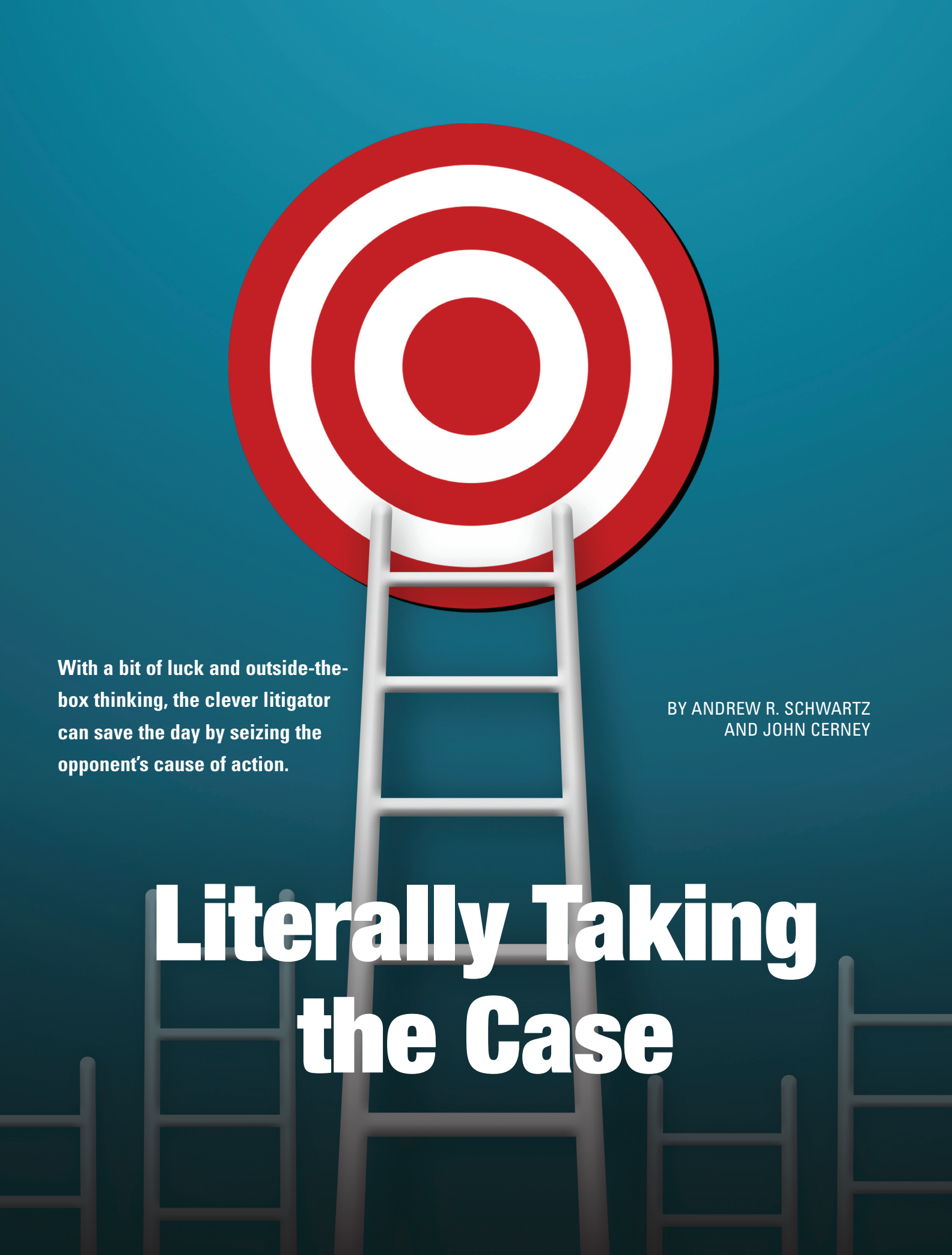

With a bit of luck and outside-the-box thinking, the clever litigator can save the day by seizing the opponent's cause of action.

BY ANDREW R. SCHWARTZ
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Literally Taking the Case

IMAGINE THE FOLLOWING SCENARIO: WITHOUT FIRST CONSULTING ITS LAWYERS, your firm's major client, Hapless Client, LLC ("Hapless") entered into a horrible one-sided contract with Sketchy Business, Inc. ("Sketchy"). To make matters worse, Sketchy just filed a contract claim against Hapless to enforce that contract, and Sketchy's complaint seeks massive damages that could put Hapless out of business permanently. An interview with Hapless confirms the truth of the essential allegations of the complaint. Since the complaint states a viable claim, a motion to dismiss will fail. Litigation might buy Hapless some time, but Sketchy will likely win on summary judgment. Settlement appears doubtful; Sketchy knows the strength of its case, and its settlement demand exceeds Hapless' ability to pay. Naturally, Hapless expects you to pull a rabbit out of your hat. What do you do?

