ICLG

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A practical cross-border insight into litigation and dispute resolution work

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Chapter 36

USA – Illinois

Justin O. Kay

Matthew M. Morrissey

Drinker Biddle & Reath LLP

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Illinois is a common law jurisdiction under which case law is developed according to precedent. Proceedings in civil cases are governed by the Illinois Code of Civil Procedure, Section 5/1–101 *et seq*., Illinois Supreme Court Rules, and local rules of the various courts.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Illinois is divided geographically into 24 judicial circuits. Each circuit court is a court of original jurisdiction. Appeals from the circuit courts are heard in the Appellate Court, which is organised into five geographic districts. The Illinois Supreme Court is the highest court of the State.

The circuit courts are organised into specialised divisions and departments ranging from criminal and family divisions to a specialised commercial calendar in the law division and mortgage foreclosure courts within the chancery division. Not all circuit courts include the same divisions and departments.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Pleading: Civil actions are commenced by the filing and subsequent service of a complaint. Defendants generally are required to respond to a complaint within 30 days of service (unless the parties agree to or the court grants an extension) by filing a motion to dismiss challenging the complaint or by filing an answer. If the complaint survives challenge, the defendant then must answer by admitting or denying each allegation or explaining under oath that it lacks knowledge sufficient to form a belief as to the truth of the allegation. Typically, the case proceeds to discovery after the defendant answers the complaint. There is no set timeline for the pleading stage, and the time spent in this stage will vary depending on numerous factors (e.g., whether a motion to dismiss is filed, how long the judge takes to decide the motion, whether the plaintiff is permitted to amend its complaint).

Discovery: The discovery phase is the opportunity for the litigants to develop the facts. Illinois allows broad discovery in civil cases, similar to most U.S. jurisdictions. Discovery can be in written form through "requests for production" seeking documents, "interrogatories" seeking answers to certain questions, and "requests for admission" seeking admissions of certain limited facts. Discovery can also be in oral form through deposition. The discovery phase can last from several months to several years or more in complex cases. In certain cases (such as class actions or where expert testimony is involved), discovery may be divided into separate phases.

Summary Judgment: Parties may file motions seeking adjudication of all or part of a complaint based on a lack of a genuine dispute regarding a material fact. Such motions typically (but not always) follow the discovery phase. Whereas motions to dismiss during the pleading stage must typically assume the truth of the allegations in the complaint, motions for summary judgment may present facts either supporting or contradicting those allegations. Summary judgment may be granted where no reasonable "fact-finder" (i.e., a judge or jury) could conclude otherwise based on the application of the law to the facts presented. Where there is dispute regarding a fact or reasonable minds could differ regarding the interpretation of a fact, the issue must be resolved at trial by the fact-finder.

Trial: Disputed issues of fact are decided by a fact-finder at a trial. Illinois distinguishes between cases at law, where questions of fact are decided by a jury, and cases in equity, where questions of fact are decided by the judge (called a "bench trial"). A party seeking trial by jury must file a jury demand with its initial pleading (generally, the complaint or answer) or the right to jury trial is waived. The length of trial depends on many factors, including the types of claims, the number of parties, and whether it is a jury trial or a bench trial. There are currently no expedited civil trial procedures in Illinois.

Appeal: When a court makes a final determination as to the rights and obligations of the parties to a lawsuit, it issues a "judgment". Such judgment may be appealed to a higher court. Appeals of judgments (whether issued at the outset of a case or after a trial) are discussed below in question 9.4. The length of an appeal varies depending on numerous factors, including whether a decision on appeal is itself appealed.

Enforcement: Once a judgment becomes final, the prevailing party will seek to have it enforced. Enforcement of judgments is discussed below in question 9.3.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Under Illinois law, a forum selection clause in a contract is presumed valid and will be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances – i.e., that trial in the agreed upon forum would be so inconvenient for the opposing party that it would effectively deprive him of his day in court. In making that determination, Illinois courts look to: (i) which law governs the formation and construction of the contract; (ii) the residency of the parties involved; (iii) the place of execution and/or performance of the contract; (iv) the location of the parties and witnesses participating in the litigation; (v) the inconvenience to the parties of any particular location; and (vi) whether the clause was equally bargained for. Various statutes occasionally place other limitations on forum selection clauses.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Fees charged by attorneys to pursue or defend a claim vary depending on the type and complexity of the matter. Illinois courts follow the American Rule under which each party bears its own costs of litigation, including attorneys' fees, unless a statute or valid agreement between parties provides otherwise. The courts also have discretion to award costs and attorneys' fees as a sanction for frivolous pleadings or other misconduct.

