Dispositive Pre-Trial Motions in Illinois - Sections 45, 48 and 57 of the Civil Practice Act

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INTRODUCTION

There are two basic types of pre-trial motions which are intended by the movant to dispose of the case. The first may be called pleading motions; such motions claim that even if all the facts alleged by the opponent were true, movant would be entitled to judgment. The second may be called fact motions; they claim that on one or more dispositive issues, there is no evidence to support the opponent's position, and that the movant is therefore entitled to judgment. Litigants tend to confuse the two types; they are especially likely to make pleading motions when fact motions are appropriate.

In Illinois, the potential for confusion is compounded by the fact that three different sections of the Civil Practice Act provide for five different motions to do the work of these two basic types. Those same sections also provide for other motions that are rarely dispositive. The pleader's problems are further complicated by the fact that some of the dispositive motions have the same name as some of the non-dispositive motions. It is little wonder that the reports are full of cases that were lost or bungled because somebody made the wrong motion.

Mr. Justice Schaefer gave bench and bar an exasperated lecture on the subject a few years ago, in a case where defendants successfully filed motions "to dismiss and for summary judgment." Writing for a unanimous court, he said:

To combine an inquiry into whether a pleading is sufficient to state a cause of action with an examination which almost necessarily

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* Assistant Professor of Law, The University of Chicago. This article is an outgrowth of my work as Reporter to the Committee on Motion Practice of the Illinois Judicial Conference. I am grateful for the financial support of the Conference, and for the helpful suggestions of other members of the Committee: Hon. Allen Hartman, Chairman, Hon. Harold R. Clark, Vice-chairman, Hon. Daniel P. Coman, Hon. Helen C. Kinney, Hon. Peyton H. Kunce, Hon. George W. Kasserman, Jr., Liaison, and Prof. Michael J. Polelle, the other Reporter. My colleagues Walter Hellerstein and Jo Desha Lucas provided helpful comments on an earlier draft. Paul Beach, Michael Brody, and Douglas Clubok provided indispensable research assistance. Assertions in this article concerning the general practice of lawyers and judges, when not supported by authority, are based on personal experience and on the apparent consensus of Illinois trial judges attending the seminar on motion practice at their 1977 annual conference. The views expressed herein are my own, and are not necessarily the views of the Illinois Judicial Conference or the Committee on Motion Practice.

assumes that a cause of action has been stated and proceeds to
determine whether there are any material issues of fact to be tried
is likely to confuse both the parties and the court.\textsuperscript{2}

This article seeks to reduce the potential for such confusion. It offers
a detailed review of sections 45,\textsuperscript{3} 48\textsuperscript{4} and 57\textsuperscript{5} of the Civil Practice Act,

\begin{itemize}
\item[2.] \textit{Id.} at 405, 312 N.E.2d at 609.
\item[3.] ILL. REV. STAT. ch. 110, § 45 (1975). Section 45 provides:
\begin{enumerate}
\item All objections to pleadings shall be raised by motion. The motion shall point
out specifically the defects complained of, and shall ask for appropriate relief, such
as: that a pleading or portion thereof be stricken because substantially insufficient
in law, or that the action be dismissed, or that a pleading be made more definite
and certain in a specified particular, or that designated immaterial matter be
stricken out, or that necessary parties be added, or that designated misjoined par-
ties be dismissed, and so forth.
\item If a pleading or division thereof is objected to by a motion to dismiss or for
judgment or to strike out the pleading, because it is substantially insufficient in
law, the motion must specify wherein the pleading or division thereof is insufficient.
\item Upon motions based upon defects in pleadings, substantial defects in prior
pleadings may be considered.
\item After rulings on motions, the court may enter appropriate orders either to
permit or require pleading over or amending or to terminate the litigation in whole
or in part.
\item Any party may seasonably move for judgment on the pleadings.
\end{enumerate}
\item[4.] ILL. ANN. STAT. ch. 110, § 48 (Smith-Hurd 1978). Section 48 provides:
\begin{enumerate}
\item Defendant may, within the time for pleading, file a motion for dismissal of
the action or for other appropriate relief upon any of the following grounds. If the
grounds do not appear on the face of the pleading attacked the motion shall be
supported by affidavit:
\begin{enumerate}
\item That the court does not have jurisdiction of the subject matter of the action,
provided the defect cannot be removed by a transfer of the case to a court having
jurisdiction.
\item That the plaintiff does not have legal capacity to sue or that the defendant
does not have legal capacity to be sued.
\item That there is another action pending between the same parties for the same
cause.
\item That the cause of action is barred by a prior judgment.
\item That the action was not commenced within the time limited by law.
\item That the claim or demand set forth in the plaintiff's pleading has been
released, satisfied of record, or discharged in bankruptcy.
\item That the claim or demand asserted is unenforceable under the provisions of
the Statute of Frauds.
\item That the claim or demand asserted against defendant is unenforceable be-
cause of his minority or other disability.
\item That the claim or demand asserted against defendant is barred by other
affirmative matter avoiding the legal effect of or defeating the claim or demand.
\end{enumerate}
\item A similar motion may be made by any other party against whom a claim or
demand is asserted.
\item If, upon the hearing of the motion, the opposite party presents affidavits or
other proof denying the facts alleged or establishing facts obviating the grounds of
defect, the court may hear and determine the same and may grant or deny the
motion. If a material and genuine disputed question of fact is raised the court may
decide the motion upon the affidavits and evidence offered by the parties, or may
deny the motion without prejudice to the right to raise the subject matter of the
\end{enumerate}
emphasizing the distinctions among the motions and the standards to be applied to each, together with modest criticisms and suggestions for reform. The limited scope of the suggested reform should be made clear. The article does not attempt to identify the best solution to all the questions raised or to set forth a model code of motion practice. Rather, it suggests only those minimum changes necessary to eliminate the obvious sources of confusion in existing law, while retaining as much as possible the terminology and substance of present Illinois practice.

The phrases used here to categorize motions — "fact motions" and "pleading motions" — are apparently novel. They refer not to the questions raised by the motions, which can vary widely, but to the information on which the motions and their resolutions must be based. Pleading motions are based solely on the pleadings — motions to strike or dismiss are typical. Fact motions must be based on facts, as proven by admissions or by sworn and competent wit-
nesses whose testimony has been reduced to writing. The prototypical fact motion is the motion for summary judgment.

**SECTION 45 MOTIONS**

*The Various Section 45 Motions*

1. **Motions to Strike**

   Any party may move to strike all or part of an opponent's pleading. Such a motion may go either to substance or form and it may or may not be dispositive. Even when the motion goes to substance, the pleading can often be saved by amendment; thus no one really expects the motion to dispose of the case.

   There are different kinds of motions to strike, serving different purposes, and litigants are well advised to specify what sort of motion to strike they are making. The motion to strike the complaint as substantially insufficient in law raises the question whether the complaint states a cause of action. Although the standards are different, this motion corresponds to the federal motion to dismiss for failure to state a claim on which relief may be granted. One may also move to strike an answer or reply as substantially insufficient in law. Motions to strike as substantially insufficient in law are the most important and most common of the motions to strike.

   The motion to strike designated matter as immaterial may go to the merits, as when it tests the relevance of some key fact on which the pleader relies, but it is often formal. The motion to strike conclusions of the pleader is nearly always formal. Other uses of the motion to strike, for example, to strike a jury demand, appear to be preserved by the "and so forth" language of section 45(1).

2. **Motions to Dismiss**

   In common usage, lawyers often say "motion to strike" when only part of a pleading is attacked, and, influenced by the federal rules, "motion to dismiss" when moving to strike the entire complaint. However, "motion to dismiss" has a separate meaning in Illinois. The statutory language contemplates that while pleadings are "stricken" in whole or in part, only actions are "dismissed".

   An order striking the complaint is not a judgment and is not appealable. The remedy from such an order is to amend the com-
plaint. Under section 46, "amendments may be allowed on just and reasonable terms," giving plaintiffs further opportunity to state a cause of action. The "may be allowed" language suggests that plaintiffs should seek leave to amend, though no statute or rule explicitly requires a formal motion. In any event, leave to amend should be granted unless it is "apparent that even after amendment . . . no cause of action can be stated." Sometimes that will be the case, and more often no amendment will be offered because the litigant has already alleged as much as he honestly can. But the procedural rules carefully preserve the right to amend so that it will be available when needed.

Leave to amend may be sought at any time before final judgment, and there is no final judgment after a complaint is stricken until judgment is explicitly entered dismissing the action. Defendants should move for such an order. Defendants will also find it expedient to request that a time limit in which to file any amendment be included in the order striking the complaint.

3. Motions for Judgment on the Pleadings

Judgment on the pleadings is not at all like summary judgment, and there is no such thing as "summary judgment on the pleadings," a phrase which has been a recurring source of confusion. Summary judgment is a fact motion, while judgment on the pleadings is a pleading motion. Indeed, in its normal application, the motion for judgment on the pleadings is conceptually indistinguishable from the motion to strike a pleading as substantially insufficient in law; there is virtually nothing that can be accomplished by one that cannot be accomplished by the other.

