

Another provision of Article 14 amends the provisions in paragraph 2.10 which govern Articles of Incorporation.<sup>537</sup> Prior to the amendment, paragraph 2.10 required that the Articles of Incorporation set forth the following items: a sufficient corporate name; the purpose for which the corporation is organized; the address of the corporation's registered office and name of its registered agent; the name and address of each incorporator; the number of shares of each class that the corporation is authorized to issue; and the number and class of shares which the corporation will issue without further report to the Secretary of State and the consideration to be received by the corporation for those shares.<sup>538</sup> Pursuant to the amendment, the sixth item is altered to allow deduction of expenses, including commissions paid or incurred in connection with the issuance of shares.<sup>539</sup>

Paragraph 6.25 provides for consideration of shares.<sup>540</sup> With the passage of the new legislation, a corporation may, with board of director approval, allow stock dividends or stock splits.<sup>541</sup> This authority, however, is qualified in that the value fixed by the board of directors in connection with such dividend or split must be transferred to paid-in capital of the corporation and any such issuance must be authorized by a majority of holders of shares of the class or series.<sup>542</sup>

A significant change also exists with regard to reduction of the

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533. *Id.*

534. *Id.* at para. 1.05.

535. *Id.*

536. *Id.* at para. 1.80.

537. *Id.* at para. 2.10.

538. *Id.*

539. *Id.*

540. *Id.* at para. 6.25.

541. *Id.*

542. *Id.*

annual franchise tax.<sup>543</sup> Paragraph 9.05 governs the power of a corporation to acquire its own shares.<sup>544</sup> The new amendment affects that power only to the extent that the basis of the annual franchise tax payable by the corporation may not be reduced until a report documenting a corporation's acquisition of its own shares is first filed with the Secretary of State.<sup>545</sup> Furthermore, if the required report is not filed before the first day of the anniversary month of a taxable year and before payment of its annual franchise tax, the annual franchise tax for that taxable year may never be reduced.<sup>546</sup>

Finally, the last important change in the Business Corporation Act of 1983 affects Revocation of Dissolution as found in Paragraph 12.25.<sup>547</sup> The only new proviso with respect to revocation of dissolution states that failure to file a revocation of dissolution in conformity with the Act does not constitute sufficient grounds for rejection of the filing by the Secretary of State. A penalty, however, may be imposed.<sup>548</sup>

### B. Corporations Legislation

The Business Corporation Act of 1983 underwent significant changes during the *Survey* period.<sup>549</sup> A recent public act, now codified and effective August 23, 1985, added new sections to the Act regarding the vote required for certain business combinations and considerations in discharge of duties.<sup>550</sup> Furthermore, with the passage of this new act, the Illinois General Assembly amended numerous sections of the Business Corporation Act.<sup>551</sup> Those amendments were effective as of January 1, 1986.<sup>552</sup>

Paragraphs 7.85 and 8.85 have been added to the Business Corporation Act of 1983 to define the rights of majority and minority stockholders during takeover.<sup>553</sup> Together, the new paragraphs op-

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543. *Id.* at para. 9.05.

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.* at para. 12.25.

548. *Id.*

549. ILL. REV. STAT. ch. 32, paras. 1.10 to 16.10 (1985). For a discussion of the amendments to the Act, see *infra* notes 532-48 and accompanying text.

550. ILL. REV. STAT. ch. 32, paras. 7.85, 8.85 (1985).

551. *Id.* at paras. 1.10, 1.15, 1.17, 1.30, 1.45, 1.70, 1.80, 2.05, 2.10, 2.30, 4.05, 4.15, 4.20, 4.25, 5.10, 5.25, 5.30, 6.50, 7.10, 7.25, 7.75, 8.35, 8.65, 9.05, 10.05, 10.20, 10.30, 11.05, 11.10, 11.30, 12.20, 12.40, 12.50, 13.45, 13.70, 14.05, 14.25, 15.10, 16.05, 16.10.

552. *Id.*

553. *Id.* at paras. 7.85, 8.85.

erate to protect minority shareholders' interests from being "squeezed out" after a hostile takeover. Typically, a hostile takeover is accomplished via a front-end-loaded takeover. The front-end-loaded takeover occurs in two stages. The first stage consists of a cash tender offer in which the acquiror obtains enough stock of the target company to achieve voting control. During the second stage, the acquiror effectively votes in a merger, consolidation or similar business combination with the acquiror's company or an affiliate thereof.

