



Civil Practice and Procedure

Donald Patrick Eckler and Quinn P. Donnelly
Pretzel & Stouffer, Chartered, Chicago

It Ain't Over 'til It's Over: Under Illinois Law Finality is Not So Final

This malapropism is one of Yogi Berra's best. While it is unlikely that he was referring to litigation when he uttered these words, their application is undeniable. This timeless quip is an appropriate response to clients inquiring about the final resolution of a dispute in Illinois where two statutes, 735 ILCS 5/2-1301 and 735 ILCS 5/2-1401, allow litigants to revisit otherwise final orders and judgments. Recently, the Illinois Supreme Court, in *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, clarified the application of 735 ILCS 2-1401. In the wake of the Court's opinion, this article will provide an overview of the statutes that can be used to obtain relief from judgment in Illinois and can, in some cases, extend the time for a party to seek such relief.

The Illinois Code of Civil Procedure, by way of sections 2-1301 and 2-1401, provides plaintiffs and defendants with a mechanism to vacate both final and non-final orders and judgments. Most often these rules are employed by plaintiffs to vacate dismissals for want of prosecution, and by defendants to vacate default judgments.

The first step in understanding and applying sections 2-1301 and 2-1401 is to identify the final or non-final nature of the order or judgment involved. Under Illinois law, a dismissal for want of prosecution does not become a final order until the period for refiling under 735 ILCS 5/13-217 has expired. *Jackson v. Hooker*, 397 Ill. App. 3d 614, 618 (1st Dist. 2010). Section 13-217, known as the "savings statute," provides a plaintiff with a one-time right to refile a claim that has been voluntarily dismissed or dismissed for want of prosecution within one year of the entry of the dismissal order or within the remaining period of limitation, whichever is greater. 735 ILCS 5/13-217. By providing the plaintiff with this additional time to refile, section 13-217 necessarily delays the final nature of any judgment. *Jackson*, 397 Ill. App. 3d at 618.

As a result, in the event that a case is dismissed for want of prosecution or voluntarily dismissed under section 2-1009, that dismissal does not become a final judgment for the purposes of sections 2-1301 and 2-1401 until a year has passed from the entry of the dismissal order. *Jackson*, 397 Ill. App. 3d at 618. After a year has passed, the plaintiff is no longer entitled to refile the claim, and the dismissal order becomes a final and appealable order, but that order is not quite final. 735 ILCS 5/13-217. The plaintiff, under section 2-1301, has 30 days to move to vacate the dismissal order. 735 ILCS 5/2-1301(e). Such a motion will be granted so long as the party seeking to vacate the judgment can show a reasonable justification. *Id.*

After a year and 30 days have passed since entry of the initial dismissal order the case is still not over. 735 ILCS 5/2-1401. Under section 2-1401, a party can petition the court to vacate the dismissal order, but will be subject to the requirements discussed below. *Id.*

There is also an important distinction between an "order of default" and a "default judgment." An order of default is not a final judgment as it does not dispose of the case and determine the rights of the parties, but merely precludes the defaulting party from raising additional defenses. *Jackson*, 397 Ill. App. 3d at 620. By contrast, a default judgment is a

final judgment that resolves the case entirely and includes: (1) a finding of the issues for the plaintiff; and (2) an assessment of damages. *Id.* at 621. While section 2-1301(e) applies to both final and non-final orders and judgments, section 2-1401 only provides relief from final orders and judgments. 735 ILCS 5/2-1401.

Motions to Vacate Pursuant to Section 2-1301

Section 2-1301(e) provides litigants with the option to bring a motion to vacate a non-final or final order during the course of litigation. 735 ILCS 5/2-1301(e). Under section 2-1301(e), a litigant can move to vacate a non-final order or judgment at any time before that order or judgment becomes final. *Id.*; *Federal Nat'l Mortg. Ass'n v. Tomei*, 2014 IL App (2d) 130652, ¶ 9. Once the order or judgment is rendered final, the litigant must bring its motion within 30 days. 735 ILCS 5/2-1301. In the event that the litigant fails to bring a motion to vacate during the 30 day period, the court loses jurisdiction and the party's only option is to bring a petition to vacate the judgment under the more exacting standards provided for in section 2-1401. *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 206-07 (2d Dist. 2010).