In the simple case where there is only a complaint, or a complaint and an answer, and defendant moves for judgment on the pleadings, the issue raised is whether the complaint states a cause of action. Where the plaintiff moves for judgment on the pleadings, the issue posed is whether the facts alleged in the answer constitute a legally

sufficient defense. A example of such application by a plaintiff is *Pied Piper Yacht Charter Corp. v. Corbel*. Plaintiff sued to recover earnest money deposited under a contract providing for return of the deposit if the sale was not closed within 30 days. Defendants answered that although the sale had never closed, negotiations had dragged on for months, the land had been held off the market, and defendant had suffered losses as a consequence. Plaintiff's motion for judgment on the pleadings was granted because the facts alleged in the answer, even if proved, would not constitute a legally sufficient defense under the contract. Although plaintiff was successful in proceeding as it did, the same result could have been accomplished by moving to strike the answer as substantially insufficient in law under section 45(1).

The final pattern illustrating the similarity between motions for judgment on the pleadings and motions to strike, is where plaintiff files a reply alleging matters in avoidance of affirmative defenses pleaded in the answer. Defendant may test the sufficiency of the reply by moving for judgment on the pleadings, or by moving to strike the reply as substantially insufficient in law.

Except as noted, the standards for deciding motions to strike a pleading as substantially insufficient in law, discussed in detail below, are fully applicable to motions for judgment on the pleadings. It is sufficient here to briefly summarize those rules and note possible distinctions between the two motions.

A motion for judgment on the pleadings requires the court to determine whether the pleadings present a material issue of fact. If the pleadings present a material issue, the motion must be denied. The motion for judgment on the pleadings does not test whether there is any evidence to support the pleadings; that must be done by motion for summary judgment or by trial. The motion for judgment on the pleadings concedes the well-pleaded facts in the opposing pleading, concedes all fair inferences therefrom, and concedes that the movant’s own allegations are false insofar as they have been controverted by opposing pleadings. Because of these

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19. See text accompanying notes 35-84 infra.
rules, cross-motions for judgment on the pleadings must be considered separately, for if any of the allegations in any pleading are denied, then one set of facts will be taken as true for purposes of plaintiff's motion and a different set for purposes of defendant's motion. It follows that one party cannot be granted judgment on the pleadings on the other party's motion. If the court concludes that the party opposing the motion is entitled to judgment on the pleadings, it should invite a motion to that effect.

There are some very minor distinctions between the motion for judgment on the pleadings and the motion to strike as substantially insufficient in law. One relates to the mechanics of granting judgment. As noted, an order striking a pleading does not immediately result in judgment since the court must grant leave to amend unless amendment would be futile.4 Although the phrase "judgment on the pleadings" suggests that the grant of the motion results in judgment, a movant cannot deprive his opponent of the right to amend by changing the name of his motion. Therefore, the opponent of a motion for judgment on the pleadings, like the opponent of a motion to strike as substantially insufficient at law, is entitled to amend unless it would be futile.25 One appropriate procedure is described in Milanko v. Jensen,26 where the trial court "announced its decision to allow" plaintiff's motion for judgment on the pleadings and continued the cause.27 When defendants "made no move to amend their answer," judgment was entered for plaintiffs.28 Other solutions are to grant judgment on the pleadings with leave to amend, or to simply enter judgment but grant a motion to vacate if an amendment is offered.

Another difference is that undenied allegations in the movant's pleading may be considered on a motion for judgment on the pleadings,29 but not on a motion to strike. This might conceivably matter in two situations, although neither is likely to arise very often. First, on motion to strike, the pleader "cannot seek to rehabilitate" his pleading by relying on the movant's pleading.30 By contrast, a motion for judgment on the pleadings should be denied if the key

24. See text accompanying notes 9-13 supra.
27. Id. at 265, 88 N.E.2d at 859.
28. Id.
missing allegation is supplied by the movant's pleading. But if the movant notices the defect, he will likely be smart enough not to plead the missing fact himself. Further, if anything turns on it, the party opposing the motion may copy the missing allegation into an amended pleading of his own.

Second, it is conceivable that although a complaint states a cause of action, no material issue will be presented when it is read in light of the answer. In that situation a motion to strike would be denied, but a motion for judgment on the pleadings could be granted. It is almost impossible to think of examples in which this situation would actually arise, except for affirmative defenses. Affirmative defenses can also be raised under sections 48 and 57.

Finally, there may be minor differences with respect to time limits which distinguish the motion for judgment on the pleadings from other section 45 motions.31

4. Other Section 45 Motions

Section 45 provides for several other motions that are rarely dispositive. One is the motion to have a pleading "made more definite and certain in a specific particular." This motion does not appear very often in the reported cases, probably because the movant may demand a bill of particulars under section 37 by simple notice without a motion. Section 37 requires the party requesting the bill of particulars to "specifically point out the defects complained of or the details desired" and to file a copy of the request. The responding party may furnish the bill, or move to have the request denied or modified. If he fails to respond, the requesting party may move to strike his pleading. Motions relating to bills of particulars are committed to the discretion of the trial court,32 and motions to make more definite and certain should be similarly treated.

Motions to add necessary parties or to dismiss improperly joined parties are also made under section 45. But joinder problems are not grounds for dismissing the entire action or striking the complaint. The proper remedy for misjoinder or failure to join a necessary party is to dismiss as to the improper party or to order the missing party added.33

The motions expressly listed in section 45(1) are not exhaustive of the methods by which pleadings can be attacked under that

31. See text accompanying notes 207-10 infra.
section. Instead, they are only offered as examples of the issues that can be raised under that section. Since "[a]ll objections to pleadings shall be raised by motion,"34 a litigant with an objection not covered explicitly by any other section should object by motion under section 45.

Motions to Strike Pleadings as Substantially Insufficient in Law

Motions to strike as substantially insufficient in law are the most important of the section 45 motions and warrant separate treatment in this article. While the most common application is in the motion to strike the complaint for failure to state a cause of action, answers and replies may also be stricken as legally insufficient. Except as noted above, the rules discussed here also apply to motions for judgment on the pleadings.

1. What May Be Considered

Only the challenged pleading and the relevant law may be considered on a motion to strike a pleading as insufficient. However, since a properly filed bill of particulars is part of the pleading which it particularizes, and exhibits to a pleading are a part thereof, these can also be considered on a motion to strike.35 Indeed, operative legal documents, such as contracts and deeds, attached as exhibits, control over inconsistent descriptions of them.36

Facts outside the pleadings may not be considered. Accordingly, "[n]ew matter or facts cannot be pleaded in a motion to strike,"37 and the movant may not set out new facts in affidavits.38 The movant may not rely on discovery materials—not even the opponent's deposition39—or on affidavits submitted by the opponent.40 Similarly, the motion may not be opposed by affidavits, although affidavits have been considered to avoid injustice when filed by a confused litigant.41 But the opponent of the motion may properly raise new

facts by amending the challenged pleading.\textsuperscript{42} There is authority that answers to requests for admission may be considered,\textsuperscript{43} although no satisfactory explanation is given. If this decision is good law, it must rest on the view that requests for admission are primarily used to determine the opponent’s position and almost never to gather information, and hence they are really part of the pleadings and not a discovery device.

Where an amended pleading does not refer to or adopt the original pleading, it completely supersedes the original pleading. Thus, the original pleading cannot be relied on by either side on a motion to strike the amended pleading.\textsuperscript{44} There is dictum, however, that binding admissions from an earlier verified pleading may be considered on motion to strike the amended pleading,\textsuperscript{45} but this is clearly wrong. There is no good reason to permit consideration of such admissions while like admissions in the pleader’s deposition or affidavits are excluded from consideration. The provision in section 45(3) that “substantial defects in prior pleadings may be considered”\textsuperscript{46} is not inconsistent with exclusion of superseded pleadings. “Prior pleadings” does not refer to pleadings superseded by amended pleadings. The phrase instead refers to pleadings still in effect which are “prior in the sequence of issue formation.”\textsuperscript{47} Thus, the complaint is prior to the answer, and both are prior to the reply. Accordingly, when defendant moves to strike a reply, he also puts in issue the sufficiency of his own answer and of the complaint.\textsuperscript{48} The provision codifies and simplifies the common law practice of “carrying back” demurrers.\textsuperscript{49}

Sometimes the material excluded from consideration on motion to strike indicates that the pleading cannot be supported and that movant is entitled to judgment. In such a case, the proper motion is for summary judgment. The reports are full of cases where the complaint was stricken, the action dismissed, and the judgment

\textsuperscript{42} ILL. REV. STAT. ch. 110, § 46 (1975).
\textsuperscript{43} City of Champaign v. Roseman, 15 Ill. 2d 363, 155 N.E. 2d 34 (1959).
\textsuperscript{46} ILL. REV. STAT. ch. 110, § 45(3) (1975).
\textsuperscript{49} See Joint Committee Comments and Jenner & Tone, Historical and Practice Notes, ILL. ANN. STAT. ch. 110, § 45 (Smith-Hurd 1975).
reversed because defendant relied on evidentiary matter, even though it seems certain that on remand that same evidentiary matter will support a successful motion for summary judgment. The distinction is not a mere technicality; calling the motion a motion to strike may induce the opponent to forego the submission of affidavits or other materials which he would have submitted if the motion were properly labeled. Moreover, mislabeling usually indicates that the movant's attorney has not thought through the case and does not know what he is attacking. Lawyers and trial judges should avoid such confusion from the beginning, and when necessary, trial judges should point out which motion is designed for movant's apparent purpose.