Paragraph 7.85 applies after the first stage of the front end-loaded takeover. Following a successful tender offer, amended paragraph 7.85 states that the tender offeror becomes an "interested shareholder" and must comply with either a super majority voting requirement or certain price and procedure conditions.<sup>554</sup> The paragraph provides that certain business combinations require approval by eighty percent of all voting shares, including "interested shareholders." Additionally, the paragraph requires a simple majority of all shares entitled to vote, excluding those of interested shareholders.<sup>555</sup> The higher vote requirement applies only to five business combinations:<sup>556</sup> mergers, consolidations, or share exchanges of a corporation or subsidiary which after such combination create an "affiliate"<sup>557</sup> or an "associate"<sup>558</sup> of an "interested shareholder."<sup>559</sup> Second, the amendment applies to any sale, lease, exchange, mortgage, pledge, transfer or other disposition of at least ten percent of the corporation's net worth.<sup>560</sup> Paragraph 7.85 also controls the issuance or transfer of a corporation's securities to an "interested shareholder."<sup>561</sup> The fourth category of business combinations includes the adoption of any plan or proposal for the liq-

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554. *Id.* at para. 7.85(a). The new Business Corporation Act defines Interested Shareholder as "any person (other than the corporation or subsidiary) who or which: (a) is the beneficial owner, directly or indirectly, of Voting Shares conveying 10% or more of the combined voting power of the outstanding Voting Shares; or (b) is an Affiliate or Associate of the corporation and at any time within the 2-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of Voting Shares conveying 10% or more of the combined voting power of the then outstanding Voting Shares." *Id.* at para. 7.85(C)(2).

555. *Id.* at para. 7.85.

556. *Id.*

557. *Id.* Paragraph 7.85 provides that affiliate and associate have the same meanings under the new Business Corporation Act as under the Rule 12b-2 of the General Rules and Regulations of the Securities Exchange Act of 1934. *Id.*

558. *Id.*

559. *Id.*

560. *Id.*

561. *Id.*

liquidation or dissolution of the corporation if proposed by an "interested shareholder."<sup>562</sup> Finally, the amended act applies to any reclassifications, recapitalizations, mergers, consolidations or share exchanges which increase the proportionate share of the outstanding shares of any class of the corporation's stock where the corporation is owned by an "interested shareholder."<sup>563</sup>

In two circumstances, paragraph 7.85 does not require the higher vote requirement and instead permits application of the voting requirements of the Business Corporation Act or of a corporation's articles of incorporation.<sup>564</sup> The first of these circumstances occurs when two-thirds of the "disinterested directors" approve the business combination.<sup>565</sup> The purpose of this exception is to protect friendly transactions from stricter voting requirements. The higher voting requirement is also waived upon fulfillment of certain price and procedure requirements.<sup>566</sup> Fulfillment of these requirements ensures fair compensation for minority shareholders.

Pursuant to the price and procedure conditions, shareholders are fairly compensated for selling their stock back to the corporation and are protected from receiving highly subordinated bonds or "junk bonds." The formula used to determine the amount of compensation depends upon the type of stock involved.<sup>567</sup> Essentially, all of the formulas limit the consideration paid to shareholders to cash or to the same form of consideration as paid by the "interested shareholder" in acquiring identical stock. Paragraph 7.85 sets forth the formulas in detail.<sup>568</sup> Paragraph 7.85 provides that nothing within the paragraph relieves an interested shareholder of the

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562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.* Paragraph 7.85(B)(1) provides:

'Disinterested Director' means any member of the board of the corporation who: (a) is neither the Interested Shareholder nor an Affiliate or Associate of the Interested Shareholder; (b) was a member of the board of directors prior to the time that the Interested Shareholder became an Interested Shareholder, or was recommended to succeed a Disinterested Director by a majority of the Disinterested Shareholders then in office; and (c) was not nominated for election as a director by the Interested Shareholder or any Affiliate or Associate of the Interested Shareholder.

*Id.* at para. 7.81 (B)(1).

566. *Id.* at para. 7.85.

567. *Id.* The price conditions for common stock are contained in paragraph 7.85(B)(2)(a). The price paid must equal at least the highest of one of two formulas provided. Similarly, the price conditions for preferred stock are contained in paragraph 7.85(B)(2)(b). Again, the price paid must be at least the highest of one of four formulas in the statute. *Id.* at para. 7.85 (B)(2)(a),(b).