In addition to paying attorneys for their time, litigants generally must also pay certain costs to commence an action, to file a jury demand, and for their attorney to appear to defend an action. These costs generally are in the range of several hundred dollars. Other fees also may apply.

Additionally, litigants may need to obtain an expert witness to testify or provide a report. Many experts charge an hourly rate and require a retainer as well as reimbursement of their costs (such as copying and travel costs).

Attorneys' fees must be reasonable (discussed below) but there are no rules that require budgeting of costs or attorney fees (though attorneys often provide budgets upon request).

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Under the Illinois Rules of Professional Conduct, the fees charged by an attorney must be reasonable. The factors considered in determining reasonableness include the time and labour involved, the complexity of the matter and technical skills required, the results obtained, and the fees customarily charged, among others. Contingent fees (i.e., fees conditioned in whole or in part on the outcome of the matter) are allowed except in domestic relations and criminal matters.

Parties normally are not required to post security for costs, although security may be required by statute in particular actions, such as *qui tam* cases or cases where the plaintiff is not a resident of Illinois and the action is for the plaintiff's benefit. As a condition to granting any restraining order or preliminary injunction, Illinois courts have discretion to require a bond or other security for costs and/or damages that may be incurred or suffered by any party who is incorrectly enjoined or restrained.

Additionally, the enforcement of a money judgment may be stayed upon appeal only if an appeal bond or other form of security, including, but not limited to, a letter of credit, escrow agreement, or certificate of deposit, is approved by and filed with the court within the time for filing a notice of appeal or within an extension of time granted by the court pursuant to Illinois Supreme Court Rule 305. The bond or other form of security must be in the amount of the judgment, plus costs and interest reasonably anticipated to accrue during the pendency of the appeal, although the court may in its discretion approve a bond or other form of security in an amount less than the full judgment plus costs and interest if additional conditions are placed to prevent dissipation or diversion of the debtor's assets during the appeal.

Litigation funding is discussed in question 1.7.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

As a general rule, actions for torts to property and most contract actions are assignable. Actions for personal injuries and some contract actions of a personal nature are not assignable.

Litigation funding, or the advancement of funds to a litigant in exchange for an interest in the outcome of the lawsuit, is rapidly gaining acceptance in the U.S. There is no definitive guidance under Illinois law that establishes the boundaries within which litigation funding is permitted. A recent and well-reasoned decision of the United States District Court for the Northern District of Illinois found that Illinois law provides no defence of maintenance (intermeddling in a lawsuit by maintaining or assisting either party to the action) or champerty (a species of maintenance in which the intermeddler makes a bargain with one of the parties to be compensated out of the proceeds of the action) against a plaintiff that entered into a contract for third-party funding of litigation expenses. *Miller UK Ltd. v. Caterpillar, Inc*., 17 F. Supp. 3d 711, 725 (N.D. Ill. 2014). While the *Miller* court did not expressly hold that third-party litigation funding contracts are legal generally, the court did find that the contract between the plaintiff and a third party for the funding of the litigation was not illegal, and, thus, that the affirmative defences were inapplicable. This ruling is consistent with a long history of Illinois cases that narrowly construe the doctrines of champerty and maintenance.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Illinois Code of Civil Procedure, Section 5/11–103 allows the court to require, at its discretion, a bond before entering a restraining order or a preliminary injunction. There is no process for obtaining a security for legal costs incurred, generally.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Notice is not required prior to filing an action except in rare situations. In certain cases, such as employment discrimination, plaintiffs are required to exhaust administrative remedies prior to filing a civil action. In medical malpractice cases, plaintiffs

must obtain a written determination from an expert that there is a reasonable and meritorious basis for filing the action. Additionally, plaintiffs may be required to provide notice prior to filing a breach of warranty claim under certain circumstances.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitations periods are established by statute, many of which are collected in Chapter 735, Article XIII, Section 5 of the Illinois Compiled Statutes (735 ILCS 5/13–101 *et seq*.). For example, unless a more specific statute applies, actions on a written contract or other written instrument are required to be commenced within 10 years after the cause of action accrues. Most personal injury actions are required to be commenced within two years after accrual. The limitations period for most actions involving injuries to property and typical business disputes that are not based on a written contract is five years.

