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Equitable Remedies for Contract Actions: Illinois

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A Q&A guide to understanding key equitable remedies available under Illinois common law for contract actions. Specifically, this Q&A discusses injunctions, rescission, reformation, and specific performance.

Equitable Remedies

Injunctions

1. What types of injunctions are available in your jurisdiction for breach of contract?

In Illinois, there are three types of injunctions that a party can seek for breach of contract. These are:

- Permanent injunctions, which are a form of final equitable relief that restrain or mandate conduct indefinitely (*Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 743 (2009); *Sparks v. Gray*, 334 Ill. App. 3d 390, 396 (2002)).
- Preliminary injunctions, which are a form of temporary equitable relief by which a court orders a litigant to perform or refrain from performing a particular act pending trial or other final decision on the merits of the plaintiff's claims (*Hartlein v. Ill. Power Co.*, 151 Ill. 2d 142, 156 (1992); *City of Kankakee v. Dep't of Revenue*, 2013 IL App (3d) 120599, ¶ 17). A preliminary injunction may only be issued on notice to the adverse party (735 ILCS 5/11-102; *New Light Cemetery Ass'n v. Baumhardt*, 373 Ill. App. 3d 1013, 1019 (2007)).
- Temporary restraining orders (TROs), which are emergency remedies by which a court immediately orders a litigant to perform or refrain from performing a particular act until a hearing for a preliminary injunction can be held (735 ILCS 5/11-101; *Bartlow v. Shannon*, 399 Ill. App. 3d 560, 567 (2010); *Peoples Gas Light & Coke Co. v. City of Chicago*, 117 Ill. App. 3d 353, 355 (1983)). The purpose of a TRO is to preserve the status quo until the court can conduct a hearing on a motion for preliminary injunction (*Delgado v. Bd. of Election Comm'rs of City of Chicago*, 224 Ill. 2d 481, 483 (2007); *County of DuPage v. Gavrilos*, 359 Ill. App. 3d 629, 638 (2005)). Under Illinois law, a TRO is a drastic remedy to be issued only in exceptional circumstances and for a brief duration (*Bartlow*, 399 Ill. App. 3d at 567). A court may grant a TRO without notice to the opposing party only where the plaintiff is likely to suffer immediate irreparable harm before it can give notice (735 ILCS 5/11-101).

2. Please identify the legal standards that Illinois courts use in deciding whether to grant:

- Permanent injunctions.
- Preliminary injunctions.
- Temporary restraining orders.

Permanent Injunctions

Illinois courts may grant a permanent injunction if the party seeking the injunction shows that:

- It has a clear and ascertainable right in need of protection.
- It is likely to suffer irreparable harm without relief.
- No adequate remedy at law exists.
- It is likely to prevail on the merits of its claim.

(*Hasco, Inc. v. Roche*, 299 Ill. App. 3d 118, 126 (1998); *Sparks*, 334 Ill. App. 3d at 395.)

Permanent injunctions are designed to extend or maintain the status quo indefinitely when the plaintiff has shown irreparable harm and no adequate remedy at law exists (*Sparks*, 334 Ill. App. 3d at 396; *Am. Nat'l Bank & Tr. Co. of Chicago v. Carroll*, 122 Ill. App. 3d 868, 881 (1984)).

Preliminary Injunctions

Illinois courts may grant a preliminary injunction where the party seeking the injunction shows that:

- It has a clear and ascertainable right in need of protection.
- It is likely to suffer irreparable harm without relief.
- No adequate remedy at law exists.
- There is a substantial likelihood that it can succeed on the merits of the case.

(*In re Marriage of Winter*, 387 Ill. App. 3d 21, 27-28 (2008).)

Once the plaintiff establishes these elements, the court must determine if the balance of hardships to the parties supports the grant of a preliminary injunction (*Nw. Podiatry Ctr., Ltd. v. Ochwat*, 2013 IL App (1st) 120458, ¶ 30). The court also may consider the effect of the preliminary injunctive relief on the public (*Clinton Landfill, Inc. v. Mahomet Valley Water Auth.*, 406 Ill. App. 3d 374, 378 (2010); *New Light Cemetery Ass'n*, 373 Ill. App. 3d at 1018).

Preliminary injunctions preserve the status quo pending the resolution of the merits of the case (*Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 397 (1993); *Sparks*, 334 Ill. App. 3d at 396). A preliminary injunction is an extraordinary remedy that courts reserve for situations where an extreme emergency exists and irreparable harm results without the injunction (*Hartlein*, 151 Ill. 2d at 156; *City of Kankakee*, 2013 IL App (3d) 120599, ¶ 17). In ruling on a motion for preliminary injunctive relief, controverted facts on the merits of the case are not decided (*Hartlein*, 151 Ill. 2d at 156).

For more information on preliminary injunctions in Illinois generally, see Preliminary Injunctive Relief: Preliminary Injunction Procedure (IL).

Temporary Restraining Orders

Illinois courts may grant a request for a TRO where the party seeking the TRO shows that:

- It has a clear and ascertainable right in need of protection.
- It is likely to suffer irreparable harm without relief.
- No adequate remedy at law exists.
- There is a substantial likelihood that it can succeed on the merits of the case.