568. *Id.* at para. 7.85(B)(2).

fiduciary obligations imposed by law.<sup>569</sup>

Paragraph 8.85 provides that the board of directors, committees of the board, individual directors and individual officers may consider the effects of any discharge of their respective duties.<sup>570</sup> The paragraph enumerates the effects of "any action upon the employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors."<sup>571</sup>

Other amendments to the Business Corporation Act of 1983 was enacted on September 23, 1985.<sup>572</sup> This legislation, effective January 1, 1986, amends numerous paragraphs of the Business Corporation Act of 1983.<sup>573</sup> Most of the amendments result in minimal changes, though a few represent a departure from existing law. Only those amendments which significantly change existing law are discussed below.

Paragraph 1.15 pertains to statements of correction.<sup>574</sup> It provides that when an instrument filed with the Secretary of State contains errors, the instrument may be corrected by filing a statement of correction. Under the amended act, most of paragraph 1.15 remains intact. The only substantive changes further define what a statement of correction may not do.<sup>575</sup> Presently, a statement of correction may not alter provisions of the articles of incorporation regarding the corporation name, the number of authorized shares, business estimates, any statements made in lieu of estimates, and the names and addresses of the incorporators.<sup>576</sup> Similarly, a statement of correction for an application for a certificate of authority for a foreign corporation may not change these provisions.<sup>577</sup> Finally, a statement of correction may not alter "provisions of an application to adopt or change an assumed corporate name with respect to [that] name; . . . provisions of a report following merger with respect to the estimates of the property of the corporation, or any statements made in lieu of these estimates . . .; and the wording

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569. *Id.* at para. 7.85.

570. *Id.* at para. 8.85.

571. *Id.*

572. ILL. REV. STAT. ch. 32, paras. 1.10, 1.15, 1.17, 1.30, 1.45, 1.70, 1.80, 2.05, 2.10, 2.30, 4.05, 4.15, 4.20, 4.25, 5.10, 5.25, 5.30, 6.50, 7.10, 7.25, 7.75, 8.35, 8.65, 9.05, 10.05, 10.30, 11.05, 11.10, 11.30, 12.20, 12.40, 12.50, 13.45, 13.70, 14.05, 14.25, 15.10, 16.05, 16.10 (1985).

573. *Id.*

574. *Id.* at para. 1.15.

575. *Id.*

576. *Id.*

577. *Id.*

of any resolution as filed in any report with the Secretary of State and which was in fact adopted by the board of directors or by the shareholders."<sup>578</sup>

Paragraph 1.70 of the Business Corporation Act refers to miscellaneous applications of the Act.<sup>579</sup> The Business Corporation Act applies to treasury shares.<sup>580</sup> Under amended paragraph 1.70, there are four provisions concerning treasury shares;<sup>581</sup> (1) they remain treasury shares until they are sold, used as payment of a dividend, restored to the status of authorized and unissued or cancelled;<sup>582</sup> (2) they may not at any time be voted or counted to determine the total number of outstanding voting shares;<sup>583</sup> (3) a corporation must report to the Secretary of State any reauthorization and reissuance of treasury shares within sixty days thereof;<sup>584</sup> and (4) cancellation of treasury shares must be reported.<sup>585</sup>

Paragraph 5.25 sets out the standards for service of process.<sup>586</sup> Pursuant to the new legislation, the Secretary of State acts as the agent of any domestic corporation or foreign corporation having a certificate of authority.<sup>587</sup> Accordingly, any process, notice or demand may be served upon the Secretary of State.<sup>588</sup> Paragraph 5.25 further delineates the amended procedures for service of process.<sup>589</sup>

The last significant changes in the Business Corporation Act of 1983 are found in Paragraph 9.05.<sup>590</sup> Paragraph 9.05, which concerns the power of a corporation to acquire its own shares, now provides that, when a corporation acquires its own shares, the shares are cancelled.<sup>591</sup> The shares are considered authorized but unissued.<sup>592</sup> Moreover, "if the articles of incorporation provide that such shares shall not be reissued, then the number of authorized shares is reduced by the number of shares acquired."<sup>593</sup> Fi-

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578. *Id.*

579. *Id.* at para. 1.70.

580. *Id.*

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.*

585. *Id.*

586. *Id.* at para. 5.25.

587. *Id.*

588. *Id.*

589. *Id.*

590. *Id.* at para. 9.05.