A cause of action typically accrues when the plaintiff suffers an injury caused by the wrongful act of another. The limitations period is tolled under the "discovery rule" if the plaintiff shows that it did not know, and with reasonable diligence could not have known, of the injury and its cause within the limitations period.

Actions in equity are governed by the common law doctrine of *laches*, which bars a claim when the defendant has been prejudiced by the plaintiff's unreasonable delay in asserting the claim. In determining unreasonable delay, the courts often look to the statutes of limitation that would apply to comparable actions at law. Statutes of limitation are considered procedural under Illinois law, affecting only the remedy and not the substantive rights of the parties. *Freeman v. Williamson*, 383 Ill. App. 3d 933, 939, 890 N.E.2d 1127, 1133 (1st Dist. 2008).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Unless otherwise provided by statute, every action is commenced by the filing of a complaint. Service on individual defendants within Illinois may be made personally or at the defendant's residence if the summons is left with a resident of at least 13 years of age. Service on corporations is made through a registered agent or by personal service on any officer or agent of the corporation found in the State. Partnerships are served by service on any partner or agent found within the State. Service is deemed to have occurred on the date the individual (or entity) is served.

Parties outside Illinois may be served by personal service in like manner as if service were made within the State. If the party is subject to jurisdiction in the State (because of being a citizen or resident or having committed an act subjecting itself to jurisdiction), such service has the same force and effect as personal service within the State. Upon an evidentiary showing that personal service is impracticable after reasonable efforts have been made, the court may order service to be made in another manner consistent with due process, such as by publication.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Parties may obtain emergency injunctive relief in the form of a temporary restraining order or preliminary injunction to prevent a threatened wrong or other imminent irreparable harm until a final determination of the merits. A temporary restraining order preserves the *status quo* until a hearing can be held on an application for preliminary injunction. A verified complaint or supporting affidavits are required for an *ex parte* temporary restraining order. While *ex parte* temporary restraining orders are disfavoured, they may be granted without notice if the movant clearly shows that immediate and irreparable injury would otherwise result. A temporary restraining order granted without notice shall expire after a period not exceeding 10 days, unless good cause is shown or the party to which it is directed against consents to a longer period. A temporary restraining order filed with notice may be in place for more than 10 days, provided a preliminary injunction hearing is scheduled within a short period of time.

To obtain a preliminary injunction, the party seeking relief must demonstrate a clearly ascertainable right that needs protection, an imminent threat of irreparable injury, that there is no adequate remedy at law, and a substantial likelihood of success on the merits. The court also considers public policy and the balance of equities and relative hardships between the parties.

There are two types of injunctions: mandatory injunctions (commanding the performance of a positive act); and prohibitory injunctions (ordering a party to refrain from doing a particular act). Mandatory injunctions are not favoured and will only be granted in cases of great necessity.

Pre-judgment attachment at the time of commencement of an action or thereafter may be available to creditors asserting a money claim under the various conditions set out in the Illinois Code of Civil Procedure, Section 4–101.

3.3 What are the main elements of the claimant's pleadings?

All pleadings must contain a plain and concise statement of the pleader's cause of action, counterclaim, defence, or reply. Each separate cause of action upon which a separate recovery might be had must be stated in a separate count or counterclaim and must contain a specific prayer for relief. Illinois is a fact pleading state, unlike federal courts which require only notice pleading. Therefore, Illinois law requires the plaintiff to allege specific facts sufficient to establish his or her right to relief.

For any claim or defence founded upon a written instrument, a copy thereof must be attached to the pleading as an exhibit. Every pleading must be signed by the party or the party's attorney to certify to the best of the signer's knowledge, information, and belief that the pleading is well grounded in fact and is warranted by existing law or good-faith argument.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Illinois allows a liberal amendment of pleadings at any time before the final judgment on terms that are "just and reasonable" and do not cause prejudice to another party. New parties can be added by amendment after the expiration of the applicable limitations period only if the party sought to be added knew or should have known

within the limitations period that it would have been named but for a mistake of identity. New claims can be added by amendment after the expiration of the applicable limitations period only if they arise from the same transaction or occurrence as a claim filed against the same party within the limitations period.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Both Illinois Supreme Court Rule 219 and Illinois Code of Civil Procedure, Section 5/2–1009 address voluntary dismissal and its potential consequences. The plaintiff may voluntarily dismiss a complaint at any time before a trial or hearing begins.