In Illinois, the moving party bears the burden of establishing that the judgment should be vacated. *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207 (2d Dist. 2004). Generally, the court will vacate an order or judgment within 30 days "upon any terms and conditions that shall be reasonable." *Larson*, 349 Ill. App. 3d at 207 (citing 735 ILCS 5/2-1301(e)). In reviewing a section 2-1301(e) motion the court's primary consideration is "whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to proceed to trial on the merits." *Id.* at 207-08 (citing *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 377 (1st Dist. 2001)). The Illinois courts have expressed a preference that, if possible, litigation be determined on its merits. *Jones v. Fox*, 313 Ill. App. 3d 249, 257 (3d Dist. 2000). As a result, where a party provides a reasonable justification, the court will generally exercise its discretion and grant a motion to vacate, pursuant to section 2-1301(e).

Petition to Vacate Pursuant to 2-1401

The entry of a final order or judgment may not end the litigation in the trial court. Section 2-1401 entitles a party to bring a petition to vacate a final judgment or order after the 30 day period provided for under section 2-1301(e) has expired and for two years from the date of the entry of the judgment or order. 735 ILCS 5/2-1401. In order to ensure that a section 2-1401 petition is timely filed a party should file the petition no later than the day before the anniversary date of the entry of the final order or judgment. *See generally Parker v. Murdock*, 2011 IL App (1st) 101645, ¶ 21 (superseding its opinion withdrawn on Sept. 20, 2011). The two year period excludes time during which the party seeking relief is under legal disability or duress and when the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c).

As a procedural note, a trial court only retains jurisdiction over a matter for 30 days after it has entered a final judgment. *Blazyk*, 406 Ill. App. 3d at 206. As a result, a party seeking relief from a final judgment under section 2-1401 must do so through a petition to the court, not a motion. *Id.* The filing of a section 2-1401 petition is a new proceeding, not a continuation of the old proceeding. 735 ILCS 5/2-1401(b); *Sarkissian v. Chicago Bd. of Educ.*, 201 Ill. 2d 95, 102 (2002). A section 2-1401 petition, just like any other initial pleading, is subject to the rules of civil procedure in Illinois. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). Specifically, a party who files a section 2-1401 petition must give notice to opposing parties as required under Supreme Court Rule 106, which dictates that the proper service must comply with the requirements of Supreme Court Rule 105. Ill. S. Ct. R. 106; *Blazyk*, 406 Ill. App. 3d at 207. In addition, a section 2-1401

petition invites a responsive pleading and may be challenged by a motion to dismiss for a failure to state a cause of action or for a failure to state a claim for which relief can be granted. *Vincent*, 226 Ill. 2d at 8.

The purpose of a section 2-1401 petition is to present a legal or factual challenge to a final judgment or order. *Warren County*, 2015 IL 117783, ¶ 31. While the petition is ordinarily used to bring facts to the attention of the trial court which, if known at the time of the judgment would have precluded its entry, the petition may also be used to challenge a purportedly defective judgment for legal reasons. *Id.* ¶ 31.

In order to prevail on a section 2-1401 petition the petitioner must establish by a preponderance of the evidence each of the following: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense in the underlying litigation; and (3) due diligence in the filing of this section 2-1401 petition for relief. *Id.* ¶ 51 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986)). The petitioner is required to support its section 2-1401 petition with an affidavit or other materials that are not otherwise included in the record. 735 ILCS 5/2-1401(b).

In proving the first element, the existence of a meritorious claim or defense, a party is not required to show the validity of the meritorious claim or defense, but only its existence. *Pirman v. A&M Cartage*, 285 Ill. App. 3d 993, 1001 (1st Dist. 1996). As a result, this element is generally easily satisfied.