591. *Id.*

592. *Id.*

593. *Id.*

nally, Paragraph 9.05(b) is further amended by the provision that a corporation which acquires its own shares may pledge those shares as security for the payment of their purchase price.<sup>594</sup> These shares do not become cancelled shares or authorized but unissued shares if the acquired and pledged shares are not voted; counted to determine the total number of issued voting shares; or called upon payment of the purchase price so as to create authorized but unissued shares.<sup>595</sup>

### *C. Securities Regulation Legislation*

Two recently codified acts contribute significantly to the laws governing securities regulation. First, the Illinois General Assembly amended section 8-320 of the U.C.C..<sup>596</sup> This legislation was approved November 14, 1985 and became effective on that same date.<sup>597</sup> Section 8-320 of the U.C.C. provides for transfer or pledge of securities within a central depository system.<sup>598</sup>

The amended section defines two new terms.<sup>599</sup> A "registered clearing corporation" is defined as "an entity or organization registered with the Securities and Exchange Commission as a clearing agency under section 17a of the Securities and Exchange Act of 1934."<sup>600</sup> Second, a "foreign clearing corporation" is defined as "an entity or organization in the business of holding securities outside the United States on behalf of others and with which a registered clearing corporation is permitted by the Securities and Exchange Commission to maintain securities positions".<sup>601</sup>

In addition to providing new definitions, section 8-320, as amended, expands the group of securities covered by the U.C.C..<sup>602</sup> Amended section 8-320 applies to securities in the custody of a clearing corporation, another clearing corporation, a foreign clearing corporation, a custodian bank or a nominee of any of them subject to the instructions of the clearing corporation.<sup>603</sup> Furthermore, section 8-320 covers securities which are forwarded by any of the above entities to an issuer or transfer agent in order to regis-

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594. *Id.*

595. *Id.*

596. ILL. REV. STAT. ch. 26, para. 8-320 (1985).

597. *Id.*

598. *Id.*

599. *Id.* paras. 8-320(6),(7).

600. *Id.* at para. 8-320.

601. *Id.*

602. *Id.*

603. *Id.*

ter a transfer or pledge of the security.<sup>604</sup> The securities covered by section 8-320 must be in bearer form<sup>605</sup> and be endorsed by an appropriate person or registered in the name of the clearing corporation, another clearing corporation, a foreign clearing corporation, a custodian bank or a nominee of any of them.<sup>606</sup> Finally, securities now covered by Section 8-320 must be shown on the account of a transferor or pledgor on the books of the clearing corporation.<sup>607</sup> Aside from the new definitions and expansion of securities covered, section 8-320 remains intact.<sup>608</sup>

Amendments and new sections also modify the Illinois Securities Law of 1953.<sup>609</sup> This legislation was signed into law on September 23, 1985 and became effective January 1, 1986.<sup>610</sup> Pursuant to one new law, the Illinois Securities Law definition of "controlling person" in section 2.4 includes a person who not only sells a security but offers one as well.<sup>611</sup> Accordingly, the definition of offer in section 2.5 has been excluded.<sup>612</sup> In section 2.5a, the new Illinois Securities Law defines an offer as "every offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value."<sup>613</sup> Additionally, section 2.6, which defines underwriter, and section 2.9, which defines salesperson, have been amended to recognize the offering of securities.<sup>614</sup> Section 2.11 of the Illinois Securities Law of 1953 provides the definition of "investment advisor."<sup>615</sup> Following the passage of this new legislation, this definition extends to registered salespersons whose performance is incidental to conducting the business of the registered dealer or registered salesperson and who receives no special compensation for such services.<sup>616</sup>

A term defined in section 2.16 is also modified.<sup>617</sup> Previously,

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604. *Id.*

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. ILL. REV. STAT. ch. 121½, paras. 137.2-4, 137.2-5, 137.2-5a, 137.2-6, 137.2-9, 137.2-11, 137.2-13, 137.2-16, 137.2-17b, 137.2-17c, 137.2-17d, 137.2-17e, 137.3, 137.4, 137.5, 137.6, 137.7, 137.8, 137.9, 137.10, 137.11, 137.11a, 137.12, 137.13, 137.14, 137.15, 137.15a, 137.16 (1985).

610. *Id.*

611. *Id.* at para. 137.2-4.

612. *Id.* at para. 137.2-5.

613. *Id.* at para. 137.2-5a.

614. *Id.* at para. 137.2-6, 137.2-9.

615. *Id.* at para. 137.2-11.