However, Rule 219 of the Illinois Supreme Court prohibits a party from using dismissal in order to avoid complying with "discovery deadlines, orders or applicable rules". Where a Court finds that a party is using dismissal in the manner prohibited by Rule 219, the Court can require the party to pay the legal costs incurred by the opposing party (or parties) in defending the action, up to and including all discovery expenses.

If a plaintiff wishes to dismiss an action after a trial or hearing has begun, Illinois Code of Civil Procedure, Section 5/2–1009 mandates that a plaintiff may only dismiss "on terms fixed by the Court", either: (1) with a joint stipulation signed by the Defendant; or (2) on a motion specifying the grounds for dismissal, which should have an attendant affidavit or other proof.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In response to a complaint, a defendant may move to dismiss the complaint for any of the reasons stated in Illinois Code of Civil Procedure, Sections 5/2–615 and 5/2–619, including challenging the jurisdiction of the court, challenging the sufficiency of the complaint to state a cause of action upon which relief can be granted, or asserting that the action is barred by an affirmative matter such as the statute of limitations or a prior judgment between the parties. If the defendant's motion is granted, the court may nevertheless permit the plaintiff to amend his complaint in order to attempt to rectify the shortcoming that precipitated the dismissal.

If the defendant does not move to dismiss, or if the motion to dismiss is denied, the defendant is required to file an answer that admits or denies each factual allegation of the complaint and sets forth a short and plain statement of any counterclaim or defences, including the defence of set-off.

The facts constituting any affirmative defence (i.e., defences the defendant bears the burden of proving) must be plainly set forward in an answer or reply. Affirmative defences include: (i) payment; (ii) release; (iii) satisfaction; (iv) discharge; (v) licence; (vi) fraud; (vii) duress; (viii) estoppel; (ix) laches; (x) statute of frauds; (xi) illegality; (xii) contributory or comparative fault; (xiii) that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of non-delivery; (xiv) want or failure of consideration in whole or in part; and (xv) any other defence which by affirmative matter seeks to avoid the legal effect of or defeat a cause of action in whole or in part.

4.2 What is the time limit within which the statement of defence has to be served?

Defendants generally are required to file an answer or otherwise respond to the complaint within 30 days after service, excluding the date of service. Extensions of time are granted routinely for good cause, such as when a defendant reasonably requires additional time to retain counsel or to investigate the allegations.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The Illinois Code of Civil Procedure, Section 2–406 permits any defendant to bring a third-party complaint against any person not a party to the action that is or may be liable to the defendant for all or part of the plaintiff's claim. In addition, the court may require the addition of any parties that are necessary for the complete determination of the matters in controversy.

Additionally, the Illinois Code of Civil Procedure, Section 2–402 provides that plaintiffs may designate as respondents in discovery other parties believed by the plaintiff to have information essential to the determination of who should be properly named as additional defendants. Respondents in discovery shall be required to respond to discovery issued by the plaintiff in the same manner as defendants. Additionally, on motion of the plaintiff, respondents in discovery may be added as defendants within six months of being named as a respondent in discovery if the evidence discloses the existence of probable cause for such action. This is true even though the time during which an action might have otherwise been initiated against the respondent in discovery expired during such six-month period.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to answer or otherwise respond within the time required, the court may enter an order of default. The plaintiff may thereafter request the court to enter judgment by default and award damages and/or other relief requested in the complaint. In its discretion, the court may require proof of the allegations showing the plaintiff is entitled to relief.