Federal rules 12(b) and 12(c) provide that if on motion to dismiss for failure to state a claim or motion for judgment on the pleadings, "matters outside the pleadings" are presented and not excluded by the court, then the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present the additional material relevant to that motion. Illinois has no comparable rule, but trial judges surely have power to implement such a procedure on their own. The procedure is workable and eliminates much of the potential for injustice and delay caused by mislabeled motions.

2. Standards to be Applied

A surprising amount of confusion surrounds the standards to be applied when considering motions to strike as substantially insufficient in law. The standards to be applied to the motion itself are set out by the statute. All motions objecting to pleadings "shall point out specifically the defect complained of," and motions charging that a pleading is substantially insufficient in law "must specify wherein the pleading . . . is insufficient." The purpose of these specificity requirements is to inform the opponent of the movant's contention, so that he can correct the defect by amendment or intelligently argue that the alleged defect does not exist. The specificity requirements should be construed to serve this purpose.

Of greater significance are the standards that will be applied to

51. FED. R. CIV. P. 12(b), (c).
52. ILL. REV. STAT. ch. 110, § 45(1) (1975).
53. Id. § 45(2).
the pleading under attack. The motion to strike concedes that all well-pleaded facts in the pleading attacked are true. Of course, the concession is only for the purposes of the motion and is no longer binding if the motion is denied. "Conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest" are not conceded and are not to be considered in ruling on the motion. This rule makes it necessary for courts and litigants to distinguish "conclusions" from "facts," and to do so without requiring the pleader to plead his "evidence." The emphasis on not pleading conclusions is unfortunate, for the necessary distinctions cannot be made. There were contemporaneous suggestions that drafters of the Civil Practice Act deliberately sought to avoid the distinctions.

The Illinois Supreme Court has recognized the difficulty and set forth a more workable standard, although it has not abandoned the labels which have caused so much confusion. The court said:

The same allegation might in one context be deemed to be one of ultimate fact, while in another, "where from a pragmatic viewpoint some of these words do not give sufficient information to an opponent of the character of evidence to be introduced or of the issues to be tried, they are held to be legal conclusions. What is law, what are facts and what is evidence, for pleading purposes, can be determined only by a careful consideration of the practical task of administering a particular litigation."

The court's emphasis on giving sufficient information to the opponent is in accord with section 42(2) of the Act, which provides that pleadings need only "reasonably inform[] the opposite party of the nature of the claim or defense." Moreover, the opponent's need for information must be considered in light of the right to a bill of particulars and, more importantly, to discovery. The pleadings

59. Van Dekerkhov v. City of Herrin, 51 Ill. 2d 374, 376, 282 N.E.2d 723, 725 (1972), citing McCASKILL, ILL. CIV. PRAC. ACT ANN. 70 (1933).
60. ILL. REV. STAT. ch. 110, § 42(2) (1975).
Dispositive Pre-trial Motions

should define the issues with sufficient precision to permit efficient discovery, for litigants should not have to engage in extensive discovery on non-existent issues. However, if a pleading provides sufficient information to structure discovery, the opponent has no need for more information at the pleading stage.61

A pragmatic approach to pleading must also consider the difficulties facing the pleader. Judges should ask themselves what further detail the pleader could allege, especially without benefit of discovery. For example, it is hard to allege motive except in conclusory terms. In alleging implied malice, there is little to say after alleging that there was no justifiable reason for the act. In alleging reliance, it is hard to allege more than that the pleader would not have spent his money if he had not believed the misrepresentation. The next level of detail is the evidentiary facts from which he will ask the jury to infer malice or reliance at the trial.

The impression is inescapable that the main reason for continued invocation of the rule against pleading conclusions is fear of unnecessary trials. If a plaintiff can state a cause of action by alleging legal conclusions, he can survive a motion to strike even though no facts whatsoever support his claim. Judges generally consider that a bad result. This is understandable, but if the basis of the movant’s claim is that no facts support the pleading, the proper way to dispose of the case is by summary judgment. It is error to strike a complaint merely because it is unbelievable or because there is no evidence to support it. Such complaints can be stricken only by first holding that their key allegations are conclusions and that what is left after striking the conclusions fails to state a cause of action. Such reasoning may be harmless when applied to truly frivolous complaints, but the rule cannot be limited to them. The emphasis on not pleading conclusions causes unnecessary difficulties for many plaintiffs with serious but inartfully drawn complaints, with allegations concerning information in defendant’s possession, and with allegations, such as motive, which cannot easily be pleaded in non-conclusory terms.

In a properly managed litigation, little should turn on characterizing pleadings as fact or conclusion; the need to make such determinations can usually be avoided. For example, the pleader may moot the issue by amending, or the trial judge may moot the issue by asking for new pleadings on his own motion.62 If the movant requires more details he may request a bill of particulars or discov-


ery. If no facts support the conclusory pleading, a request for summary judgment is appropriate.

Unfortunately, the motion to strike pleadings as conclusory is often used for purely tactical reasons, i.e., as part of the psychological battle between attorneys. Judges should not treat such motions sympathetically. The issue of whether the pleading is conclusory can also arise in the midst of briefing the motion to strike for substantial insufficiency in law, as when the movant claims that some key allegation must not be considered. Inertia may then cause both sides to fight it out on that line without exploring other solutions. If a pleading is stricken as conclusory in such a situation, the pleader obviously should be granted leave to amend.

In spite of the aforementioned drawbacks, there is at least one good effect of Illinois' emphasis on not pleading conclusions. The court must consider all possible conclusions supported by the well-pleaded facts, whether or not the pleader sets forth the conclusions and even if he sets forth the wrong conclusions. If the well-pleaded facts support a legally recognizable cause of action, it is unnecessary to plead the conclusion. Conversely, if the facts do not support a cause of action, pleading the conclusion adds nothing. This rule is in accord with the original understanding of modern pleading rules — that legal theories need not be pleaded. However, the rule is being abandoned in federal courts. Despite the more liberal federal pleading rules, federal courts are increasingly likely to require the pleader to state his legal theories and treat theories not pleaded as waived.

The Illinois rule is preferable if reasonably applied, though attorneys should not rely on it. Developing legal theories is an advocate's task, and busy trial judges are not likely to spend time looking for theories the advocate missed. Nevertheless, if a judge believes that a pleading may state a claim or defense on a theory not raised by the parties, his obligation in Illinois is to say so, and that serves the Act's policy of determining controversies "according to the substantial rights of the parties." Even under the Illinois rule, however,


64. See F. James & G. Hazard, Civil Procedure § 2.12 at 89-90 (2d ed. 1977).

65. E.g., Mahone v. Waddle, 564 F.2d 1018, 1025 n.8 (3d Cir.), cert. filed sub nom. City of Pittsburg v. Mahone, 46 U.S.L.W. 3374 (1977); but see id. at 1054 (Garth, J., dissenting).

the court should consider the possibility that a legal theory has been waived if it is first asserted so late in the litigation that substantial prejudice would result.

Section 33(3) provides that "Pleadings shall be liberally construed with a view to doing substantial justice between the parties," and this rule applies when considering motions to strike. The pleader is entitled to the benefit of all well-pleaded facts together with "all reasonable inten-\textsuperscript{7} deations," and "all reasonable in-\textsuperscript{7} ferences" are to be construed in his favor. A complaint should not be stricken unless the court concludes that there is no possible set of facts in support of the allegations that would entitle plaintiff to relief. Moreover, there need be only the "mere possibility of recovery," for the court is not to weigh probabilities at this stage.