(*Bridgeview Bank Grp. v. Meyer*, 2016 IL App (1st) 160042, ¶¶ 12-15; *Bartlow*, 399 Ill. App. 3d at 567; *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664 (1993).)

Once the plaintiff establishes a prima facie case regarding these elements, the court must decide whether the balance of harms favors granting the TRO (*Bridgeview Bank Grp.*, 2016 IL App (1st) 160042, ¶ 12).

A TRO may be granted without notice to the opposing party only where the plaintiff establishes, by affidavit or verified complaint, that immediate irreparable injury, loss, or damage is likely to result before notice can be given and a hearing held (735 ILCS 5/11-101).

A TRO must have a definite duration, which, if issued without notice, is not more than ten days after the order is signed, although it may be extended another ten days by order of court or longer by stipulation of the parties (735 ILCS 5/11-101). If issued with notice, the duration of the TRO typically extends until the court holds a hearing on the plaintiff's request for a preliminary injunction (*Peoples Gas Light & Coke Co.*, 117 Ill. App. 3d at 355; *Jurco v. Stuart*, 110 Ill. App. 3d 405, 408-09 (1982); see *Friedman v. Thorson*, 303 Ill. App. 3d 131, 137 (1999) (the court must schedule the preliminary injunction hearing within a short time after the hearing request)).

For more information on TROs in Illinois generally, see Preliminary Injunctive Relief Toolkit (IL), Practice Note, Preliminary Injunctive Relief: TRO Procedure (IL), and Standard Document, Motion for TRO (IL).

Rescission

3. What are the elements of a rescission claim under Illinois law?

A party seeking to rescind a contract under Illinois law must demonstrate that:

- The parties entered into a valid and enforceable contract.
- The contract was:
  - induced by fraud or misrepresentation (*Ill. State Bar Ass'n Mut. Ins. Co. v. Coregis Ins. Co.*, 355 Ill. App. 3d 156, 165 (2004); *Puskar v. Hughes*, 179 Ill. App. 3d 522, 528 (1989));
  - procured by duress (*Enslen v. Village of Lombard*, 128 Ill. App. 3d 531, 533 (1984); *Kaplan v. Keith*, 60 Ill. App. 3d 804, 807-08 (1978));
  - materially breached where the breaching party's conduct defeated the object of the parties' contract or rendered it unattainable (*Pardo v. Mecum Auction Inc.*, 77 F. Supp. 3d 703, 711 (N.D. Ill. 2014) (applying Illinois law);

CC Disposal, Inc. v. Veolia ES Valley View Landfill, Inc., 406 Ill. App. 3d 783, 790 (2010); *Horwitz v. Sonnenschein Nath & Rosenthal LLP*, 399 Ill. App. 3d 965, 973-74 (2010) (*Horwitz I*); *Wilkonson v. Yovetich*, 249 Ill. App. 3d 439, 445-46 (1993));

- entered into because of a unilateral or mutual mistake that existed at the time the contract became effective and that was so grave that enforcement of the contract is unconscionable (*Vandenberg v. Brunswick Corp.*, 2017 IL App (1st) 170181, ¶ 36; *Cameron v. Bogusz*, 305 Ill. App. 3d 267, 272 (1999)); or
- objectively impossible to perform due to destruction of the subject matter of the contract or by operation of law (*YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 6-7 (2010); *Downs v. Rosenthal Collins Grp., L.L.C.*, 2011 IL App (1st) 090970, ¶ 39).

- The court can substantially restore the parties to the status quo (*Horwitz I*, 399 Ill. App. 3d at 974-75; *Ill. State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 165; *Puskar*, 179 Ill. App. 3d at 528-30). However, the plaintiff need not return the defendant to the status quo where:
  - the defendant's fraud or other acts rendered doing so impossible;
  - the impossibility arose due to no fault of the plaintiff; and
  - the defendant obtained a benefit from the contract.

  (*23-25 Building P'ship v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 757-58 (2008).)
- The plaintiff has no adequate legal remedy (*Horwitz v. Sonnenschein Nath & Rosenthal*, 2018 IL App (1st) 161909, ¶¶ 31-33 (*Horwitz II*); *CC Disposal, Inc.*, 406 Ill. App. 3d at 788).

4. How, if at all, does bringing a rescission claim affect a party's ability to bring a breach of contract claim?

Rescission is available where a party wishes to cancel a contract and restore the parties to the position they were in before the contract (*Ill. State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 165). Rescission disaffirms the contract and asks the court to declare the contract void from its inception and return the parties to their pre-contract status quo rather than award money damages for a breach (*Puskar*, 179 Ill. App. 3d at 528).

A claim for rescission of a contract is inconsistent with a breach of contract claim that seeks money damages. Counsel should not plead claims for rescission and money damages for breach of contract in the same count (See *In re Estate of Yanni*, 2015 IL App (2d) 150108, ¶ 28). However, Illinois permits parties to plead inconsistent causes of action in the alternative, even if a party may recover under just one of those causes (735 ILCS 5/2-613(a); 735 ILCS 5/2-613(b)).