After entry of an order of default, the defendant may appear and request the court to set aside the default; such requests are granted liberally if no judgment has been entered. If judgment has been entered, the defendant may still move to set aside that judgment, but generally must do so within 30 days after entry thereof. The party seeking to set aside such a judgment has the burden of establishing sufficient grounds to justify the request. A court's overriding concern is whether vacating the judgment would lead to substantial justice between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits. In exercising its discretion, the court balances the severity of the penalty and the attendant hardship on the plaintiff if required to proceed to a trial on the merits.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, a defendant can move to dismiss pursuant to the Illinois Code of Civil Procedure, Section 2–619 for lack of subject matter jurisdiction (i.e., that the court is not empowered to hear the subject matter of the dispute) or pursuant to Section 2–301 for lack

of personal jurisdiction (i.e., that the defendant was not properly served or cannot be sued at all in this particular court). Objections to subject matter jurisdiction can be raised at any time; lack of subject matter jurisdiction is not waivable and can be raised by the court on its own initiative. Objections to personal jurisdiction are waived by filing any responsive pleading that does not assert the objection.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

See question 4.3.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Actions pending in the same court may be consolidated to aid convenience whenever it can be done without prejudice to a substantial right. When civil actions involving one or more common questions of law or fact are pending in different judicial circuits, the Supreme Court may transfer all such actions to one circuit for consolidated pre-trial, trial, or post-trial proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

The trial court has discretion to order separate trials of any cause of action, counterclaim or third-party claim to promote convenience or efficiency.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Illinois circuit courts are divided into divisions and departments to which cases are assigned on the basis of the subject matter, the relief sought, and the nature of the claims asserted. Specific divisions and methods of assignment vary by circuit.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Illinois courts have broad discretion to manage their cases. Among other things, Illinois courts are authorised to set and modify deadlines (so long as such deadlines are not jurisdictional), dismiss or strike defective claims or pleadings, supervise discovery, grant summary judgments, rule on evidentiary disputes, and sanction litigants or third parties subject to the court's jurisdiction.

Under the American Rule, each party typically is responsible for its own costs and fees. Costs and fees may be shifted to another party only by agreement between the parties, by fee-shifting statute awarding costs and fees to the prevailing party, or by court order. For example, (as discussed below), a court may order a party to pay the costs and fees of his adversary where the party pursued a frivolous argument in refusing to cooperate in discovery and the adversary was forced to seek the court's assistance in procuring the information from that party.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Illinois courts may impose sanctions for frivolous pleadings, failure to respond to valid discovery requests, failure to comply with a court order, or other conduct that is disrespectful toward the authority of the court. The most common sanction is to require the offending party to pay the other party or parties' reasonable expenses, and/or attorneys' fees incurred as a result of the sanctionable conduct. When the offending party's conduct is extreme or has caused prejudice, the courts also may impose a monetary fine, bar the offending party from offering certain evidence, strike the offending party's pleadings with respect to the relevant issue, or dismiss the matter altogether.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

As discussed above in question 4.1, upon motion, Illinois courts will dismiss or strike any claim that is insufficient in law or that is barred by any affirmative matter that appears on the face of the complaint or can be established on undisputed facts. The courts also may strike immaterial matter, dismiss mis-joined parties, and may strike all or part of a party's pleadings as a sanction for failure to comply with discovery or other misconduct.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Civil courts in Illinois may enter summary judgment if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court has discretion to enter partial summary judgment. If summary judgment will not dispose of all of the issues in the case, the court may: (1) allow the motion and delay judgment; (2) allow the motion and enter judgment; or (3) allow the motion, enter judgment, and stay enforcement pending the determination of the remaining issues.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Illinois courts have broad discretion to stay proceedings. Discovery may be stayed in whole or in part pending the determination of a motion to dismiss or other matter that might moot the requested discovery. Stays are commonly granted where some or all of the issues before the court are the subject of and likely to be determined in an administrative proceeding, another court action, or through arbitration.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Illinois permits broad discovery into any matter relevant to the subject matter of the action. The basic methods of discovery include written interrogatories, requests for production of documents and electronic records or other tangible things, inspection of real estate, subpoenas to non-parties, and depositions. Discovery may be conducted in any sequence unless otherwise directed by the court. Documents and other evidence are exempt from discovery if they are not relevant to the subject matter of the litigation or if they fall within a recognised privilege. Discovery can also be obtained by an action designating one or more persons as respondents in discovery if the plaintiff believes they have information essential to determining who should be named as defendants in the action.

Illinois Supreme Court Rules 201, 214 and 218 specifically address electronic discovery. For example, Rule 218 encourages parties to address potential electronic discovery issues during their initial case management conference, and Rule 214(b) mandates that "if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained, or in a reasonably usable form or forms".