Despite the explicit statutory provision and the many cases following it, there is still confusion over how to construe pleadings. There are many appellate court cases stating that "pleadings are construed most strongly against the pleader," or that pleadings are to be construed "strictly." There are even a few early supreme court decisions expressing such views, but they are clearly inconsistent with the statute. The first strict construction case after the Civil Practice Act relied on old common law demurrer cases and did not refer to section 33(3). The strict construction rules have stayed alive by bare repetition ever since. Often the strict construction rules appear in the same opinion with the liberal construction rule, without any effort to reconcile the two statements. Some cases

\textsuperscript{67} Id. § 33(3).
\textsuperscript{69} Doner v. Phoenix Mutual Joint Stock Land Bank, 381 Ill. 106, 112, 45 N.E.2d 20, 23 (1942).
\textsuperscript{73} Neurauter v. Reiner, 117 Ill. App. 2d 141, 146, 254 N.E.2d 66, 69 (1st Dist. 1968).
\textsuperscript{77} Klein v. Chicago Title & Trust Co., 295 Ill. App. 208, 14 N.E.2d 852 (1st Dist. 1938).
\textsuperscript{78} People v. Northbrook Sports Club, 53 Ill. App. 3d 331, 368 N.E.2d 663, 665-66 (1st
limit the strict construction rules by construing pleadings liberally with respect to matters of form but not with respect to substance.\textsuperscript{79} Other courts apply the strict construction rules primarily when resolving "ambiguous or inconsistent allegations."\textsuperscript{80} But this too is inconsistent with the rule of liberal construction, with the rule that a pleading is entitled to all its reasonable intenments, with the rule that a pleading is good if any possible set of facts in support of it would entitle the pleader to relief, and with the right to plead inconsistent alternatives when in doubt as to the true facts.\textsuperscript{81}

One recent supreme court case applied something less than liberal construction when the pleader was deliberately evasive.\textsuperscript{82} The case arose under the Structural Work Act.\textsuperscript{83} Plaintiff alleged that he was employed by the general contractor as a foreman and laborer, and that the owner was in charge of the work, but refused to allege further details. The supreme court upheld a dismissal because the allegations appeared inconsistent, and the plaintiff, although afforded an opportunity to remove the ambiguity, refused to do so.\textsuperscript{84} This narrow holding does not infringe on the statutory right to plead inconsistent alternatives, for the factual allegations seemed to negate the allegations that the owner was in charge of the work without giving rise to any alternative theory of liability. In any event, the court's rationale was much narrower than any version of the strict construction rules. Given the clear provisions of the Civil Practice Act, the decision should not be extended to broader applications.

\textbf{SECTION 57 MOTIONS (SUMMARY JUDGMENT)}

\textit{Nature and Purpose of the Motion}

1. Generally

Summary judgment is a fact motion: it pierces the pleadings and raises the question whether there is any evidence to support them. If, on one or more dispositive issues, there is no evidence to support one side's position, summary judgment is appropriate. The purpose is to avoid unnecessary trials by summarily disposing of cases which

\textsuperscript{79} Klein v. Chicago Title & Trust Co., 295 Ill. App. 208, 14 N.E.2d 852 (1st Dist. 1938).
\textsuperscript{80} E.g., Church v. Adler, 350 Ill. App. 471, 479, 113 N.E.2d 327, 332-33 (3d Dist. 1953).
\textsuperscript{81} ILL. ANN. STAT. ch. 110, § 43(2) (Smith-Hurd 1978).
\textsuperscript{82} Van Dekerkhov v. City of Herrin, 51 Ill. 2d 374, 282 N.E.2d 723 (1972).
\textsuperscript{83} ILL. REV. STAT. ch. 48, §§ 60 et seq. (1975).
\textsuperscript{84} 51 Ill. 2d at 376, 282 N.E.2d at 725.
present no genuine issues of material fact. Consequently, consideration of a summary judgment motion becomes a preliminary inquiry to determine whether there is a genuine issue of material fact which must be determined by the fact-finder. It is appropriate even in causes of action under statutes expressly guaranteeing a jury trial, for it may be granted only where there is no genuine jury issue.

Summary judgment existed in some form in Illinois as early as 1872, but prior to 1955 the statute restricted it to certain classes of "simple" cases and "conclusive" fact patterns. The adoption of the amended section 57 in 1955 greatly expanded the scope and applicability of summary judgment in Illinois by providing for summary judgment without regard to the cause of action or the complexity of the fact pattern. Thus, cases decided under the old section are no longer good law.

2. Distinguishing Summary Judgment Motions from the Pleading Motions

Litigants and courts have confused motions for summary judgment with motions for judgment on the pleadings and with other motions to test the sufficiency of the pleadings. As noted, the supreme court has since sternly cautioned against such improper use of motions. A summary judgment motion should be entertained only if the movant does not contest the legal sufficiency of the opponent's pleading, or if the pleading is upheld on motion to strike.

A pleading motion under section 45 submits to the court that the pleadings raise no issue of fact to be tried and that the movant is entitled to judgment under the allegations and admissions made on the face of the pleadings. Summary judgment, on the other hand, may be based on affidavits, pleadings, depositions and admissions on file, which may reveal that there is no genuine issue of fact —

87. ILL. REV. STAT. ch. 110, § 181 (1953) (repealed).
88. ILL. ANN. STAT. ch. 110, § 57. For text of section 57 see note 5 supra. (Smith-Hurd 1978).
92. See text accompanying note 2 supra.
93. ILL. ANN. STAT. ch. 110, § 57(3) (Smith-Hurd 1978).
that one side has no evidence to support its position on an issue raised by the pleadings. A motion to strike as substantially insufficient in law tests a litigant's legal theory; a motion for summary judgment tests his evidence. There are exceptions to the last statement—a motion for summary judgment may test one side's legal theory as applied to the facts revealed by affidavits and discovery. Thus, the briefs may focus on whether the opponent has any evidence on an issue, or on whether an issue on which he has evidence is dispositive, or on both. But summary judgment is never based on the pleadings alone. To grant summary judgment, the court must know the dispositive facts and conclude that they are not genuinely disputed. Summary judgment affidavits are a substitute for testimony taken in open court and can contain as much pertinent information as the affiant could competently testify to if he were sworn as a witness.4

3. Motions for Partial Summary Judgment

Although the 1955 amendments generally follow Federal Rule 56, one important difference remains. Section 57, like the federal rule, authorizes summary judgment upon “all or any part of the relief sought,” or “on the issue of liability alone although there is a genuine issue as to the amount of damages.” Federal Rule 56(d) provides further that if the court denies summary judgment, it shall “if practicable . . . make an order specifying the facts that appear without substantial controversy. . . . Upon the trial of the action the facts so specified shall be deemed established.” Section 57 does not include such a provision. A proposal to do so was eliminated from the final draft of the 1955 amendment because “a majority of the Joint Committee felt that it tended to invite encroachment upon the right to trial by jury or court on evidence adduced in open court.” Thus, the federal precedents, often helpful on summary judgment issues, are misleading with respect to partial summary judgment. Unfortunately, there are few Illinois decisions.

The narrower Illinois rule allows summary judgment upon indi-


97. *Id.* § 57(3).


Individual counts of a complaint.\textsuperscript{100} In \textit{Messenger v. Rutherford},\textsuperscript{101} the first district granted summary judgment on five items of an account stated, without any indication that the items were pleaded in separate counts. This suggests that “all or any part of the relief sought” includes any separate item of damage, even if other items of damage are sought, and any injunction, even if additional injunctive relief is also sought. The inference to be drawn from \textit{Messenger} is a reasonable statutory interpretation. Similar analysis applies to partial declaratory judgments, but there it is necessary to avoid slipping into the rejected federal procedure by simply declaring findings on certain issues. The declaratory judgment must “terminate the controversy or some part thereof.”\textsuperscript{102} Summary judgment is also available to or against individual parties in multi-party litigation. Finally, as noted, there is express authorization of interlocutory summary judgment on liability, followed by further proceedings as to damages.\textsuperscript{103}

After granting partial summary judgment, the trial judge has broad discretion to prevent piecemeal litigation or unfair advantage. Supreme Court Rule 192 authorizes the court to enter judgment immediately after granting the motion or to postpone it, to permit enforcement immediately after judgment or to postpone it, or to enter immediate judgment only for the excess of movant’s claim over the amount of any unresolved claim of his opponent.\textsuperscript{104} With respect to summary judgments, this rule should supersede rule 304’s more general requirement that partial judgments are interlocutory unless the court expressly finds that there is no reason to delay immediate enforcement or appeal.\textsuperscript{105} However, no cases have squarely decided the issue.\textsuperscript{106} Thus, to permit immediate appeal from a partial summary judgment, a cautious trial judge should make duplicative certification under rules 192 and 304.

\textbf{What May Be Considered}

1. Pleadings

A party may not rely on his own unverified pleading to support

\begin{itemize}
\item \textsuperscript{100} Metropolitan San. Dist. v. Pontarelli & Sons, Inc., 7 Ill. App. 3d 829, 847, 188 N.E.2d 905, 913 (1st Dist. 1972).
\item \textsuperscript{101} 130 Ill. App. 2d 407, 264 N.E.2d 775 (1st Dist. 1970).
\item \textsuperscript{102} ILL. ANN. STAT. ch. 110, § 57.1 (Smith-Hurd 1978).
\item \textsuperscript{103} Id. § 57(3).
\item \textsuperscript{104} Id. ch. 110A, § 192.
\item \textsuperscript{105} Id. § 304.
\end{itemize}
or oppose a motion for summary judgment. "The fact that the pleading may be verified will generally not affect this rule since the pleading will rarely (and should not) match the specificity of the affidavit." While there is authority indicating in dicta that verified pleadings may not be considered at all, this view is wrong. The supreme court has stated that consideration must be limited to "evidentiary facts through affidavits or such," and a verified pleading meets that criterion if it is detailed and shows personal knowledge by the verifier. Of course, each side may rely on any admissions in the opponent's pleadings.