616. *Id.*

617. *Id.* at para. 137.2-16.

section 2.16 contained the definition of "securities commissioner."<sup>618</sup> Now, the term "securities commissioner" has been replaced by "securities director" and the latter has been defined as the chief administrator, rather than the clerk, of the Securities Department.<sup>619</sup>

New sections 2.17b, 2.17c, 2.17d and 2.17e now exist in the Illinois Securities Law of 1953.<sup>620</sup> These sections do not create any substantive changes. Instead, they simply amend the Securities Law's references to other legislation. The references have been updated to cite to amended versions of the same legislation.<sup>621</sup>

Section 3 of the Illinois Securities Law also was subjected to significant revisions.<sup>622</sup> Section 3 removes certain securities from the ambit of the provisions in sections 5, 6, and 7.<sup>623</sup> Section 3 adds to the exemptions set out in section 3C.<sup>624</sup> In addition to the previously listed exemptions,<sup>625</sup> amended section 3C exempts "any interest or participation in any common trust fund or similar fund maintained by any such bank, savings institution or trust company exclusively for the collective investment and reinvestment of assets contributed thereto by such bank, savings institution or trust company or any affiliate thereof, in its capacity as fiduciary, trustee, executor, administrator or guardian."<sup>626</sup> Other subsections of section 3 remain unchanged.<sup>627</sup>

Section 4's enumeration of exempt transactions also has been amended<sup>628</sup> to include offers, in addition to the previously exempted sales.<sup>629</sup> Furthermore, section 4F now contains specific requirements which must be fulfilled before an offer or sale by a registered dealer becomes exempt.<sup>630</sup>

Section 5 of the Illinois Securities Law which provides for the registration of securities,<sup>631</sup> requires that registration by either co-

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618. *Id.*

619. *Id.*

620. *Id.* at paras. 137.2-17 (b),(c),(d),(e).

621. *Id.*

622. *Id.* at para. 137.3.

623. *Id.*

624. *Id.*

625. *Id.* Previously, section 3C exempted securities "issued by and representing an interest in a debt of, or guaranteed by, any United States bank, savings institution, or trust company." *Id.*

626. *Id.* at para. 137.3.

627. *Id.*

628. *Id.* at para. 137.4.

629. *Id.*

630. *Id.*

631. *Id.* at para. 137.5.

ordination or qualification be completed prior to the offer or sale of securities in Illinois.<sup>632</sup> Accordingly, section 5A sets forth the process of registration by coordination. Registration by qualification is detailed further in section 5B.<sup>633</sup> New provisions in section 5C involve oversales of securities.<sup>634</sup>

Sections 5E, 5F, and 5G also have been significantly amended.<sup>635</sup> Section 5E requires that renewal of registration<sup>636</sup> be performed by an issuer, controlling person, or registered dealer if an application for renewal is filed with the Secretary of State.<sup>637</sup> The renewal may be for the amount of securities remaining unsold under the preceding registration.<sup>638</sup> In addition, applications must be accompanied by a renewal fee.<sup>639</sup>

Section 5F requires the applicant or registrant to notify the Secretary of State in writing within two business days after the receipt "of any stop order, denial, order to show cause, suspension or revocation order, injunction or restraining order, or similar order entered or issued by any state, federal or other regulatory authority or by any court"<sup>640</sup> affecting securities which are registered or will be registered in Illinois.<sup>641</sup> Finally, section 5G states that documents filed or fees paid under section 5 are deemed filed or paid, respectively, on the date of their receipt by the Secretary of State.<sup>642</sup>

Section 6, as amended, provides for registration of face amount certificate contracts.<sup>643</sup> Face amount certificate contracts must be registered either by coordination or by qualification.<sup>644</sup> Section 6A outlines registration of face amount certificate contracts by coordination<sup>645</sup> and registration by qualification is set forth in section 6B.<sup>646</sup>

As amended, section 7 of the Illinois Securities Law of 1953 per-

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632. *Id.*

633. *Id.*

634. *Id.*

635. *Id.*

636. *Id.*

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.* at para. 137.6.