In addition, the Illinois Rules of Evidence address inadvertent disclosure of privileged or protected information during discovery (which may occur as a result of predictive coding). Specifically, Rule 502(b) and 502(d) of the Illinois Rules of Evidence allow for a court to order that privilege is not waived in the current or any other proceeding by the inadvertent disclosure of otherwise privileged materials in the litigation pending before the court issuing the order.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The attorney-client privilege protects from disclosure of any communications made in confidence between a client and the client's attorney for the purpose of obtaining legal advice. The attorney work product doctrine, often called a privilege, protects materials prepared by or for a party or its counsel in preparation for trial to the extent that such materials disclose their theories, mental impressions or litigation plans. Illinois also recognises common law privileges protecting confidential communications between spouses, patient and physician, priest and penitent, and in some instances insured and insurer. Related to the patient/physician privilege, the *Petrillo* doctrine prohibits defence attorneys from engaging in *ex parte* communications with the plaintiff's treating physicians and other healthcare providers outside of the formal discovery rules set forth in the Illinois Supreme Court Rules.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties may be subpoenaed for production of documents and tangible things (a subpoena *duces tecum*), to require their appearance and testimony in a deposition, trial or other evidentiary proceeding (a subpoena *ad testificandum*), or both. Third parties may move to quash requests that are unduly burdensome. The court may also order conditions such as payment of the third party's reasonable expenses.

Additionally, Illinois law allows for respondents in discovery to be named in complaints. Once a respondent in discovery has been named, the plaintiff has six months (which can be extended under limited circumstances) to either convert the respondent to a defendant or dismiss the respondent from the case. A respondent in discovery may be made a defendant during this period even though the time during which an action otherwise could have been initiated against such respondent expired during this period.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Illinois courts have broad discretion to supervise discovery. The court usually establishes a discovery schedule, which may include a sequence of discovery. The court also rules on objections to discovery that cannot be resolved by agreement and on other discovery motions or disputes (e.g., ordering a party to produce documents, granting a protective order and ordering that certain documents need not be produced). However, an Illinois court will not entertain a motion related to a discovery dispute unless the parties engage in reasonable attempts to resolve their differences prior to motion practice. Every motion regarding discovery must include a statement confirming that the relevant attorneys attempted to resolve the dispute without court intervention.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

A party may not seek discovery for any improper purpose such as annoyance, embarrassment, or oppression. When discovery involves confidential personal or business information, the court upon motion normally will enter a protective order restricting the use of such information and the persons to whom it may be disclosed. Parties may also redact sensitive information from responsive documents. Additionally, Illinois Supreme Court Rule 138 requires parties to redact "personal identity information" such as social security numbers and financial account numbers from documents filed with the court.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The Illinois Rules of Evidence, modelled after the Federal Rules of Evidence, went into effect on January 1, 2011. Prior to 2011, Illinois evidentiary rules were dispersed throughout case law, statutes, and Illinois Supreme Court Rules. The Illinois Rules of Evidence are not intended to abrogate or supersede any statutory rules of evidence.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All relevant evidence is admissible unless otherwise provided by law. Evidence is relevant if it tends to make any fact of consequence to the determination of the action more or less probable than it would be without the evidence. Otherwise, relevant evidence may

nonetheless be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The Illinois Rules of Evidence offer specific rules regarding when character evidence and hearsay evidence are admissible.

An expert witness qualified by knowledge, skill, experience, training, or education may testify if scientific, technical, or other specialised knowledge within his or her expertise will assist the trier of fact to understand the evidence or to determine a fact in issue. Illinois state courts apply the *Frye* standard of general acceptance when considering the admissibility of expert evidence. Illinois is in the minority of states to apply *Frye*: all federal courts and most state courts apply the *Daubert* standard.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Every witness must testify under oath or affirmation. Fact witnesses are permitted to testify only to matters within their personal knowledge. Witnesses may give written statements in the form of affidavits or declarations, which also must be under oath and based on personal knowledge. Generally, written statements are not admissible at trial if the witness does not appear to testify and be cross-examined. However, there are limited situations where affidavits or previous deposition testimony may be admitted *in lieu* of personal appearance at trial. Additionally, depositions may be used at trial for impeachment or as admissions against a party admission.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Illinois Supreme Court Rule 213 distinguishes independent expert witnesses from controlled expert witnesses. Independent expert witnesses are generally fact witnesses not retained by any party but who also possess an expertise such that they may have expert opinions to offer. One example of an independent expert witness would be a treating physician. Controlled expert witnesses, on the other hand, are explicitly retained by the party offering them. Prior to trial, parties are required to disclose expert witnesses, the subject matters on which they will testify, and their expected conclusions and opinions. For controlled experts, parties must also produce the bases for each expert's opinions, the expert's qualifications, and any report prepared by the expert witness about the case. To the extent that a party or its attorney gives instructions to an expert that form part of the basis for the expert's conclusions or opinions, those instructions would be subject to disclosure. An expert may testify in court to conclusions or opinions without first testifying to the underlying facts and data, but must disclose the underlying facts and data on cross-examination if requested.