Pleadings may also be considered "for the limited purpose of discerning what issues are raised by the controversy." This is a very limited purpose indeed. Illinois does not follow the federal rule that the materials in support of a motion for summary judgment must negate all issues raised by the opponent's pleading. In Fooden v. Board of Governors, several college professors alleged that they had been terminated for exercising their right of free speech. Defendant Board moved for summary judgment, filing an affidavit stating that since plaintiffs were untenured, they could be dismissed at will at the end of their term. The affidavit did not give the reasons for the dismissal and did not deny the free speech allegations of the complaint. The professors relied on the undisputed complaint, filing no counter-affidavits. Summary judgment was granted for the Board, and the Illinois Supreme Court affirmed. The court said that the unverified complaint, based on information and

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110. Lesser v. Village of Mundelein, 36 Ill. App. 3d 433, 437, 344 N.E.2d 29, 32 (2d Dist. 1975); see also Jenner & Martin, Supplement to Historical and Practice Notes, ILL. ANN. STAT. ch. 110, § 57 (Smith-Hurd 1978 Supp.).
115. Id. at 583, 272 N.E.2d at 498-99.
116. Id. at 584-85, 272 N.E.2d at 499; id. at 590, 272 N.E.2d at 502 (Ward, J., dissenting).
belief, did not raise a triable issue of fact even though it was undisputed. 117

Fooden may have been wrongly decided. Section 57(3) requires that the papers show movant to be entitled to judgment, and that requirement was arguably not met by affidavits which completely ignored the first amendment allegations on which the complaint was based. A rule that undisputed allegations in the pleadings may be considered in opposition to motions for summary judgment would add more complexity to the procedural system, but it would not do any serious damage to the more fundamental rule that summary judgment pierces the pleadings and forces both sides to show what they can prove.

However, it is more important that the issue in Fooden be settled than that it be settled any particular way. The rule in Fooden simply allocates the burden of filing affidavits. If the professors had filed affidavits supporting their free speech contentions, they would have been entitled to summary judgment unless the Board filed additional affidavits denying the charges. If they had filed affidavits asserting inability to obtain affidavits from the hostile witnesses who had actual knowledge of the Board’s reasons for terminating them, the Board’s motion for summary judgment would have been denied. 118 Essentially, they lost because their undisputed allegations were not sworn.

2. Affidavits

Affidavits are the most common evidence on motions for summary judgment. Reasserting conclusory pleadings by affidavit for the sole purpose of avoiding summary judgment, however, is effectively precluded by Supreme Court Rule 191(a), which states that affidavits supporting or opposing a motion for summary judgment shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached therein sworn or certified copies of all papers upon which the affiant relying; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. 119

Although this rule applies explicitly to affidavits only, comparable standards of reliability must be applied to other material offered to

117. Id. at 587-88, 272 N.E.2d at 501.
support or oppose the motion. This is the reason why verified pleadings so rarely measure up. The court must limit its consideration to "well-alleged" facts, i.e., facts alleged in a form which complies with rule 191(a). Statements made on information and belief are never enough. The Fooden court indicated that the sufficiency of the affidavit may be tested by "motion to strike, or otherwise." It is not essential to move to strike the affidavit as such; one can move to strike the motion for summary judgment. It should also be sufficient to argue in one's brief or memorandum in opposition to the motion that specified portions of the affidavit are conclusory, fail to show personal knowledge, or are otherwise insufficient. Little purpose is served by an infinite regress of motions to strike each newly filed piece of paper.

However, many judges prefer motions to strike insufficient affidavits or parts thereof, because such motions keep the record clear. They also give the party whose affidavit is stricken a chance to procure a more satisfactory affidavit. But better ways are available to serve those purposes. Motions to strike require the parties and the court to decide sufficiency in the abstract, often before they know for sure which parts of the affidavits will even matter in light of briefing on the merits. Unless the affidavits are obviously inadequate, there will be much less wasted effort if the sufficiency of particular statements is argued and decided in connection with argument and decision of the merits. The record can be kept clear by describing in the order granting summary judgment any statements that were not considered due to insufficiency. The opponent can still cure the insufficiency with a supplemental affidavit on motion to vacate. In cases where it seems likely that the insufficiency can be cured, the court may issue an order striking the insufficient statement and granting time to file further affidavits before deciding the merits.

120. See notes 108-10 supra and accompanying text.
123. 48 Ill. 2d at 587, 272 N.E.2d at 501 (emphasis added); but see Allen v. Meyer, 14 Ill. 2d 284, 292, 152 N.E.2d 576, 580 (1958) (suggesting that filing of counter-affidavits concedes "sufficiency" of the supporting affidavits); see also text accompanying notes 231-32 infra.
3. Depositions

Despite restrictive language in some opinions, depositions may also be used either to support or oppose motions for summary judgment.\(^\text{126}\) Despite the directive in section 57 that the depositions be "on file,"\(^\text{127}\) at least one court has held that an affidavit could quote admissions from unfiled depositions provided that affiant quoted verbatim.\(^\text{128}\) He could not, however, submit his conclusions based on the depositions. Nevertheless, an affidavit "declaratory of things apparent on the face of depositions in the record" has been allowed to stand.\(^\text{129}\) The court in that case relied on a supreme court holding that material summarizing exhibits before the court could be included in affidavits.\(^\text{130}\) Each of these cases seems correct, but where the affidavit summarizes or describes, it is simply a guide to the relevant parts of the deposition or exhibit; the affiant's characterization of the material adds nothing.\(^\text{131}\)

4. Other Discovery Material

In addition to pleadings, depositions, and affidavits, the statute explicitly authorizes consideration of admissions.\(^\text{132}\) This includes any admission by the opponent of the motion. Admissions may be made in answers to requests for admission under Supreme Court Rule 216,\(^\text{133}\) in depositions if clear and unequivocal,\(^\text{134}\) in pleadings or affidavits,\(^\text{135}\) and in interrogatory answers.\(^\text{136}\) Out of court admissions may be brought to the court's attention by the affidavit of any witness with personal knowledge of the admission.\(^\text{137}\)


Documents produced under Supreme Court Rule 214\textsuperscript{138} may be made exhibits to affidavits and thus become relevant to motions for summary judgment.\textsuperscript{139} The statute makes no reference to interrogatory answers, but there is no reason to treat them differently from affidavits if they are based on personal knowledge. Supreme Court Rule 191(b) explicitly authorizes submission of interrogatory answers and documents where the person answering the interrogatories or producing the documents cannot or will not give his affidavit.\textsuperscript{140}

5. Missing or Unavailable Evidence

It often happens that one side moves for summary judgment before the other side has gathered all its evidence. This is particularly likely where key evidence is in possession of movant. Supreme Court Rule 191(b)\textsuperscript{141} offers the opponent of the motion a solution. The opponent should file an affidavit, stating that key facts are known only to those whose affidavits are unavailable to him, setting forth the facts to which he believes such persons would testify, and his reasons for that belief. The court may then “make any order that may be just,”\textsuperscript{142} including granting or denying the motion or granting a continuance. Summary judgment would seem proper only if the missing facts were immaterial. It is possible to imagine cases where there was no chance at all that the missing facts would ever be produced, but it is difficult to justify summary judgment in such a case without permitting the opponent any discovery.

Where the missing facts are in possession of the movant or persons friendly to him, courts should not require much detail in the opponent’s affidavit of what he thinks the witness would testify to if called, especially since defendant may move for summary judgment before plaintiff may initiate discovery.\textsuperscript{143} Most judges will continue motions for summary judgment to permit reasonable discovery. But they are not required to do so unless the rule 191(b) procedure is properly invoked. It is not enough to complain generally that information is unavailable, or that the motion is premature, or to ask the court to speculate on missing facts.\textsuperscript{144}

The rule applies whatever the reason for the unavailability of

\textsuperscript{138} ILL. ANN. STAT. ch. 110A, § 214 (Smith-Hurd 1978).
\textsuperscript{139} ILL. REV. STAT. ch. 110A, § 191(a) (1975).
\textsuperscript{140} Id. § 191(b).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Compare § 57(2) with § 201(d).
affidavits. The reference to a "continuance to permit affidavits to be obtained" indicates that simple time pressure may be enough, assuming there is no lack of diligence sufficient to justify serious penalty. While the rule applies to either party, the movant should not have to invoke it, since he can simply delay filing his motion.

**Standards To Be Applied**

Summary judgment shall be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment or decree as a matter of law." "Genuine" is construed to mean that there is evidence to support the position of the motion's opponent. "Material" issues are those that matter to the result; immaterial issues of fact do not preclude summary judgment. One dispositive issue may make all others immaterial. For example, in a Structural Work Act case, once it is clear that defendant was not in charge of the work, all other issues become immaterial, and defendant is entitled to summary judgment.

The Illinois Supreme Court has summarized the above by saying that if what is submitted to support and oppose the motion "would have constituted all of the evidence before the court and upon such evidence there would be nothing left to go to the jury, and the court would be required to direct a verdict, then a summary judgment should be entered." This incorporates the rule in *Pedrick v. Peoria & Eastern Railroad*, providing that verdicts should be directed and judgments notwithstanding the verdict entered when "all of the evidence, . . . viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." Many trial judges are opposed to applying this standard to summary judgments; they believe that it requires them to weigh evidence, that weighing evidence is improper on motion for summary judgment, and that the supreme court could not possibly have meant what it said.