When pleading rescission in the alternative, counsel should:

- Set out the rescission claim in a separate count from any breach of contract claim that seeks money damages.
- Not incorporate by reference, in the rescission count, any allegation that conflicts with the rescission count.
- Allege that the court should rescind the parties' contract if it determines that the contract, as written, does not support the plaintiff's position.

(735 ILCS 5/2-613(a); 735 ILCS 5/2-613(b); see *Ahern v. Knecht*, 202 Ill. App. 3d 709, 715-16 (1990); see also *Bargman v. Econs. Lab., Inc.*, 181 Ill. App. 3d 1023, 1032 (1989) (if the plaintiff does not plead counts in the alternative, the opposing party may use the allegations as a judicial admission against the plaintiff).)

Although a party may proceed to trial seeking both the equitable remedy of rescission and contract damages, the party cannot ultimately recover under both theories (see *Horwitz I*, 399 Ill. App. 3d at 974-75; *Farmer v. Koen*, 187 Ill. App. 3d 47, 52 (1989); *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 356 (2011); see also *Union Planters Bank, N.A. v. Thompson Coburn LLP*, 402 Ill. App. 3d 317, 359-61 (2010) (the plaintiff can present alternative legal theories to the jury but cannot recover twice for the same injury); *Finke v. Woodard*, 122 Ill.App.3d 911, 919-20 (1984) (jury permitted to select between contract damages and rescission)).

5. How does a party rescind a contract in Illinois?

A contracting party may rescind a contract in one of two ways under Illinois law:

- It may file a complaint asking the court to void the contract without first having restored the counterparty to its pre-contract status quo. In its complaint, the plaintiff must state its intent to rescind the contract and offer to return to the defendant the consideration and any other benefit the plaintiff received (*Puskar*, 179 Ill. App. 3d at 528-29; *Hassan*, 408 Ill. App. 3d at 356-57).

- It may notify the counterparty of its intent to rescind the contract and voluntarily restore the counterparty to its pre-contract status quo (for example, *Pinelli v. Alpine Dev. Corp.*, 70 Ill. App. 3d 980, 1004-05 (1979)). If, however, the counterparty fails to return the rescinding party to its pre-contract status quo, the rescinding party may file suit to recover whatever is necessary to restore it to its pre-contract status quo.

A plaintiff seeking to rescind a contract may waive the claim if it does not act promptly (that is, within a reasonable period of time after discovering the grounds for rescission) (*Ill. State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 165; *Vincent v. Vits*, 208 Ill. App. 3d 1, 7 (1991)). Courts may interpret a continued recognition of the contract's validity and acceptance of benefits under the contract as a waiver of the right to rescind (*YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. 3d at 6; *Aden v. Alwardt*, 76 Ill. App. 3d 54, 59-60 (1979); *Ill. State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 165).

6. What is the primary relief available to a party seeking rescission?

The primary relief available in an Illinois rescission claim is a court order rescinding the contract and restoring the pre-contract status quo. Restoring the status quo requires the parties to return any property or other consideration they received under the contract (*Puskar*, 179 Ill. App. 3d at 528-29; *Hassan*, 408 Ill. App. 3d at 356). A court generally may not grant rescission if the parties cannot be restored to the positions they occupied before entering into the contract (*Pardo*, 77 F. Supp. 3d at 711 (applying Illinois law); *Ill. State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 165; *Puskar*, 179 Ill. App. 3d at 528-29; *Hassan*, 408 Ill. App. 3d at 356; *Horwitz I*, 399 Ill. App. 3d at 974-75; *Wilkonson*, 249 Ill. App. 3d at 443; *Newton v. Aitken,* 260 Ill. App. 3d 717, 179 (1994)).

However, the court may excuse the plaintiff from returning the consideration it received where:

- The defendant's fraud or other acts render doing so impossible.
- The impossibility arose due to no fault of the plaintiff.
- The defendant obtained a benefit from the contract.

(*23-25 Building P'ship*, 381 Ill. App. 3d at 757-58; *Int'l Ins. Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 629-30 (1993).)

7. What damages, if any, are available when a party seeks rescission?

A plaintiff seeking rescission generally cannot recover damages related to the rescission. To prevail, the rescinding party must demonstrate that it has no adequate legal remedy, which means that money damages cannot make the plaintiff whole (*CC Disposal, Inc.*, 406 Ill. App. 3d at 790; *Newton*, 260 Ill. App. 3d at 719; *Horwitz II*, 2018 IL App (1st) 161909, ¶ 33).

However, rescission also generally requires the parties to account for any benefits received from the other party under the contract (*Puskar*, 179 Ill. App. 3d at 528-29; *Finke v. Woodard*, 122 Ill. App. 3d 911, 919 (1984)).

In some circumstances, a court may award consequential or incidental damages (sometimes referred to as rescissory damages) to make the parties whole (*Kleczek v. Jorgensen*, 328 Ill. App. 3d 1012, 1017-18 (2002) (trial court rescinded the parties' contract, ordered the return of the plaintiff's purchase price, and awarded damages for out-of-pocket expenses); *Hassan*, 408 Ill. App. 3d at 357). A plaintiff may be able to recover consequential damages if restitution of the consideration given to the defendant is insufficient to make the plaintiff whole (*Kleczek*, 328 Ill. App. 3d at 1017-18; *Hassan*, 408 Ill. App. 3d at 357 (trial court properly awarded the plaintiff damages in the amount of the plaintiff's investment in a gas station business)).