As Happless' attorney, you know this desperate situation will require creative thinking. Your research about Sketchy shows that it has a long and colorful history in the courts, including an unsatisfied adverse judgment in favor of J. Creditor, LLC ("J. Creditor"). Here, a rather unusual strategy presents itself: Purchase J. Creditor's judgment against Sketchy. With that judgment, Hapless can then seize Sketchy's claim, *i.e.* its "chose in action" against Hapless.

While this unorthodox approach seems far-fetched, it can actually work (the authors of this article have used it successfully). With that in mind, it is worth exploring Illinois law governing "choses in action," how to seize them, and how doing so can save your client from a desperate situation.

What is a "chose in action"?

The term "chose in action" refers to a right to bring an action to recover a debt, money, or thing.[1] However, the chose-in-action concept is surprisingly vague considering that Illinois law has recognized it for more than a century.[2] In *Unifund CCR Partners v. Shah*, the First District of the Illinois Appellate Court defined a chose in action as a proprietary right *in personam*, noting that debts "are a type of intangible property known as a chose in action …."[3] In *Gonzalez v. Profile Sanding Equipment, Inc.*, the First District further explained the concept: "In looking at the definition of 'chose,' we find it akin to an instance where a party has a 'cause' for some duty due to him or her, or something similar to 'rights' under a contract or a breach of that contract."[4] The *Gonzalez* Court went on to explain: "[I]f a party to a contract alleges that the contract has been breached, then that party has a chose in action for breach of contract."[5]

Anglo-American law traditionally defines the term "chose in action" broadly. English legal historian Sir William Searle Holdsworth explained "the category of choses in action is in English law enormously wide, and that it can only be defined in very general terms."[6] According to Holdsworth, the term "chose in action" describes all personal rights of property that can only be claimed or enforced by action, and not by taking physical possession.[7] Holdsworth wrote: "In its primary sense the term '*chose* in action' includes all rights which are enforceable by action—rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach."[8]

This quote suggests that the term "chose in action" encompasses all personal things that can only be enforced through an "action," including contract rights. The Fourth District of the Illinois Appellate Court once explained "[t]he term 'chose in action' is of very comprehensive import, and includes the almost infinite variety of contracts, covenants and promises, which confer on one party a right to recover a personal chattel or a sum of money from another by action."[9]

Some ancient Illinois cases such as *Glass v. Doane* suggest that only money-damage claims can qualify as a "chose in action."[10] There, the First District wrote, "[i]t is doubtless the rule that legal rights only are subject to garnishment, and that mere equitable interests

1. *Chose in action*, Black's Law Dictionary (11th ed. 2019).
2. See, *e.g.*, *Ellis v. People*, 199 Ill. 548, 552 (1902).
3. *Unifund CCR Partners v. Shah*, 407 Ill. App. 3d 737, 741 (1st Dist. 2011).
4. *Gonzalez v. Profile Sanding Equipment, Inc.*, 333 Ill. App. 3d 680, 694 (1st Dist. 2002).
5. *Id.*
6. W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 Harv. L.Rev. 997 (1920).
7. *Id.*
8. *Id.*
9. *Chaffin v. Nichols*, 211 Ill. App. 109, 115 (4th Dist. 1918).
10. *Glass v. Doane*, 15 Ill. App. 66, 71 (1st Dist. 1884).

TAKEAWAYS >>

- Fighting a claim by purchasing a plaintiff's debts and then seizing its chose in action against the defendant may subvert the plaintiff's ability to collect damages.
- In Illinois, not all claims are assignable; in particular, claims that implicate clear public policy concerns.
- When faced with any lawsuit, consider investigating whether the plaintiff owes any debts, which may present creative options favoring your client.

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THE TERM "CHOSE IN ACTION" REFERS TO A RIGHT TO BRING AN ACTION TO RECOVER A DEBT, MONEY, OR THING. HOWEVER, THE "CHOSE IN ACTION" CONCEPT IS SURPRISINGLY VAGUE CONSIDERING THAT ILLINOIS LAW HAS RECOGNIZED IT FOR MORE THAN A CENTURY.

in choses in action, can not be reached by this process."[11] Another 19th-century case, *Burgess v. Capes, for Use of*, defined "chose in action" as "a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with a contract, but which can not be enforced without action."[12] These cases are too old to be precedential,[13] but they do suggest the limits of what qualifies as a "chose in action."