The supreme court should say it again. The statutory requirement
that the issue of fact be genuine is sufficient to support application of the Pedrick rule. A single standard for summary judgment, directed verdict, and judgment notwithstanding the verdict is a desirable development. It emphasizes that each of these motions serves the same purpose — each takes the case away from the jury because of the losing party’s complete failure of proof.\textsuperscript{153} There is no reason to believe lawyers and judges can meaningfully apply more than one standard anyway; fine gradations of certainty are illusory.

Even with a unified standard, however, there will be cases where summary judgment is denied but a verdict is later directed. A judge has less information at the summary judgment stage; most notably, he has not heard the witnesses in person. Live testimony provides demeanor evidence, cross-examination, and usually, a more detailed development of the facts. Without such information, it is harder to be sure the Pedrick standard is met.\textsuperscript{154}

Several rules of construction have been applied and misapplied to motions for summary judgment. For instance, the motion concedes that all “well-alleged facts” submitted in opposition are true; similarly, well-alleged facts submitted in support of the motion are taken as true unless contradicted by well-alleged facts.\textsuperscript{155} However, affidavits supporting the motion are strictly construed, whereas affidavits opposing the motion are liberally construed.\textsuperscript{156} An oft-stated but incorrect assumption is that both sides’ affidavits must be construed strictly. In reality, the rules are stacked against the movant, who must show beyond doubt that he is entitled to judgment.\textsuperscript{157}

Even if the physical facts are completely undisputed, there may be a triable dispute over the characterization of those facts, or the inferences to be drawn therefrom.\textsuperscript{158} Moreover, characterization of

\begin{footnotesize}
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\item[(155)] Fooden v. Board of Governors, 48 Ill. 2d 580, 587, 272 N.E.2d 497, 500 (1971), cert. denied, 408 U.S. 943 (1972); see also text accompanying note 121 supra.


\end{enumerate}
\end{footnotesize}
the facts may depend on nuances and details not easily developed by affidavit. Thus, it is rarely possible to grant summary judgment on certain issues, for example, negligence. In *Wegener v. Anna*, an automobile-pedestrian collision case, the plaintiff pedestrian admitted in a discovery deposition that he was looking straight ahead and did not know what color the light was. The trial court entered summary judgment in favor of defendant on the basis “that the plaintiff was not, as a matter of law, in the exercise of ordinary care.” The appellate court reversed, holding that the trial court did not have before it sufficient information to determine as a matter of law that plaintiff's conduct was both negligent and a proximate cause of his own injuries. Similarly, questions of motive, intent, or subjective feelings are rarely appropriate for summary judgment. Finally, if the issue is the construction of an ambiguous contract, summary judgment must be denied if disputed parole evidence would be admissible. If the affidavits and other materials disclose a genuinely disputed material issue, summary judgment must be denied no matter how likely the court thinks it is that the movant will win at trial. Summary judgment cannot be used to try the disputed issue.

Credibility cannot be assessed without live testimony. Thus, an inconsistency found in a witness' statement will not support a motion for summary judgment. In *Doherty v. National Casting Div., Midland-Ross Corp.*, movant sought to have a witness' affidavit disregarded because it was materially inconsistent with his deposition in another case in which he was a party. Although the inconsistencies were unexplained, the court held that they were relevant only to impeachment at trial and denied the motion. However, the court indicated that the result might have been different if the affiant had been the opponent of the motion instead of a non-party. This suggestion arose from the court's attempt to distinguish an earlier case, *Burnley v. Moore*, a case where the plaintiff was...

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159. 11 Ill. App. 3d 316, 296 N.E.2d 589 (5th Dist. 1973).
160. *Id.* at 318, 296 N.E.2d at 590.
161. *Id.* at 320, 296 N.E.2d at 591.
167. *Id.* at 332-33, 285 N.E.2d at 540.
168. 41 Ill. App. 2d 156, 190 N.E.2d 141 (1st Dist. 1963).
stabbed by a customer in a bar and sued the owner under the Dram Shop Act. Plaintiff admitted on deposition and in answers to request for admission that she was the barmaid who sold the customer his drinks. The owner moved for summary judgment on the ground that plaintiff contributed to the customer's intoxication. Plaintiff then filed an affidavit stating, without explanation, that she had served no liquor to her assailant or anyone with him. The court held that the affidavit raised no genuine issue and granted summary judgment. Under the Pedrick rule, the implication is that even if she testified in accordance with her affidavit and a series of juries had believed her, no verdict based on her testimony could ever stand. This proposition is flawed. It is difficult to see how, without hearing her live testimony, a judge can decide he would never let a jury believe her. Moreover, the Illinois Supreme Court has held that any assessment of credibility on affidavits is unconstitutional. Perhaps Burnley is best explained on the theory that her responses to requests for admissions were incontrovertible. Even more troublesome is Giroux v. Karlock, indicating that "inconsistencies . . . throughout" the opponent's discovery deposition could be considered on motion for summary judgment. Giroux and Burnley seem wrongly decided, although there may be some room for argument with respect to Burnley.

While it is appealing to ignore obviously perjured affidavits, such results are impossible to reconcile with the right to have demeanor considered in credibility determinations. There are other remedies for perjury besides denying trial. Under section 57(5), movant may be awarded attorneys' fees and expenses, and both the opponent and his attorney may be punished for contempt of court. The affiant and any accomplices, including the attorney, may be prosecuted for perjury, or for suborning perjury. While perjury prosecutions are unlikely, the section 57 remedies could provide an effective deterrent if regularly used. The remedy would be even more attractive if the opponent's attorney were made liable for fees and expenses.

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169. ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd 1978).
170. See text accompanying notes 150-51 supra.
172. Cf. City of Champaign v. Roseman, 15 Ill. 2d 363, 365, 155 N.E.2d 34, 36 (1959) (judgment on the pleadings proper where requests for admissions admitted, despite denial of same facts in pleading); but compare Fed. R. Civ. P. 36(b) ("matter admitted . . . is conclusively established unless . . . court . . . permits withdrawal or amendment"), with ILL. REV. STAT. ch. 110A, § 216 (1975) (no comparable language).
175. Id. ch. 38, §§ 32-2, 32-3 (1975); see also id. §§ 5-2(c), 8-1(a) and 8-2(a).
when he is culpable, since his client may be insolvent. The advantage of compensation, contempt, and prosecution as compared to simply granting summary judgment is that each of these remedies permit credibility to be determined in light of demeanor and cross-examination.

A commonly heard statement is that when both sides move for summary judgment, they agree that only a question of law is involved. This is not always true, e.g., if the motions are unrelated, as where plaintiff moves for summary judgment on the merits and defendant moves for summary judgment on the ground that plaintiff lacks standing. In any event, the parties' agreement is not binding on the court; it may deny both motions if it finds a material issue of fact. The normal standards are to be applied to each motion, and they should be considered independently. All the affidavits may be considered on both motions, but those that are strictly construed with respect to one motion will be liberally construed with respect to the other, and vice versa.

SECTION 48 MOTIONS
Nature of the Motion

The final motion to be considered is authorized by section 48 of the Civil Practice Act. Section 48 provides a separate procedure for raising eight specific defects or defenses and other affirmative matter. The Joint Committee nearly eliminated it as duplicative, for all of the section 48 defenses can be raised either under section 45 or section 57. If a section 48 defense appears on the face of the complaint, defendant may move to dismiss the action without supporting affidavits. This is a pleading motion. A similar motion could obviously be made under section 45, and the standards to be applied are identical. Jenner and Tone suggest that the section 45 motion is more appropriate. If a section 48 defense does not appear on the face of the complaint, the motion must be supported with affidavits alleging the defense. This is a fact motion; as Jenner and Tone point out, it amounts to a summary judgment procedure. Supreme

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178. Id.
180. See note 4 supra.
182. See id.
Court Rule 191(a)'183 governs affidavits under both sections 48 and 57. The standards are identical except as noted below. Although section 48 authorizes both fact motions and pleading motions, it does not authorize a hybrid; with one rare exception, each individual motion must be one kind or the other.184

Because a section 48 motion is called a motion to dismiss, it has traditionally been held to concede the truth of the complaint.185 Subject to that exception, the motion has been treated like a summary judgment motion when supported by affidavits. Ordinarily, it is of no significance that the complaint is taken as true, since all issues which can be raised under section 48 are in the nature of affirmative defenses, avoiding the effect of plaintiffs' allegations.186 Thus, plaintiff must meet affidavits with counter-affidavits; he cannot rest on his pleadings.187

Confusion arises when the complaint anticipates affirmative defenses and alleges facts which would negate them. An example is a section 48 motion based on a statute of limitations,188 where the complaint alleges a date of occurrence within the time limit. If the complaint is conceded, the motion must fail. Affidavits stating that the occurrence was earlier than alleged are useless, even if no counter-affidavits are filed. This is the one situation in which Illinois law authorizes a hybrid motion balancing one side's pleading against the other side's facts. So long as the rule that the complaint is conceded is retained insofar as the complaint merely states the cause of action, it should also be retained when the complaint negates defenses. Arguments over whether the complaint only states the cause of action or goes further and negates defenses are difficult to resolve and a waste of time, since a section 57 motion avoids the whole problem. Thus the hypothetical motion should fail, and section 57 should be used instead.