Next, the party bringing the petition must show that it acted diligently both in the underlying action and in filing the petition to vacate the final order or judgment. The Illinois Supreme Court explained that section 2-1401 is not intended to relieve the defeated party for its own mistakes, negligence, or for the negligence of its attorney. *Warren County*, 2015 IL 117783, ¶ 38 (citing *Airoom*, 114 Ill. 2d at 222). Instead, section 2-1401 will only provide relief where the petitioner can show that its failure to defend or prosecute the lawsuit was “the result of an excusable mistake and that the petitioner acted reasonably under the circumstances and was not negligent.” *Id.*

In evaluating the petitioner’s diligence the court examines the particular facts, circumstances, and equities of the underlying litigation. *Warren County*, 2015 IL 117783, ¶ 50. As a result, the petitioner must provide an affidavit and other documentation in support of its claimed diligence. *Id.* ¶ 31. Just as in any other civil proceeding, the party responding to the petition can and should provide its own affidavit and documents in opposition of the petition. *Id.* 51.

The courts are cognizant of the fact that a section 2-1401 petition represents the last option to vacate a judgment or order. From the outset, the procedural context of these petitions implies that a petitioner—who had several other opportunities to vacate the judgment—lacks the diligence necessary to prevail. In order to successfully refute this lack of diligence, the petitioner must provide a “reasonable excuse” for failing to vacate the judgment at an earlier time. *Airoom*, 114 Ill. 2d at 222. In order to prevail, the petitioner must show that the entry of the final judgment or order was not known to the petitioner and could not have been discovered through the exercise of reasonable diligence. *Juszczuk v. Flores*, 334 Ill. App. 3d 122, 128 (1st Dist. 2002).

Generally, when the petitioner has failed to act diligently the court will deny the petition to vacate the judgment. There are limited and extraordinary circumstances, however, where the court has ignored the diligence of the parties and granted the petition in the interest of preventing the unjust entry of a judgment and to do substantial justice between the parties. *Coleman v. Caliendo*, 361 Ill. App. 3d 850, 855-56 (1st Dist. 2005) While the first district, in *R.M. Lucas Co. v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102955, ¶ 24, asserts that *Vincent* overruled the holding in *Coleman*, the Illinois Supreme Court’s recent decision in *Warren County*—as discussed more fully below—explains equitable considerations are appropriate in reviewing a section 2-1401 petition. *Warren County*, 2015 IL 117783, ¶ 51.

A section 2-1401 petition, like any pleading, is not immune to opposition. As discussed briefly above, a section 2-1401 petition is procedurally like a complaint and is therefore subject to the same rules of civil procedure. *Blazyk*, 406

Ill. App. 3d at 207 (citing *Vincent*, 226 Ill. 2d at 15). Accordingly, a section 2-1401 petition is subject to both jurisdictional and substantive challenges.

The petitioner is required to properly serve all parties with notice of the section 2-1401, pursuant to Supreme Court Rules 106 and 105. 735 ILCS 5/2-1401(b). Unless and until service is effectuated the court does not have personal jurisdiction over the respondent. *Blazyk*, 406 Ill. App. 3d at 207. The First District has noted an extremely narrow equitable exception that allows for service outside of the requirement of Supreme Court Rule 106. The exception provides for service of a section 2-1401 petition on a party's attorney of record in the original proceeding when the original attorney is in court representing that same client in a matter related to the original judgment. *Welfelt v. Schultz Transit Co.*, 144 Ill. App. 3d 767, 772 (1st Dist. 1986) (citing *Public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706, 712 (1st Dist. 1973)).

The respondent must challenge the propriety of service at the first instance or it will be held to have waived any objection to personal jurisdiction. *Welfelt*, 144 Ill. App. 3d at 772. If a party appears and argues the merits of the petition that party is deemed to have waived any jurisdictional defect. *Blazyk*, 406 Ill. App. 3d at 207; *Welfelt*, 144 Ill. App. 3d at 772.

The respondent to a section 2-1401 petition is also entitled to bring a substantive challenge seeking the dismissal of the petition under section 2-615 for a failure to state a claim or under section 2-619 based on some other affirmative matter, such as timeliness. *Blazyk*, 406 Ill. App. 3d at 207.