More recently, in 1968, the Second District of the Illinois Appellate Court in *Baron v. Villareal* held that the "process of garnishment, being a legal proceeding given by statute, only entitles a party to recover such indebtedness as could be recovered by an action of debt, or *indebitatus assumpsit*, in the name of the attachment or judgment debtor against the garnishee."[14] *Baron* has limited precedential value because it applied the Garnishment Act,[15] which Illinois courts construe strictly.[16]

By contrast, the supplementary proceedings statute[17] likely envisions a broader definition of "choses-in-action." In *City of Chicago v. Air Auto Leasing Co.*, the First District held that Illinois courts construe supplementary proceedings liberally, noting that section 2–1402 of the Illinois Code of Civil Procedure provides not only for the discovery of a debtor's assets and income, but also vests the courts with "broad powers to compel the application of discovered assets or income to satisfy a judgment."[18]

In our hypothetical, Sketchy's breach-of-contract claim against Hapless qualifies as a "chose in action" against Hapless.

Seizing a "chose in action"

In the case of *Hapless*, J. Creditor is a judgment creditor to Sketchy (*i.e.,* a person having a legal right to enforce execution of a judgment for a specific sum of money).[19] In Illinois, a judgment creditor may execute upon a "chose-in-action" of the judgment debtor in satisfaction of the judgment. Section 2-1402(c)(1) authorizes the courts to compel judgment debtors, like Sketchy, "to deliver up, to be applied in satisfaction of the judgment, in whole or in part, money, ***choses in action***, property or effects in his or her possession or control …."[20] The judgment creditor does this by filing a "motion for turnover order" within the supplementary proceedings.

Through the supplementary proceedings statute, J. Creditor has the right to seize Sketchy's cause of action against Hapless, effectively taking over the case as a means to satisfy Sketchy's debt to J. Creditor. J. Creditor may not want such an asset, as most sane businesses try to avoid new litigation rather than seek it out. Perhaps J. Creditor would prefer to monetize its judgment against Sketchy and move on with its regular business?

Judgments as transferable assets

As Hapless' attorney, you should investigate any judgments against Sketchy. Judgments are public records, and we know of several software programs that search public records, including the PeopleMap system in Westlaw that the authors currently use. Hapless' lawyer could also hire an investigator or have her paralegal search the records of the court system for jurisdictions where Sketchy transacts business.

Judgments can be bought and sold.[21] Therefore, if a judgment against Sketchy exists, Hapless may consider trying to buy it from Sketchy's creditor. If Sketchy has not paid that judgment, its creditor may be willing to sell that judgment—possibly at a discount. Hapless could then use the judgment against Sketchy to force a turnover of Sketchy's claim against Hapless.

A party looking to acquire a judgment must recognize that Illinois law does not permit the turnover of certain types of claims. Illinois treats the turnover of a chose in action as a "compelled assignment,"[22] and a judgment creditor

11. *Id.*
12. *Burgess v. Capes, for Use of*, 32 Ill. App. 372, 374 (3d Dist. 1890), *aff'd sub nom. Capes v. Burgess*, 135 Ill. 61 (1890).
13. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 95 (1996).
14. *Baron v. Villareal*, 100 Ill. App. 2d 366, 372 (2d Dist. 1968).
15. Ill. Rev. Stat. 1967, ch. 62, par. 33.
16. *Baird v. Senne*, 13 Ill. App. 3d 226, 228 (1st Dist. 1973).
17. 735 ILCS 5/2-1402.
18. *City of Chicago v. Air Auto Leasing Co.*, 297 Ill. App.3d 873, 878 (1st Dist. 1998).
19. *Judgment creditor*, Black's Law Dictionary (11th ed. 2019).
20. 735 ILCS 5/2-1402(c)(1) (emphasis added).
21. *Reynolds v. Retirement Board of Firemen's Annuity & Benefit Fund of Chicago*, 2013 IL App (1st) 120052 at ¶ 31 ("In Illinois, as in most states, judgments are assignable").
22. *Phelan by Phelan v. State Farm Mutual Automobile Insurance Co.*, 114 Ill. App. 3d 96, 101-02 (1st Dist. 1983).