8. What happens to the contract after the court grants rescission?

In a rescission action, there generally is little to no dispute over whether the parties entered into a valid contract. Under Illinois law, seeking rescission does not make the contract void or undercut the contract's enforceability. It merely makes the contract voidable and subject to rescission (*Pardo*, 77 F. Supp. 3d at 711 (applying Illinois law); *Allianz Ins. Co. v. Guidant Corp.*, 373 Ill. App. 3d 652, 675 (2007); *Cusamano v. Norrell Health Care, Inc.*, 239 Ill. App. 3d 648, 653 (1992).) Neither party has any further obligation to the other after the court rescinds the contract.

9. What are the most common defenses to a rescission claim under Illinois law?

The most common defenses to a rescission claim under Illinois law argue that rescission is improper because:

- The plaintiff waived its right to rescission by its continued recognition of the contract's validity and acceptance of benefits under the contract (*YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. 3d at 6; *Aden*, 76

Ill. App. 3d at 59-60; *Ill. State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 165; *Vincent*, 208 Ill. App. 3d at 7; *DeSantis v. Brauvin Realty Partners, Inc.*, 248 Ill. App. 3d 930, 936 (1993)).

- The defendant's breach was not material (*Pardo*, 77 F. Supp. 3d at 711 (applying Illinois law); *C & K NuCo, LLC v. Expedited Freightways, LLC*, 2014 WL 4913446, at *15 (N.D. Ill. Sep. 30, 2014) (applying Illinois law); *CC Disposal, Inc.*, 406 Ill. App. 3d at 790; *Horwitz I*, 399 Ill. App. 3d at 973-74; *Newton*, 260 Ill. App. 3d at 719).
- The court cannot substantially restore the status quo (*Horwitz I*, 399 Ill. App. 3d at 974-75; *Ill. State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 164; *Puskar*, 179 Ill. App. 3d at 530).
- The plaintiff has an adequate legal remedy (*CC Disposal, Inc.*, 406 Ill. App. 3d at 790; *Newton*, 260 Ill. App. 3d at 719; *Horwitz II*, 2018 IL App (1st) 161909, ¶ 33).
- The contract provides explicit conditions precedent to rescission, such as a requirement that the rescinding party provide notice, and the plaintiff did not comply with those conditions before seeking rescission (*Walker v. Aetna Life Ins. Co.*, 1988 WL 46635, at *9 (N.D. Ill. 1988) (applying Illinois law); *Guarantee Ins. Agency Co. v. Mid-Continental Realty Corp.*, 57 F.R.D. 555, 562 (N.D. Ill. 1972) (applying Illinois law); *Puskar*, 179 Ill. App. 3d at 528-29; *Hassan*, 408 Ill. App. 3d at 356; *Boldon v. Chiappa*, 140 Ill. App. 3d 913, 920 (1986)).
- The party seeking rescission is attempting to avoid its obligations where:
  - the risk was foreseeable; and
  - the contract allocated the risk to the plaintiff or the plaintiff assumed the risk.

  (*Ner Tamid Congregation of N. Town v. Krivoruchko*, 638 F. Supp. 2d 913, 927-28 (N.D. Ill. 2009) (applying Illinois law); *United States v. Winstar Corp.*, 518 U.S. 839, 905 (1996); *YPI 180 N. LaSalle Owner, LLC*, 403 Ill. App. 3d at 6-7.)
- The party seeking rescission failed to use due diligence before entering into the contract (*Paloian v. Grupo Serla S.A. de C.V.*, 433 B.R. 19, 35 (N.D. Ill. 2010) (applying Illinois law); *S.T.S. Transport Serv., Inc. v. Volvo White Truck Corp.*, 766 F.2d 1089, 1093 (7th Cir. 1985) (applying Illinois law); *Vandenberg*, 2017 IL App (1st) 170181, ¶ 36; *Cameron*, 305 Ill. App. 3d at 273).
- The rescinding party bore the risk of the mistake under the contract (*Alliance Prop. Mgmt., Ltd. v. Forest Villa of Countryside Condo. Ass'n*, 2015 IL App (1st) 150169, ¶ 39; *Jordan v. Knafel*, 378 Ill. App. 3d 219, 223 (2007)).

10. How, if at all, can a defendant assert rescission?

A defendant responding to a breach of contract action may plead rescission as a counterclaim in its responsive pleading (see, for example, *GreenPoint Mortg. Funding, Inc. v. Hirt*, 2018 IL App (1st) 170921, ¶ 19; *Stevens v. Wilson*, 86 Ill. App. 3d 1047, 1049-50 (1980); see generally 735 ILCS 5/2-608).

Counsel representing a defendant in a breach of contract action should consider pleading a counterclaim for rescission when pleading affirmative defenses, such as coercion, duress, fraud, mistake, false representations, or impossibility of performance.

11. What is the statute of limitations for a rescission claim and when does the statute of limitations begin to run?

The statute of limitations depends on the substantive claim for which the plaintiff seeks rescission.