Party-retained experts do not owe duties to the court except the duty of all witnesses to testify truthfully. The Illinois Rules of Evidence do not provide for court-appointed experts.

Illinois does not currently have any rules that explicitly prohibit or allow the use of concurrent expert testimony.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Upon final determination of the rights and obligations of the parties, Illinois courts may enter judgment awarding any lawful relief to which any party is entitled. The most common relief is money damages. Where money damages do not provide a complete remedy or where the law otherwise provides, a court may order injunctive or other equitable relief. As discussed above, pre-judgment relief is more limited and normally granted only to preserve the *status quo* or to prevent imminent irreparable harm.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

In jury trials, the amount of damages, if any, is determined by the jury. The courts have some powers to reduce a jury award if it is excessive. In a bench trial, the amount of damages is determined by the court. Judgments for money damages are subject to post-judgment interest at the rate of 9% *per annum* (6% if the judgment debtor is a governmental entity) from the date of the judgment until satisfied.

Pre-judgment interest is awarded only if authorised by statute or contract. The Illinois Interest Act, 815 ILCS 205/2, provides for pre-judgment interest to be awarded on monies due on a bond, bill, promissory note or other written instrument and permits pre-judgment interest on monies vexatiously withheld and in certain other circumstances. In these circumstances, interest accrues at the rate of 5% *per annum* on all moneys after they become due. Various other statutes authorise pre-judgment interest for specific actions.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Judgments may be enforced in Illinois by levy against real or personal property of the debtor or by garnishment of wages or other assets of the debtor in the possession of a third party. The dominant procedure is a citation to discover assets, which may be brought against the judgment debtor or any other person reasonably believed to possess or control assets of the debtor. The citation initiates a supplemental proceeding to discover assets or income of the debtor and compel their application toward satisfaction of the judgment. Service of the citation upon any respondent imposes a lien upon any property of the debtor in the respondent's possession.

Judgments validly entered by the courts of another state within the United States are given full faith and credit and may be enforced in the same manner as a judgment by a court in Illinois. With respect to judgments of a foreign country, Illinois follows the Uniform Foreign-Country Money Judgments Recognition Act (Illinois Code of Civil Procedure, Section 5/12–661). Such judgments will not be recognised if they were rendered without jurisdiction or in proceedings not compatible with due process, and may not be recognised for limited additional reasons set forth in the statute (such as the foreign court lacked jurisdiction or circumstances raise substantial doubts about the integrity of the foreign court).

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Every final judgment of a circuit court in a civil case is appealable as of right to the Illinois Appellate Court. The appeal is initiated by filing a notice of appeal within 30 days. Certain cases are directly appealable to the Illinois Supreme Court, such as cases in which a statute of the United States or the State of Illinois is held invalid. Appeals of Appellate Court judgments to the Illinois Supreme Court are requested by a petition for leave to appeal, which must be filed within 35 days after the entry of the judgment pursuant to Illinois Supreme Court Rule 315. Whether such a petition will be granted is a matter of sound judicial discretion.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The Illinois Supreme Court Rules provide for mandatory arbitration proceedings in certain small civil actions in which the plaintiff is only seeking money. The programme is available only in judicial circuits which, with the approval of the Supreme Court, elect to utilise the procedure or which are directed to use the procedure by the Supreme Court. Whether an action within a participating judicial circuit is subject to mandatory arbitration depends on whether the amount of money in dispute is below the maximum amount authorised by the Supreme Court for that circuit, and other local rules adopted by the judicial circuit.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration and mediation are the most common methods of alternative dispute resolution. In limited circumstances, either arbitration (typically binding) or mediation (typically non-binding) is available through the court system. More often, the parties engage private mediators or arbitrators. If the parties agree, a subject matter expert can act as an arbitrator or mediator.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation generally is conducted in the circumstances and according to the procedures to which the parties and the mediator agree. Arbitration usually occurs when one of the parties makes a demand for arbitration pursuant to a binding agreement between the parties to arbitrate disputes. Absent unusual circumstances, the arbitration would be conducted in a forum and according to rules and procedures set forth in the underlying agreement to arbitrate. Additionally, the Federal Arbitration Act (FAA) applies to state court proceedings where the transaction at issue involves interstate commerce. It requires parties to engage in arbitration where they have previously agreed to do so and requires arbitration awards to be confirmed by a court of law.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