However, Millsaps v. Bankers Life Co.189 appears to require plaintiff to file counter-affidavits in such a situation. The narrow holding

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183. ILL. REV. STAT. ch. 110A, § 191(a) (1975).
184. See text accompanying notes 185-89 infra.
188. ILL. ANN. STAT. ch. 110, § 48(1)(e) (Smith-Hurd 1978).
of that case is that allegations in the complaint on information and belief are inadequate to defeat a section 48 motion; presumably, they would be adequate if the truth of the complaint was conceded. But *Millsaps* should not be taken as authoritatively changing the rule that section 48 motions concede the truth of the complaint, since it does not squarely address the question.

There are other differences between section 48 and section 57. The time limits are different and, unlike denial of a section 57 motion, denial of a section 48 motion may be raised on appeal. Most importantly, an evidentiary hearing is available in some circumstances under section 48, but never under section 57. Within section 48's scope, movant has a choice of procedures if any of these differences matter. Several of these distinctions will be discussed in greater detail below.

**Issues Which May Be Raised — "Other Affirmative Matter"**

Section 48(1) lists eight defects and defenses which can be raised by the motion. Section 48(1)(i) authorizes motions raising “any other affirmative matter” avoiding or defeating the claim. This was added in 1955. Older cases limiting the motion to the eight named defenses are no longer good law. "Affirmative matter" has been construed more broadly than “affirmative defense.” A claim that Illinois rather than Iowa law governed has been entertained under section 48, as has a claim of privilege in a libel suit. But “where the affirmative matter, so called, is nothing more than evidence upon which defendant expects to contest a vital fact stated in the complaint,” section 48 cannot be used. This is in accord with the rule that the section 48 motion concedes the well-pleaded allegations of the complaint.

A shadow of doubt is cast on these rules by *John v. Tribune Co.* In that case the defendant newspaper reported that “Dolores Reising, 57, alias . . . Eve John” had been arrested for prostitution. The real Eve John, age 27, who lived at the same address, sued for

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190. ILL. ANN. STAT. ch. 110, § 48(a)(a)-(h) (1975); see note 4 supra.
196. Id. at 439, 181 N.E.2d at 106.
libel, alleging that the story referred to her. The trial court granted defendant's section 48 motion, supported by affidavits, which set out the facts indicating that the story could not be construed as referring to plaintiff. The appellate court reversed, stating that the motion merely set forth the evidence which tended to disprove the complaint's allegation that the story referred to plaintiff.\textsuperscript{197} There was a trial, a verdict for defendant, and another appellate court reversal, this time based on trial errors.\textsuperscript{198} On further appeal, the supreme court held that the trial errors need not be considered because the first appellate court decision, reversing the grant of the section 48 motion, had been in error.\textsuperscript{199}

The opinion has been construed as authorizing section 48 motions "to traverse the ultimate facts alleged in the complaint,"\textsuperscript{200} and so construed, its authority has been questioned.\textsuperscript{201} But that is not the holding of the case, nor is there any dictum to that effect. The opinion is difficult to construe, because when the supreme court acted, a trial record was available on which to decide the issue originally presented by the section 48 motion. Thus, the court gave little attention to the procedural situation presented by the first appeal. The key to the case is the supreme court's holding that whether the story referred to plaintiff was a question of law, and not of fact.\textsuperscript{202} Hence, the allegation that the story referred to plaintiff was a conclusion of law, not to be considered on motion to dismiss. Accordingly, it was not conceded by the motion, and the supporting affidavits did not contradict any well-pleaded allegation of the complaint. The case is therefore consistent with the general rules stated above.

If anything, \textit{John v. Tribune Co.} illustrates the pitfalls of a hybrid motion. All procedural difficulties would have been avoided if defendant had moved for summary judgment. Under section 57, the pleading would have been irrelevant, and it would have been unnecessary to decide whether the allegation was a conclusion or whether the motion raised affirmative matter. Thus, unless movant wants an evidentiary hearing under section 48(3), he is foolish to use section 48 instead of section 57; he can only make trouble for himself.

\textsuperscript{197} 19 Ill. App. 2d at 553, 154 N.E.2d at 865.
\textsuperscript{198} 28 Ill. App. 2d 300, 171 N.E.2d 432 (1st Dist. 1961).
\textsuperscript{199} 24 Ill. 2d at 445, 181 N.E.2d at 107-08.
\textsuperscript{201} Id. at 265, 369 N.E.2d at 369.
\textsuperscript{202} 24 Ill. 2d at 440-41, 181 N.E.2d at 107.
Resolving Issues Of Fact

The most important difference between section 48 motions and section 57 motions is that the judge may sometimes resolve the section 48 motion even where there is a disputed issue of fact.\(^{203}\) He is to decide on the "affidavits and evidence;" this, together with the rule against resolving credibility issues without demeanor evidence, requires an evidentiary hearing if a genuine factual issue is presented.\(^{204}\) The court may refuse to hold such a hearing if he denies the motion without prejudice, but a separate hearing on the affirmative defense can save an unnecessary trial if the defense is good. Section 48(3) provides that the court may not hold such a hearing if the opponent of the motion has demanded a jury trial. This provision does not create any right to jury trial which would not otherwise exist.\(^{205}\) Section 48(3) implies that the movant's demand for jury trial is irrelevant; by making a section 48 motion, he consents to a non-jury hearing of the defense if that becomes necessary.

There is no comparable provision for holding separate hearings on potentially dispositive issues raised on motion for summary judgment, though similar advantages could be obtained. It has been held error to separate issues for trial without explicit authorization.\(^{206}\)

COMPARISON OF TIME LIMITS

The Civil Practice Act and Supreme Court Rules provide potentially significant variations with respect to the timing of the various dispositive motions. However, many trial judges apply a uniform rule of reasonableness to requests for continuances and for leave to file out of time, so the variations between statutory sections are much less important than they appear:

Section 45 contains no time limits, except for section 45(5), which says that motions for judgment on the pleadings "may" be made "seasonably."\(^{207}\) The conventional practice in Illinois is to call a section 45 motion a motion to strike if it attacks the complaint

\(^{203}\) ILL. ANN. STAT. ch. 110, § 48(3) (Smith-Hurd 1978); see also id. § 43(3) (separate trial of "defense to jurisdiction of the subject matter or in abatement"); id. § 44(2) (separate trial of separate claims).

\(^{204}\) Emerson v. LaSalle Nat'l Bank, 40 Ill. App. 3d 794, 797, 352 N.E.2d 45, 48 (2d Dist. 1976).

\(^{205}\) Berk v. County of Will, 34 Ill. 2d 588, 590-91, 218 N.E.2d 98, 100 (1966).


\(^{207}\) ILL. REV. STAT. ch. 110, § 45(5) (1975); cf. Fed. R. Civ. P. 12(c) (motion for judgment on the pleadings may be made only after the pleadings are closed).
before an answer is filed, and to call it a motion for judgment on
the pleadings if it comes after the pleadings are closed or if it attacks
the answer or reply. Thus, the motion for judgment on the pleadings
is "generally made after issues are settled by pleadings." But
these usages are only customary; they are not required by statute,
rule or decision. A motion for judgment on the pleadings before
answer is unusual but proper, at least when made by defendant.

Supreme Court Rule 182(c) provides that "a motion attacking a
pleading other than the complaint" must be made within twenty-
one days after the last day for filing the pleading attacked. This
at least applies to motions to strike answers and replies. However,
given the customary usage, and the permissive language of the stat-
ute, there is doubt whether rule 182(c) is intended to apply to mo-
tions for judgment on the pleadings. Moreover, there may be a
practical reason to distinguish the motions for timing purposes: the
various kinds of motions to strike may raise either substance or
form, but the motion for judgment on the pleadings may raise only
substance. However, the language of the rule clearly applies, since
there is no doubt that the motion for judgment on the pleadings
attacks the other party’s pleadings. No cases have decided whether
rule 182(c) applies to motions for judgment on the pleadings. A
holding that it does not would hardly be surprising. But it should,
if the rule is retained at all. Most judges will grant reasonable exten-
sions of time for motions that appear serious, and the right to extra
time should not depend on how the motion is labeled.

The most important part of rule 182(c) is its exception. It does not
apply to motions attacking the complaint, which constitute the vast
majority of section 45 motions. Inferentially therefore, such motions
can be made at any time. The distinction between complaints and
other pleadings makes little sense; rule 182(c) should be repealed.

Under section 57 the plaintiff may move for summary judgment
"at any time" after defendant has appeared or was required to
appear. Defendant may so move "at any time," even before
answer. Moreover, the pendency of the motion tolls the time in

Dist. 1976); Oak Park Nat’l Bank v. Peoples Gas Light & Coke Co., 46 Ill. App. 2d 385, 393,
197 N.E.2d 73, 77 (1st Dist. 1964).

Dist. 1976); but see Columbus Sav. & Loan Ass'n v. Century Title Co., 45 Ill. App. 3d 550,
552-53, 359 N.E.2d 1151, 1153 (2d Dist. 1977) (plaintiff cannot use motion for judgment on
the pleadings as substitute for motion for default judgment).