If the rescission claim is based on a contract theory (for example, material breach or impossibility of performance), the statute of limitations in Illinois is ten years for written contract claims and five years for oral contract claims (735 ILCS 5/13-206; 735 ILCS 5/13-205; *Clark v. Robert W. Baird Co.*, 142 F. Supp. 2d 1065, 1075 (N.D. Ill. 2001) (applying Illinois law)). The limitations period for a breach of contract claim starts to run from the date of the breach (*Clark*, 142 F. Supp. 2d at 1075 (applying Illinois law); *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995)).

Although the **discovery rule** is not typically applied to straight breach of contract claims in Illinois, a plaintiff may avoid the application of the statute of limitations if it can show that the defendants fraudulently concealed the plaintiff's cause of action from the plaintiff (*Clark*, 142 F. Supp. 2d at 1075-76 (applying Illinois law); 735 ILCS 5/13-215).

If the claim is based on fraud or related theories, the statute of limitations in Illinois is five years, which runs from the date the plaintiff either:

- Becomes aware of the fraud.
- Should, with reasonable diligence, be aware of the fraud.

(See 735 ILCS 5/13-215; *Henderson Square Condo. Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶¶ 51-55;

CitiMortgage, Inc. v. Parille, 2016 IL App (2d) 150286, ¶¶ 41-43 (the discovery rule did not toll the statute of limitations on the plaintiff's unjust enrichment and fraud claims); see also *Hermitage Corp.*, 166 Ill. 2d at 77-79 (discussing the discovery rule in tort and breach of contract actions).)

However, in some circumstances a shorter limitations period or statutes of repose may apply to certain statutory claims for rescission (see, for example, *In re Hunter*, 400 B.R. 651, 660-62 (Bankr. N.D. Ill. 2009) (Truth in Lending Act (TILA) three-year period limits only the consumer's right to rescind not the consumer's right to seek judicial enforcement of the rescission); see also *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029, ¶ 32 (rescission under federal TILA is barred after the three-year period of the statute of repose has run); *Wells Fargo Bank, N.A. v. Terry*, 401 Ill. App. 3d 18, 21 (2010) (same); see also *Buehl v. Dayson*, 127 Ill. App. 3d 958, 966 (1984) (six-month notice period under Illinois securities law)).

A party seeking rescission may not wait and see if affirming a contract ultimately proves more profitable than immediately rescinding it (see *DeSantis*, 248 Ill. App. 3d at 936 (five-year statute of limitations for fraudulent misrepresentation began to run on the date on which the plaintiff may have asserted that the partnership defrauded the plaintiff and sought rescission of the contract as a remedy)). A court may find that a party waived the right to rescind if that party does not seek rescission within a reasonable time of learning about the conduct giving rise to the right to rescind. Counsel should therefore consider including any relevant dates in the complaint where the statute of limitations may be an issue.

Reformation

12. What are the elements of a reformation claim under Illinois law?

The party seeking reformation of a written instrument must establish that there had been a meeting of the minds resulting in an actual agreement between the parties; however, when the agreement was reduced to writing, some agreed-on provision was omitted or one not agreed on was inserted, either due to a mutual mistake or due to mistake of one party and fraud by another. (*Nwidor*, 2018 IL App (1st) 171378, ¶ 36). There is a presumption that a written instrument conforms to the intention of the parties subject to the instrument. Therefore, in an action for reformation, the proponent's burden of proof is clear and convincing evidence. (*Nwidor*, 2018 IL App (1st) 171378, ¶ 36.)

To properly state a cause of action for reformation under Illinois law, the complaint must set out:

- That the parties reached an agreement under which they intended to be bound.
- That the parties reduced the agreement to a written contract.
- That the written contract either:
  - does not contain material terms to which the parties agreed; or
  - contains material terms to which the parties did not agree.
- The exact material terms that the parties:
  - intended to include in the written contract; or
  - should not have included in the written contract.
- Detailed facts demonstrating that the absence of material terms or the inclusion of erroneous terms in the written contract was the result of:
  - mutual mistake;
  - scrivener's error; or
  - fraud.

(*Hartmann v. Prudential Life Ins. Co. of Am.*, 9 F.3d 1207, 1209 (7th Cir. 1993) (applying Illinois law); *Zannini v. Reliance Ins. Co. of Ill.*, 147 Ill. 2d 437, 449-50 (1992); *Ill. Ins. Guar. Fund v. Nwidor*, 2018 IL App (1st) 171378, ¶ 36; *First Mercury Ins. Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 46; *Parille*, 2016 IL App (2d) 150286, ¶ 29.)

A party most often seeks reformation because it wants the contract to remain in effect, but on the terms to which the parties actually agreed. A party may need to seek reformation in court where, for example:

- The parties cannot agree on the necessary correction.
- The mistake benefited one of the parties and that party now opposes reformation.
- The parties have differing views on their original agreement.

However, courts may not reform a contract simply to:

- Relieve a party of the consequences of an unfavorable or oppressive agreement.
- Interject into the written agreement terms not previously agreed to.
- Include a provision that one party suggested and the other rejected.

(See, for example, *Nwidor*, 2018 IL App (1st) 171378, ¶¶ 34-37; *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶¶ 30-33.)

13. How, if at all, does bringing a reformation claim affect a party's ability to bring a breach of contract claim?

A party may bring claims for reformation and breach of contract in the same complaint. For example, if the plaintiff believes that the defendant breached a material term of the parties' agreement, but it is unclear whether the contract, as written, contains or accurately states that material term, the plaintiff may:

- Sue for breach of contract in one count of the complaint.
- Sue for reformation in a separate count of the complaint and seek damages (or another appropriate remedy) for breach of the contract as reformed.

A plaintiff may plead inconsistent causes of action in the alternative, even if recovery is limited to just one of those causes (FRCP 8(d)(2); FRCP 8(d)(3); 735 ILCS 5/2-613(a); 735 ILCS 5/2-613(b)).

When pleading reformation in the alternative, counsel should:

- Set out the reformation claim in a separate count from the breach of contract claim (See *Yanni*, 2015 IL App (2d) 150108, ¶ 28 (a party must plead separate theories of relief in separate counts); see also *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 615 (7th Cir. 2013) (applying Illinois law) (while a party may plead inconsistent theories in alternative counts, inconsistent allegations within a count may defeat that claim)).
- Not incorporate by reference, in the reformation count, any allegation that is inconsistent with reformation, such as that the parties' written contract accurately reflects the parties' original and actual agreement (for example, see *Cohen*, 735 F.3d at 615 (applying Illinois law) (allegations of an express contract in an unjust enrichment count defeated that count)).
- Allege that the court should reform the parties' contract if the contract, as written, does not accurately reflect the parties' actual agreement (for example, see *Parille*, 2016 IL App (2d) 150286, ¶¶ 29-31).

(FRCP 8(d)(2); FRCP 8(d)(3); 735 ILCS 5/2-613(a); 735 ILCS 5/2-613(b); *Bargman v. Econs. Lab., Inc.*, 181 Ill. App. 3d 1023, 1032 (1989) (if the plaintiff does not plead counts in the alternative, the opposing party may use the allegations as a judicial admission against the plaintiff).)

14. What relief is available to a party seeking reformation?

The relief available to a party seeking reformation is a modified contract that restates the terms of the contract to reflect the actual agreement the parties made. The party seeking reformation should be specific and plead the exact language that should be either included in or removed from the written agreement (for example, see *Parille*, 2016 IL App (2d) 150286, ¶¶ 29-30; *Schaffner v. 514 W. Grant Place Condo. Ass'n, Inc.*, 324 Ill. App. 3d 1033, 1044-45 (2001); *Briarcliffe Lakeside Townhouse Owners Ass'n v. City of Wheaton*, 170 Ill. App. 3d 244, 251-53 (1988)).

In some instances, the plaintiff may be able to seek other forms of equitable relief in addition to reformation, such as:

- Specific performance of the contract, as reformed.
- Injunctive relief, including a temporary restraining order, preliminary injunction, or permanent injunction.
- Damages based on breach of the contract, as reformed.

A plaintiff may seek multiple forms of equitable relief in a single cause of action (Ill. S. Ct. R. 135(a)). However, if the plaintiff seeks alternative forms of equitable relief (for example, reformation and rescission) that rely on inconsistent factual allegations, counsel should seek those forms of relief in separate counts.

15. What damages, if any, are available when a party seeks reformation?

Depending on the facts of the case, where the plaintiff alleges that the defendant breached the contract as reformed, the plaintiff may seek the following types of damages in Illinois state or federal court:

- Compensatory damages (also called actual damages), which may include:
  - direct damages (also known as general damages), which follow directly from the defendant's wrongful conduct (*Westlake Fin. Grp., Inc. v. CDH-Delnor Health Sys.*, 2015 IL App (2d) 140589, ¶ 31; *Midwest Software, Ltd. v. Willie Washer Mfg. Co.*, 258 Ill. App. 3d 1029, 1053 (1994); and
  - consequential damages (also called special damages), which do not follow directly from the defendant's breach, but are foreseeable and were in the contemplation of the parties at the time of contracting (*Westlake Fin. Grp., Inc.*, 2015 IL App (2d) 140589, ¶ 31).

- Liquidated damages, which are a pre-determined amount of damages usually set out in a liquidated damages clause in the contract (see *Berggren v. Hill*, 401 Ill. App. 3d 475, 479-80 (2010); *Jameson Realty Grp. v. Kostiner*, 351 Ill. App. 3d 416, 423 (2004)). Illinois courts generally enforce liquidated damages clauses when it can be shown that:
  - the parties intended to establish an agreed-on amount of damages if a breach occurs;
  - the amount provided as liquidated damages was reasonable at the time of contracting and bears some relation to the actual damages which may be sustained; and
  - the actual damages are difficult to prove and uncertain in amount.

  (*Berggren*, 401 Ill. App. 3d at 480.)

Illinois courts do not enforce a liquidated damages clause when it merely serves as a threat to secure performance or as a penalty against nonperformance (*Jameson Realty Grp.*, 351 Ill. App. 3d at 424).

16. What happens to a contract after it is reformed?

Under Illinois law, if a court orders reformation, the contract remains in effect, but in modified form based on the terms the court determines the parties intended to include in the contract (*Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (2008); *Briarcliffe Lakeside Townhouse Owners Ass'n*, 170 Ill. App. 3d at 251-53; *Nwidor*, 2018 IL App (1st) 171378, ¶ 36).