644. *Id.*

645. *Id.*

646. *Id.*

tains to registration of investment fund shares.<sup>647</sup> Again, registration of investment fund shares must be accomplished by either coordination or qualification.<sup>648</sup> The procedures for both methods of registration are detailed in Sections 7A and 7B respectively.<sup>649</sup> Section 7 also provides for renewal of registration for investment fund shares in a manner similar to that provided in section 5.<sup>650</sup>

Furthermore, section 8 states that, except as otherwise provided within the Act, dealers, salespersons and investment advisers must be registered with the Secretary of State.<sup>651</sup> This registration requirement, however, does not apply when such a person offers or sells securities in a transaction "believed in good faith to be exempted by [subsections] . . . of [Section] 4."<sup>652</sup> Moreover, the registration section requires that salespersons of dealers, issuers, or controlling persons<sup>653</sup> pass an examination conducted by the Secretary of State.<sup>654</sup> Other provisions of the section articulate conditions which operate to deny, suspend, or revoke registration.<sup>655</sup>

Advertising is considered in section 9.<sup>656</sup> Pursuant to section 9, the Secretary of State may require the filing of certain advertising communications which have been or will be disseminated to prospective investors.<sup>657</sup> Other specifically enumerated types of advertisement can never fall within the registration requirement, and consequently do not require registration.<sup>658</sup>

Section 10 delineates service of process procedures.<sup>659</sup> Section 11 creates the duties and powers of the Secretary of State.<sup>660</sup> The fees provisions contained in section 11A have been changed significantly.<sup>661</sup> Other important changes have occurred with respect to the sentence for any person who violates the section 12 definition of violation.<sup>662</sup> These new sentencing provisions are contained in

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647. *Id.* at para. 137.7.

648. *Id.*

649. *Id.*

650. *Id.*

651. *Id.* at para. 137.8.

652. *Id.*

653. *Id.*

654. *Id.*

655. *Id.*

656. *Id.* at para. 137.9.

657. *Id.*

658. *Id.*

659. *Id.* at para. 137.10.

660. *Id.* at para. 137.11.

661. *Id.* at para. 137.11a.

662. *Id.* at para. 137.12.

Section 14.<sup>663</sup>

In section 15, evidentiary matters are discussed.<sup>664</sup> The scope of section 15 now extends to administrative, civil, and criminal actions.<sup>665</sup> Furthermore, section 15a has been added to permit the issuance of non-binding statements by the Secretary of State.<sup>666</sup> These statements generally concern the applicability of the Illinois Securities Law of 1953 to any transaction or proposed transaction.<sup>667</sup> Finally, section 16 operates as a savings clause.<sup>668</sup>

*D. Banks and Banking Legislation*

Recently, the Illinois General Assembly passed a new Public Act affecting banks and banking.<sup>669</sup> Its provisions became effective July 1, 1986.<sup>670</sup> This act, now codified, amends the Illinois Bank Holding Company Act of 1957 (the "Act").<sup>671</sup> The amendments have been instituted to provide "a unified and orderly method of permitting limited interstate banking on a regional basis".<sup>672</sup> Consequently, the amended Act is significantly different from the original one.<sup>673</sup>

In section 2, important terms relied upon throughout the amended act are defined. Four significant changes appear in the definitional section.<sup>674</sup> First, the definition of "banking office" generally includes a bank's main office, a bank facility, or any bank office where deposits are accepted.<sup>675</sup> This definition, however, does not extend to automatic tellers or offices outside of the United

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663. *Id.* at para. 137.14.

664. *Id.* at para. 137.15.

665. *Id.*

666. *Id.* at para. 137.15a.

667. *Id.*

668. *Id.* at para. 137.16.

669. 1985 Ill. Laws 84-1036. The provisions of Public Act 84-1036 relating to bank holding companies were renumbered by Public Act 84-1123, which was signed by Governor Thompson on June 30, 1986. All citations regarding bank holding companies are to Public Act 84-1123 (codified at ILL. REV. STAT. ch. 17, paras. 2502-2512 (Supp. 1986)).

670. ILL. REV. STAT. ch. 17 paras. 2502, 2505, 2508, 2509, 2509.01, 2510, 2510.01-.04, 2510.1, 2512 (Supp. 1986); ILL. REV. STAT. ch. 17, paras. 501-505; ch. 26, para. 4-213 (1985).

671. ILL. REV. STAT. ch. 17 paras. 2502, 2505, 2508, 2509, 2509.01, 2510, 2510.01-.04, 2510.1, 2512 (Supp. 1986); ILL. REV. STAT. ch. 17, paras. 501-505; ch. 26, para. 4-213 (1985).

672. ILL. REV. STAT. ch. 17, para. 2512 (Supp. 1986).

673. *Id.* at paras. 2502, 2505, 2508, 2509, 2509.01, 2510, 2510.01-.04, 2510.1, 2512 (Supp. 1986).

674. *Id.* at para. 2502.

675. *Id.* at para. 2502(c).