It would be highly unusual for arbitration or mediation to be prohibited in any kind of commercial dispute. Moreover, under Illinois law, the FAA pre-empts a state law that would otherwise hold arbitration clauses invalid on grounds that apply only to the arbitration clause. However, Illinois courts may refuse to enforce arbitration clauses that are substantively or procedurally unconscionable.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Illinois courts routinely will enforce a valid agreement between the parties to mediate or arbitrate disputes. However, it is a basic tenet of Illinois law that the parties are only bound to arbitrate those issues they have clearly agreed to arbitrate. The courts also regularly stay proceedings pending arbitration or mediation and may grant other temporary relief in aid of the parties' ADR efforts. Absent an enforceable agreement, Illinois courts rarely would compel arbitration or mediation of a substantial commercial dispute. Illinois practice with respect to these matters is similar to other states.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Mediation is non-binding, and absent a court order directing a party to participate in a mediation, it would be unusual for a party to be sanctioned for refusing to mediate. Settlements reached in mediation do not need to be documented with the court except insofar as the settlement would otherwise require court approval, such as the settlement of a class action on a class-wide basis.

Arbitration is binding upon the parties to the agreement to arbitrate. Unless the parties have otherwise agreed, arbitration decisions are subject to judicial review only on very limited grounds such as corruption, fraud, or if the arbitrator exceeds his or her powers under the governing arbitration agreement. This is similar to practices in federal court and other states.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

Various alternative dispute resolutions institutions provide mediation and arbitration services in a number of substantive areas of expertise. Some of the major institutions include the American Arbitration Association (AAA) and JAMS. In addition, there are industry-specific alternate dispute resolution bodies. For example, the National Futures Association provides arbitration services for disputes between and among members.

Justin O. Kay
Drinker Biddle & Reath LLP
191 N. Wacker Dr., Ste. 3700
Chicago
IL 60606–1698
USA

Tel: +1 312 569 1381
Email: justin.kay@dbr.com
URL: www.drinkerbiddle.com

Named one of the 2017 Emerging Lawyers in Illinois by Leading Lawyers and featured in *Benchmark Litigation*'s 2017 "Under 40 Hot List", Justin O. Kay is a partner at Drinker Biddle and Reath LLP, based in the firm's Chicago office. Justin is a vice chair of the firm's Class Actions Team; a member of the Telephone Consumer Protection Act Team and California Retail Class Actions Initiative; and Chair of the firm-wide National Hiring Committee. His practice focuses on complex civil matters in federal court, in state court, and before federal agencies. He primarily defends corporations in class action cases involving consumer protection laws.

Matthew M. Morrissey
Drinker Biddle & Reath LLP
191 N. Wacker Dr., Ste. 3700
Chicago
IL 60606–1698
USA

Tel: +1 312 569 1365
Email: matthew.morrissey@dbr.com
URL: www.drinkerbiddle.com

Matthew M. Morrissey is an associate with Drinker Biddle & Reath LLP and a member of its Class Actions Team, Telephone Consumer Protection Act (TCPA) Team and California Retail Class Actions Initiative in the Litigation Group. Matt litigates claims in federal and state courts throughout the country. Specifically, he represents clients in commercial disputes, class actions, internal investigations and complex corporate governance litigation. Matt also has experience defending clients facing regulatory and enforcement actions involving federal, state and municipal authorities. Matt is a regular contributor to the firm's TCPA blog, which provides breaking news and important insights about the TCPA. The firm has also featured his work on its SEC Law Perspectives Blog, which provides reports, discussions, and analysis on noteworthy trends in enforcement and regulatory activity of the U.S. Securities and Exchange Commission.