The Illinois Supreme Court in *Warren County* clarified that the nature of the challenge presented in a 2-1401 petition will dictate the proper standard of review on appeal. *Warren County*, 2015 IL 117783, ¶ 31. Where the challenge to the original judgment is fact dependent and the petitioner must satisfy each of the elements by a preponderance of the evidence, the circuit court's decision will be reviewed for an abuse of discretion. *Id.* ¶ 51. In the alternative, where the 2-1401 petition presents a purely legal challenge, then the circuit court's decision should be reviewed *de novo*. *Id.* ¶ 47. Most notably, the Supreme Court in *Warren County* explained that generally speaking a section 2-1401 petition that raises a fact-dependent challenge must be resolved by considering the facts, circumstances, and equities of the underlying case. *Id.* ¶ 50. Equitable considerations are only inapplicable in the specific and limited context of a section 2-1401 petition that raises a purely legal issue. *Id.* ¶ 47.

Special Considerations:

Section 2-1401 does not apply to void orders or judgments. 735 ILCS 5/2-1401(f). As a result petitions brought to vacate an order or judgment on voidness grounds can be brought at any time and are not limited by the two year period under section 2-1401. *Sarkissian*, 201 Ill. 2d at 104. In the event that a case is dismissed for want of prosecution after the plaintiff has already taken advantage of its one voluntary dismissal and refile, pursuant to sections 2-1009 and 13-217, that dismissal becomes a final order immediately upon entry and the 30 day period under 2-1301(e) begins to run. *Jackson*, 397 Ill. App. 3d at 618. During that 30 day period the plaintiff can move to vacate the dismissal for want of prosecution, thereby reinstating its claim. 735 ILCS 5/2-1301(e). After the 30 day period has lapsed the plaintiff can seek relief under section 2-1401. 735 ILCS 5/2-1401(a).



Practice Pointers:

As a practitioner seeking relief or opposing the grant of relief from otherwise final orders or judgments, keep the following in mind:

Vacate early and often: Attempt to vacate orders of default, default judgments, and dismissals for want of prosecution at the earliest possible juncture.

Save the Date: Diary the following: (1) the date of the expiration of the statute of limitations, the date that the year to re-file pursuant to section 13-217 expires; (2) the date of the entry of a final order or judgment; (3) the 30 day date noting the expiration of a right to relief under section 2-1301(e); and (4) the 2 year (minus one day) date from the entry of judgment (the date of the last opportunity to seek relief) to safely determine when the litigation is truly at its end.

Be Diligent: While litigating, do so diligently and create and maintain a record that may be needed later to support a petition to vacate a judgment or order.

Challenge Jurisdiction: In opposing a petition for relief under section 2-1401 challenge jurisdiction at the first possible instance. If a party appears and argues the merits of the petition, then jurisdiction is waived. *Blazyk*, 406 Ill. App. 3d at 207; *Welfelt*, 144 Ill. App. 3d at 772.

Yogi Berra also said that “You’ve got to be very careful if you don’t know where you are going, because you might not get there.” In navigating the Illinois Code of Civil Procedure, the same holds true.

About the Authors

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*. He practices in both Illinois and Indiana in the areas of commercial litigation, professional malpractice defense, tort defense, and insurance coverage. Mr. Eckler earned his undergraduate degree from the University of Chicago and his law degree from the University of Florida. He is a member of the Illinois Association of Defense Trial Counsel, the Risk Management Association, and the Chicago Bar Association. He is the co-chair of the CBA YLS Tort Litigation Committee. The views expressed in his article are his, and do not reflect those of his firm or its clients.

Quinn P. Donnelly is an Associate at *Pretzel & Stouffer, Chartered*, where his practice includes commercial disputes, employment claims, insurance defense, and professional negligence claims. Mr. Donnelly earned his J.D., *cum laude*, from the John Marshall Law School with a certificate in Trial Advocacy and as a member of the Order of John Marshall. While in law school he served as a Staff Editor of the *John Marshall Law Review*, as a Judicial Extern for the Honorable Maria Valdez of the United States District Court for the Northern District of Illinois, and as a Rule 711 Law Clerk for the Cook County State’s Attorney’s Office.



About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.