States.<sup>676</sup> Second, section 2 defines "principal place of business" as the state location of the bank office holding the bank's largest total deposits.<sup>677</sup> With respect to bank holding companies, the principal place of business is "the state in which the total deposits held by all of the banking offices of all of the bank subsidiaries of such bank holding company are the largest."<sup>678</sup> Third, section 2 defines "Illinois Bank" as any bank which is organized under Illinois or federal law and whose principal place of business is in Illinois.<sup>679</sup> Fourth, pursuant to the amended act, any bank which is not an "Illinois Bank" but whose principal place of business is a "Midwestern State" constitutes a "Midwest Bank."<sup>680</sup>

Other definitional changes in section 2 indicate how a bank holding company qualifies as an "Illinois Bank Holding Company." A bank holding company qualifies if its principal place of business is in Illinois<sup>681</sup> and the company is not controlled by another bank holding company whose principal place of business is not in Illinois.<sup>682</sup> Furthermore, "Midwest Bank Holding Company" means any bank holding company which does not qualify as an "Illinois Bank Holding Company" but has its principal place of business in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, or Wisconsin.<sup>683</sup> Additionally, a "Midwest Bank Holding Company" may not be controlled by another bank holding company which does not have its principal place of business in one of the aforementioned midwestern states.<sup>684</sup> Finally, the Act defines "foreign bank" and sets forth the method for identifying the "home state" of a foreign bank.<sup>685</sup>

Section 3.02 specifies actions considered unlawful under the Act.<sup>686</sup> The most significant change in this section concerns acquisitions of Illinois banks by other Illinois bank holding companies or by Midwest bank holding companies.<sup>687</sup> Essentially, the amended Act requires that any bank holding company, Illinois or Midwest, acquiring an Illinois bank have a minimum total capital

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676. *Id.* at para. 2502(c)(1).

677. *Id.* at para. 2502(r).

678. *Id.*

679. *Id.* at para. 2502(l).

680. *Id.* at para. 2502(o).

681. *Id.* at para. 2502(m)(1).

682. *Id.* at para. 2502(m)(2).

683. *Id.* at para. 2502(g).

684. *Id.* at para. 2502(p).

685. *Id.* at para. 2502(j)(k).

686. *Id.* at para. 2505.

687. *See* Given, *supra* note 672, at 535.

of seven percent of its total assets.<sup>688</sup> The capital requirement is enforced before the transaction and after its completion.<sup>689</sup>

Other noteworthy amendments to the Bank Holding Company Act affect section 3.07's provision for control and voting shares.<sup>690</sup> Section 3.07 now operates to restrict non-Illinois bank holding companies from controlling or owning more than five percent of the voting shares of an Illinois bank.<sup>691</sup> The section prohibits such control or ownership unless the prospective controller/owner conforms with section 2 of the Act, registers before December 31, 1981 with the Federal Reserve Board as a bank holding company, and either controls at least two Illinois banks,<sup>692</sup> or qualifies under other provisions set forth in the Act.<sup>693</sup>

The other provisions referred to in section 3.07 create six conditions which, if fulfilled, permit a Midwest bank holding company to acquire an Illinois bank or Illinois bank holding company.<sup>694</sup> First, the laws of the state of the Midwest bank holding company must not be "unduly restrictive when compared to those imposed by the laws of Illinois."<sup>695</sup> Accordingly, the Commission of Banks and Trust Companies examines the restrictions upon powers or privileges of Illinois bank holding companies under the laws of the Midwestern state.<sup>696</sup> The Act states that the Commissioner will not approve the application of any Midwest bank holding company unless the laws of the Midwestern state would permit "an Illinois bank holding company to acquire the Midwest bank holding company seeking to make the proposed acquisition."<sup>697</sup> Further, the laws of the Midwestern state also must permit an identical acquisition by an Illinois bank holding company. For example, if the target Illinois bank or bank holding company were located in the Midwestern state, the laws of the Midwestern state would have to allow an Illinois bank holding company to acquire it.<sup>698</sup>

Second, pursuant to section 3.07, an applicant must furnish information indicating that the acquisition would promote the safety

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688. ILL. REV. STAT. ch. 17, para. 2505(a)(7) (Supp. 1986).

689. *Id.*

690. *Id.* at para. 2510.01(a).

691. *Id.*

692. *Id.* at para. 2509.01.

693. *Id.* at para. 2510.

694. *Id.* at para. 2510.01(a)(1).