17. What are the most common defenses to a reformation claim?

The most common defenses to a reformation claim under Illinois law are that:

- The original contract reflects the parties' true intentions (*Wheeler-Dealer, Ltd.*, 379 Ill. App. 3d at 871; *Zannini*, 147 Ill. 2d at 449-50; *Ciolino*, 2018 IL App (1st) 171532, ¶ 46; *Parille*, 2016 IL App (2d) 150286, ¶ 29).
- The plaintiff is using reformation solely to relieve the burden of an unfavorable or oppressive agreement (*Nwidor*, 2018 IL App (1st) 171378, ¶¶ 34-37; *Ringgold Capital IV, LLC*, 2013 IL App (1st) 121702, ¶¶ 30-33).
- The plaintiff is attempting to interject into the written agreement terms not previously agreed to (*Nwidor*, 2018 IL App (1st) 171378, ¶¶ 34-37; *Ringgold Capital IV, LLC*, 2013 IL App (1st) 121702, ¶¶ 30-33).
- The plaintiff is attempting to interject into the written agreement a provision that one party suggested and the other rejected (*Nwidor*, 2018 IL App (1st) 171378, ¶¶ 34-37; *Ringgold Capital IV, LLC*, 2013 IL App (1st) 121702, ¶¶ 30-33).
- At least one party was ignorant of facts, which, if known, is likely to have resulted in a different contract where the proper remedy is rescission and not reformation (*Wheeler-Dealer, Ltd.*, 379 Ill. App. 3d at 871; *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 27-29 (1941)).
- The party seeking reformation did not meet its burden of proof (*Nwidor*, 2018 IL App (1st) 171378, ¶ 36).

18. How, if at all, can a defendant assert reformation?

Under Illinois law, a defendant responding to a breach of contract action may plead reformation as a counterclaim in its responsive pleading (*Ciolino*, 2018 IL App (1st) 171532, ¶ 47). For example, a defendant may assert reformation as a counterclaim in response to a breach of contract action by alleging that the contractual provisions it allegedly breached were the product of a scrivener's error and therefore the contract should be reformed accordingly (*Roots v. Uppole,* 81 Ill. App. 3d 68, 72-73 (1980)).

19. What is the statute of limitations for a reformation claim and when does it begin to run?

The statute of limitations for a reformation claim under Illinois law depends on the substantive claim on which the reformation claim is based.

If the reformation claim is based on a contract theory (for example, material breach or impossibility of performance), the statute of limitations in Illinois is ten years for written contract claims and five years for oral contract claims (735 ILCS 5/13-206; *Clark*, 142 F. Supp. 2d at 1075) (applying Illinois law). The limitations period for a breach of contract claim starts to run from the date of the breach (*Clark*, 142 F. Supp. 2d at 1075) (applying Illinois law).

If the claim is based on fraud or related theories, the statute of limitations for fraud in Illinois is five years, which runs from the date the plaintiff either:

- Becomes aware of the fraud.
- Should, with reasonable diligence, be aware of the fraud.

(See 735 ILCS 5/13-205; *Henderson Square Condo. Ass'n*, 2015 IL 118139, ¶¶ 51-55; *Parille*, 2016 IL App (2d)

150286, ¶¶ 41-43 (the discovery rule did not toll the statute of limitations on the plaintiff's unjust enrichment and fraud claims); see also *Hermitage Corp.*, 166 Ill. 2d at 77-79 (discussing the discovery rule in tort and breach of contract actions).)

However, in some circumstances, a shorter limitations period or statutes of repose may apply to a reformation claim (*In re Marriage of Braunling*, 381 Ill. App. 3d 1097, 1101 (2008) (the limitations period was tolled during the marriage under the Illinois Uniform Premarital Agreement Act); *Schons v. Monarch Ins. Co. of Ohio*, 214 Ill. App. 3d 601, 608-09 (1991) (the discovery rule tolled the statute of limitations on the plaintiff's reformation claim)).

Specific Performance

20. What are the elements of a specific performance claim in Illinois?

To state a claim for specific performance under Illinois law, a plaintiff must allege that:

- The parties entered into a valid, binding, and enforceable contract.
- The plaintiff either:
  - complied with the terms of the contract; or
  - was ready, willing, and able to perform the contract.
- The defendant failed to perform its part of the contract.
- The plaintiff has no other adequate remedy at law.

(*Schilling v. Stahl*, 395 Ill. App. 3d 882, 884 (2009); *John O. Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771, 785 (2000).)

21. How, if at all does seeking specific performance affect a party's ability to bring a breach of contract claim seeking damages?

Under Illinois law, seeking specific performance is an alternative to bringing a breach of contract claim seeking damages. It seeks an order from the court compelling a party to perform its contractual duties, rather than pay money damages for a breach. However, a plaintiff should always plead a separate claim for breach of contract damages in the alternative to specific performance. Doing so ensures a remedy if the court decides that specific performance is not the appropriate remedy for the defendant's breach. (*Crum v. Krol*, 99 Ill. App. 3d 651, 656 (1981).)