ISBA RESOURCES >>

- David K. Staub, *How Limited Is Limited Liability?*, Trusts & Estates (May 2020), law.isba.org/3jlv0Hm.
- ISBA Free On-Demand CLE, *The Basics of the Fair Debt Collection Practices Act* (recorded Oct. 3, 2019), law.isba.org/31zHvcq.
- ISBA Free On-Demand CLE, *Litigating in an E-World: E-Discovery, Forensics, and Open Source Intelligence in Research* (recorded Sept. 17, 2019), law.isba.org/3kmFcR7.

cannot execute upon a "non-assignable" right by turnover motion. Therefore, if Sketchy had a "non-assignable" claim, then J. Creditor could not seize it; Hapless would not want to pursue the purchase of such a judgment.

But Illinois law does permit the assignment of most claims: Assignability is the rule and nonassignability is the exception. In *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.,* the Illinois Supreme Court explained: "The only causes of action that are not assignable are torts for personal injuries and actions for other wrongs of a personal nature, such as those that involve the reputation or feelings of the injured party. These limitations are based primarily on public policy concerns."[23] Common law and statutory rights are generally assignable absent a clear statute or public policy to the contrary.[24]

Illinois law permits the transferability of claims arising from property rights. The Court long ago held that "claims for property and for torts done to property are generally to be regarded as assignable, especially in bankruptcy and insolvency."[25] Illinois law considers contract rights as a species of property.[26] Therefore, J. Creditor and/or Hapless could use a judgment against Sketchy to execute upon Sketchy's contract claim against Hapless.

Examples of assignable claims under Illinois law also include tort claims seeking punitive damages for fraud,[27] bad-faith claims against insurance companies,[28] and rights of contribution against joint tortfeasors.[29] By contrast, Illinois generally does not permit the assignment of legal malpractice claims[30] or personal-injury claims.[31] Statutory claims based upon penal statutes also appear nonassignable. In *Italia Foods, Inc. v. Sun Tours, Inc.,* the Second District answered a certified question, stating "[g]enerally, if a statute is penal, claims thereunder are not assignable, because they are personal rights."[32] However, the Illinois Supreme Court vacated that portion of the Second District's opinion as a moot question.[33]

Questions exist as to whether a creditor may execute upon equitable claims. As discussed above, some older cases hold that only claims at law may be garnished while equitable rights cannot.[34] However, these cases preceded the supplementary proceedings statute, which Illinois courts construe liberally. Many of these cases also occurred when Illinois had separate courts of law and equity and preceded our current scheme of civil procedure.

Conclusion

In our hypothetical, Hapless should certainly consider buying J. Creditor's judgment against Sketchy. With that judgment in hand, Hapless could then move for a turnover of Sketchy's "chose in action" against Hapless. Once it obtains the right to Sketchy's claim, Hapless can dismiss the claim with prejudice and thereby defeat the "indefensible" contract claim against it.

A PARTY LOOKING TO ACQUIRE A JUDGMENT MUST RECOGNIZE THAT ILLINOIS LAW DOES NOT PERMIT THE TURNOVER OF CERTAIN TYPES OF CLAIMS. ILLINOIS TREATS THE TURNOVER OF A CHOSE IN ACTION AS A "COMPELLED ASSIGNMENT," AND A JUDGMENT CREDITOR CANNOT EXECUTE UPON A "NON-ASSIGNABLE" RIGHT BY TURNOVER MOTION.

23. *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill. 2d 214, 225 (1998).
24. *Amalgamated Transit Worker's Union v. Pace Suburban Bus Division of Regional Transit Authority,* 407 Ill. App. 3d 55, 60 (1st Dist. 2011).
25. *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 110 (1897).
26. *Metropolitan Trust Co. v. Jones*, 384 Ill. 248, 252 (1943).
27. *Kleinwort Benson North A*merica, 181 Ill. 2d at 225.
28. *O'Neill v. Gallant Insurance Co.*, 329 Ill. App. 3d 1166, 1186 (5th Dist. 2002); *Phelan by Phelan v. State Farm Mutual Automobile Insurance Co.*, 114 Ill. App. 3d 96, 101-02 (1st Dist. 1983).
29. *Block v. Pepper Construction Co.*, 304 Ill. App. 3d 809, 813 (1st Dist. 1999).
30. *Gonzalez v. Profile Sanding Equipment, Inc.*, 333 Ill. App. 3d 680, 694 (1st Dist. 2002).
31. *Illinois Farmers Insurance Co. v. Makovsky*, 293 Ill. App. 3d 77, 85 (1st Dist. 1997).
32. *Italia Foods, Inc. v. Sun Tours, Inc.*, 399 Ill. App. 3d 1038, 1064 (2d Dist. 2010) (internal citation omitted).
33. *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶ 42.
34. *Glass v. Doane*, 15 Ill. App. 66, 71 (1st Dist. 1884).