695. *Id.*

696. *Id.*

697. *Id.*

698. *Id.* at para. 2501.01(a)(1).

and soundness of the institution to be acquired.<sup>699</sup> Moreover, the Commissioner must be satisfied that "the banks already controlled by the applicant adequately meet the convenience and needs of the communities served by them in accordance with the Federal Community Reinvestment Act of 1977" (the "C.R.A.").<sup>700</sup> Information also must substantiate that the Illinois bank or bank holding company will be operated in compliance with the C.R.A. after the acquisition.<sup>701</sup> Finally, fulfillment of the second condition requires the applicant to demonstrate "how the transaction will bring net new benefits to Illinois."<sup>702</sup>

Third, in permitting a Midwest bank holding company to acquire Illinois banks or Illinois bank holding companies, the Commissioner must, under certain circumstances, impose limitations.<sup>703</sup> The new act directs the Illinois Commissioner to "make the acquisition subject to any conditions, restrictions or other limitations that would be applicable to acquisitions by Illinois bank holding companies in the other state but would not be applicable to intra-state transactions in that state."<sup>704</sup>

The fourth precondition for acquisition mandates that the Commissioner approve an acquisition by written order within sixty days of submission of a completed application.<sup>705</sup> Similarly, if the Commissioner disapproves an application, he must substantiate the disapproval in a written ruling.<sup>706</sup> Furthermore, under the amended Illinois act, the Commissioner imposes and collects application fees which are based upon the cost of processing the application.<sup>707</sup>

The fifth provision of section 3.07 allows the Commissioner to "enter into cooperative and reciprocal agreements with the bank regulatory authorities of any Midwestern state."<sup>708</sup> The permitted agreements facilitate periodic examination of bank holding companies.<sup>709</sup> Accordingly, pursuant to the agreements, the Commissioner "may accept reports of examination and other reports from

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699. *Id.* at para. 2510.01(a)(2)(A).

700. *Id.* at para. 2510.01(a)(2)(B).

701. *Id.* at para. 2510(a)(2)(C). See Given, *supra* note 672, at 537-38.

702. ILL. REV. STAT. ch. 17, para. 2510.01(a)(2)(D) (Supp. 1986).

703. *Id.* at para. 2510.01(e).

704. *Id.*

705. *Id.* at para. 2510.01(f)(2)(A). If the Commissioner decides to hold a public hearing, the decision must be rendered within 30 days of the hearing. *Id.* at para. 2510.01(f)(2)(B).

706. *Id.*

707. *Id.* at para. 2510.01(f).

708. *Id.* at para. 2510.02.

709. *Id.*

[the out-of-state] authorities in lieu of conducting his own examinations."<sup>710</sup>

The final provision of section 3.07 determines the consequences for an unlawful acquisition of an Illinois bank or Illinois bank holding company.<sup>711</sup> The amended Illinois act indicates that if an acquisition prohibited by section 3.07 transpires, the Commissioner must order the entity making the acquisition "to divest itself immediately of its . . . ownership or control of [the] Illinois bank or Illinois bank holding company."<sup>712</sup>

In addition to the aforementioned amendments to the Illinois Bank Holding Company Act of 1957, the amended act instituted changes in other Illinois banking laws.<sup>713</sup> These additional amendments are pro-consumer in nature.<sup>714</sup> Pursuant to the amendments, Illinois banks and savings and loans must "provide a disclosure statement for each consumer-deposit account it offers."<sup>715</sup> Moreover, the amended act directs every Illinois bank or savings and loan to offer a Basic Checking Account to any person over the age of sixty-five who so requests.<sup>716</sup> Furthermore, an amendment establishes that every bank and savings and loan must file a Community Reinvestment Act Statement and make it available for public inspection.<sup>717</sup> Finally, a significant change in section 4-213 of the U.C.C. requires banks and savings and loans "to fulfill specific check clearing periods for customers who have had accounts with the bank or savings and loan for at least ninety days."<sup>718</sup>

## IX. CONCLUSION

During the *Survey* year, the Illinois Supreme Court and the Illinois appellate courts refined numerous principles of commercial law. Furthermore, the *Survey* year produced significant commercial legislation.

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710. *Id.*

711. *Id.* at para. 2510.01(g).

712. *Id.*

713. *Id.* See also Given, *supra* note 672, at 541.

714. ILL. REV. STAT. ch. 17, paras. 501-505 (1985).

715. *Id.* at para. 503.

716. *Id.* at para. 504.

717. *Id.* at para. 505.

718. ILL. REV. STAT. ch. 26, para. 4-213 (1985). See Given, *supra* note 672, at 542.