Counsel seeking damages for breach of contract and specific performance should plead them in separate counts in the complaint (Ill. S. Ct. R. 135(b) (parties may plead separate counts when pleading mixed claims of law and equity); see *Yanni*, 2015 IL App (2d) 150108, ¶ 28 (a party must plead separate theories of relief in separate counts)).

22. What relief may be granted to a party seeking specific performance?

The relief available to a party seeking specific performance under Illinois law is a court order directing the opposing party to do what the contract requires it to do (*Chung v. Pham*, 2020 IL App (3d) 190218, ¶ 66; *Giannini v. First Nat'l Bank of Des Plaines*, 136 Ill. App. 3d 971, 982 (1985)).

23. What damages, if any, are available when a party seeks specific performance?

In an action for specific performance under Illinois law, the court may award to the plaintiff damages that are incidental to and caused by the delay in performance (sometimes referred to as equitable compensation) if the circumstances warrant that relief (*Lobo IV, LLC, v. V Land Chicago Canal, LLC*, 2019 IL App. (1st) 170955, ¶¶ 84-85). For example, a court may award both money damages and specific performance where there are multiple injuries, some of which can be remedied by damages and others only by specific performance (*Yonan v. Oak Park Fed. Sav. & Loan Ass'n*, 27 Ill. App. 3d 967, 976 (1975)).

When a court awards incidental damages, it typically limits them to an amount that is likely to return the parties to the positions they occupied before the breach (*Mandel v. Hernandez*, 404 Ill. App. 3d 701, 706 (2010); see *Douglas Theater Corp., v. Chicago Title & Tr. Co.*, 266 Ill. App. 3d 1037, 1043-44 (1994) (distinguishing incidental damages for specific performance from legal damages like lost profits)). For example, courts have awarded damages for property expenses relating to an order of specific performance to enforce a contract for the sale of real property (*Haas v. Cravatta*, 71 Ill. App. 3d 325, 332 (1979) (requiring the turnover of rents and reimbursement for money spent on property taxes and insurance in conjunction with specific performance)).

24. What are the most common defenses to a specific performance claim?

Under Illinois law, the most common defenses to a claim seeking specific performance are:

- The defendant cannot do what the contract requires it do. A court may not direct a defendant to convey title to property, for example, if the defendant does not hold title to the property the court has ordered the defendant to convey (*Pedersen & Houpt, P.C. v. Main St. Village W., Part 1, LLC*, 2012 IL App (1st) 112971, ¶ 43; *LaSalle Bank, N.I. v. First Am. Bank*, 316 Ill. App. 3d 515, 526 (2000).)
- There are other available remedies, such as money damages, that can make the plaintiff substantially whole (*Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 477 (2004); *Phillips v. McCullough*, 278 Ill. App. 3d 442, 450 (1996); *George F. Mueller & Sons, Inc. v. Morales*, 25 Ill. App. 3d 466, 469 (1975)).
- The defendant is likely to suffer considerable hardship or loss if the contract were specifically enforced, resulting from events that occurred after the parties executed the contract (*Schwinder*, 348 Ill. App. 3d at 477-78; *Gordon v. Bauer*, 177 Ill. App. 3d 1073, 1083 (1988)).
- The plaintiff frustrated or prevented the defendant's ability to perform its obligations under the contract (*Schwinder*, 348 Ill. App. 3d at 477-78; *LaSalle Bank, N.I.*, 316 Ill. App. 3d at 526).
- Specific performance is not necessary to carry out the parties' primary intentions when they entered into the contract (*O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 839-40 (2002)).
- Granting specific performance of the obligation at issue requires constant and long-continued supervision by the court (*Yonan*, 27 Ill. App. 3d at 972).

25. How, if at all, can a defendant assert specific performance?

Under Illinois law, a defendant responding to a breach of contract action may plead specific performance as a counterclaim in its responsive pleading (*In re Cnty. Treasurer and ex officio Cty. Collector of Kane Cty., Ill.*, 2018 IL App (2d) 170418, ¶ 42; see generally, 735 ILCS 5/2-608). A counterclaim for specific performance may be appropriate where, for example, the plaintiff stops performing and commences an action to rescind the contract. A defendant believing that the contract is valid and enforceable may assert a counterclaim for an order directing the plaintiff to perform (*Payne v. Meeker*, 10 Ill. App. 3d 986, 989 (1973)).

26. What is the statute of limitations for a claim seeking performance and when does the statute of limitations begin to run?

Because a specific performance claim is based on a contract, the statute of limitations in Illinois is ten years for written contract claims and five years for oral contract claims (735 ILCS 5/13-206; 735 ILCS 5/13-205; *Clark*, 142 F. Supp. 2d at 1075 (applying Illinois law)). The limitations period for a breach of contract claim starts to run from the date of the breach (*Clark*, 142 F. Supp. 2d at 1075 (applying Illinois law); *Hermitage Corp.*, 166 Ill. 2d at 77-79).

However, in some circumstances a shorter limitations period or statutes of repose may apply to a specific performance claim (for example, 735 ILCS 5/13-214 (actions based on construction contracts must be filed within four years of the date the plaintiff knew or reasonably should have known of the act or omission on which the claim is based)).