210. ILL. REV. STAT. ch. 110A, § 182(c) (1975).

211. ILL. ANN. STAT. ch. 110, § 57(1) (Smith-Hurd 1978).

212. Id. § 57(2).

which to answer. 214 Trial judges are generally hostile to pre-answer motions for summary judgment and think they should be discouraged, since they are apt to cause confusion. 215 The court should be sure that such motions are not mislabeled efforts to challenge the sufficiency of the complaint. It has been suggested that courts faced with a pre-answer summary judgment motion presume that the pleadings would join issue. 216 A more practical solution is to treat the motion and affidavits as a temporary answer; they must be looked to to see what is denied, and everything else can be treated as admitted until the pleadings are complete. 217

The section 48 motion must be made within the time for pleadings. 218 However, unless movant seeks an evidentiary hearing under section 48(3), he can accomplish all his purposes with a motion to strike the complaint as substantially insufficient in law or for judgment on the pleadings under section 45, or for summary judgment under section 57. 219 Since none of these alternatives is subject to a time limit, the time limit under section 48 is illusory. Moreover, the court may grant leave to make a section 48 motion out of time, 220 and most judges do so freely if the motion appears serious and the delay has not been prejudicial.

COMPARISON OF RULES RESPECTING WAIVER AND APPEAL

Section 42(3) says that all defects in pleadings must be raised in the trial court, but an exception has been read into the statute. 221 "The objection that the complaint does not state a cause of action, or a plea does not state a defense, may be raised at any time, either before or after judgment." 222 However, this exception does not extend to all objections which may be raised on motion to strike as substantially insufficient in law. "While defects in a complaint containing an incomplete or otherwise insufficient statement of a good

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905, 911 (1st Dist. 1972).
cause of action may be waived, the question of whether a complaint absolutely fails to state or indicate any ground of liability which the law will recognize can be raised at any time. Thus, such delayed objections should raise some ultimate legal issue which will control the outcome of the case if resolved in favor of movant. All other objections, including motions under sections 48 and 57, are waived if not raised in the trial court. Moreover, such motions are undoubtedly subject to the trial judge’s power to control the conduct of the litigation if they are first raised after unreasonable and prejudicial delay.

An order denying a motion to strike is not appealable. However, the movant may plead and still preserve his claim of error for appeal after final judgment. Some pleading defects may naturally be lost to the harmless error rule, but the movant may contest the facts without losing his right to challenge the pleader's legal theory. Similarly, the trial judge also has discretion to permit more than one motion to strike as substantially insufficient in law by the same side in the same case.

Conversely, when a pleading is stricken and the pleader pleads over, he waives any right to challenge the order striking his first pleading. If he wishes to appeal that order, he must refuse to amend and suffer judgment. His appeal will then "stand or fall on [the] contents" of the stricken pleading. However, this imposes no serious dilemma on the pleader. If the amended pleading relies on the same legal theory as the first, all the relevant allegations of the first pleading can be repeated and supplemented as necessary. If the pleader has two theories and one is stricken, and he wants to preserve it while trying the other theory, he can do so by putting the two theories into separate counts or defenses of an amended pleading.

The denial of a motion for summary judgment cannot be appealed, either immediately or after trial. The grant of a motion for summary judgment, on the other hand, normally results in a final

judgment which of course is appealable. In addition, the trial court has discretion to permit the filing of additional affidavits on a motion to vacate the summary judgment.\(^{230}\)

There are cases saying, without explanation, that filing affidavits in opposition to a motion for summary judgment concedes "the sufficiency" of the motion and supporting affidavits.\(^{231}\) Neither the reason nor the scope of this proposition has ever been made clear. If this position has not yet been explicitly overruled, it should at least be limited to purely formal objections.\(^{232}\)

Subsections 48(3)\(^{233}\) and 48(4)\(^{234}\) provide that denial of a section 48 motion is without prejudice to its reassertion in the answer unless the motion is decided on the merits. Denial on the merits requires a finding that the facts material to the defense are not genuinely disputed and that they do not constitute a defense, or an evidentiary hearing at which movant fails to prove his defense.

Section 48(5)\(^{235}\) provides that erroneous denial of the motion may be raised on appeal even though movant pleads over. Thus, for this purpose the motion is treated like a section 45 motion instead of a section 57 motion. This is the logical rule where the denial was on the merits. It is illogical, though probably harmless, where the denial was without prejudice. Naturally, grant of a section 48 motion, which normally results in judgment for defendant, is appealable.

**SUGGESTIONS FOR REFORM**

Minor suggestions for reform have already been mentioned during the course of this article. However, four major suggestions have been reserved because they are related and should be discussed together. At least three, and possibly all four, would require legislative action.

The suggestions are to eliminate judgment on the pleadings, recodify the rest of section 45, repeal section 48, and adopt a rule or statute similar to Federal Rule 42(b), which authorizes separate trial of individual issues. The intended result is to create (1) one dispositive pleading motion, codified in a separate subsection from other pleading motions, (2) one dispositive fact motion, and (3) a procedure for separate trial of potentially dispositive factual issues which are relatively simple but genuinely disputed.

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\(^{232}\) See notes 123-25 supra and accompanying text.

\(^{233}\) See note 4 supra.

\(^{234}\) Id.

\(^{235}\) Id.
The pleading motion would concede the allegations of the pleading attacked, and no other allegations would be considered. Thus, the one potentially important distinction between the present motions to strike as substantially insufficient in law and for judgment on the pleadings would be resolved by adopting the motion to strike procedure. If the movant wished to introduce new facts, he would do so by affidavit and make a fact motion. This would serve any conceivable purpose that is now served by considering all the pleadings on a motion for judgment on the pleadings, and eliminate the duplication and confusion caused by that motion.

The fact motion would be the present motion for summary judgment. The affirmative matters which can now be raised under either section 48 or section 57 would be raised by motion for summary judgment. Section 48 would be repealed as duplicative. Section 48(3), which authorizes separate trial of disputed affirmative matters, is not duplicative. It should be preserved and expanded by adoption of a rule similar to Federal Rule 42(b), which reads as follows:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . issue or . . . issues, always preserving inviolate the right of trial by jury . . . 234

The federal rule goes well beyond section 44(2) of the Civil Practice Act,237 because it authorizes separate trial of issues that arise within the same claim.

A careful exploration of provisions for divided trials is beyond the scope of an article on pre-trial motions. It is sufficient to suggest that the utility of the separate trial provision in section 48(3) can be maximized by removing the two limitations which now encumber it. The first of these is the restriction to affirmative defenses and other affirmative matter. These are not the only potentially dispositional separate issues which can be profitably tried in advance of more complicated issues.238 The federal standard of “convenience . . . expedition and economy” states the underlying considerations directly and is no more difficult to administer than the affirmative matter requirement.

The second restriction on section 48(3) is the limitation to bench trials. The potential savings of time, money, and judicial resources from avoiding unnecessary trials of issues which turn out to be irrelevant is even greater in jury cases. There is no reason to forbid separate trials in jury cases so long as each issue is tried to a jury, and the separated issue is “so distinct and separable from the other that a trial of it alone may be had without injustice.”

It remains only to sketch the outline of a recodified section 45. Section 45(1) would provide for the motion to strike pleadings as substantially insufficient in law. It should also provide that if matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as a motion for summary judgment and all parties be given reasonable opportunity to present all material pertinent to such a motion. Section 45(2) would provide that every order granting a motion under section 45(1) should do one of the following: (1) deny leave to amend and direct entry of judgment; or (2) state that judgment will be entered sua sponte if no amended pleading is filed within a time limit fixed in the order. As a safeguard, section 45(2) would also provide for a motion for judgment for failure to plead. This would be a technical motion designed solely to obtain a final judgment after the opponent’s pleading was stricken, no amendment was filed, and the court failed to enter judgment sua sponte. It would correspond to the present section 45 motion to dismiss after striking of the complaint or reply, and to the motion for default judgment after striking of the answer. This separate subsection would replace that part of present section 45(4) which makes explicit that the court can enter orders terminating the litigation after ruling on a section 45 motion. Additional subsections, or separate sections, would provide for the section 45 motions which are generally not intended to be dispositive, such as motions relating to joinder and motions raising formal defects.

At one level, these are the suggestions of a theorist; they reflect a tendency to value logical neatness. But they are also the suggestions of a practitioner and a teacher. The present jumble of dispositive pre-trial motions in Illinois contributes to confusion, wasted effort,

and occasional injustice. Students find these rules hard to learn. Some parts of the jumble are worse than others; the duplication in section 48 is fairly harmless and would remain so if the other three suggestions were implemented without repealing it. But section 45 is not harmless. Its confusing nomenclature, its mixture of substance and form, and its duplicative provisions, create procedural traps into which careless or inexperienced litigators often fall. The only obstacle to reform is complacency; most lawyers learn from experience how motion practice works, and eventually forget that the statute was more a hindrance than a help. That is hardly a reason for subjecting new generations of lawyers to the same experience. The statute can and should be amended.