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This 2024 handbook revises and replaces the 2021 edition of this title.

IICLE® is grateful to LaVon M. Johns for her generous donation of time and knowledge in serving as the General Editor and an author for this handbook edition. IICLE® is also grateful to the chapter authors for their dedication to this project. We are able to continue to publish current, accurate, and thorough practice handbooks because of the generous donation of time and expertise by volunteer authors like them.

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REAL ESTATE LITIGATION

2024

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Table of Contents

Preface	ix
About the Authors	xi
1. Reformation	1 — 1
Hal R. Morris	
Megan Warshawsky	
Jack J. Brinker	
2. Breach of Real Estate Contract: Specific Performance	2 — 1
Mark C. Goldenberg	
Kevin P. Green	
3. Suits To Quiet Title in Real Estate	3 — 1
Hal R. Morris	
Megan Warshawsky	
Jack J. Brinker	
4. Suits To Partition Interests in Real Estate	4 — 1
Hal R. Morris	
Megan Warshawsky	
Jack J. Brinker	
5. Affirmative Claims, Predatory Lending, and Potential Class Actions	5 — 1
Daniel A. Edelman	
Tara L. Goodwin	
6. Residential Real Estate Mortgage Foreclosure: Plaintiff-Lender’s Case	6 — 1
James V. Noonan	
Mitchell A. Lieberman	
Jill Sidorowicz	
7. Loan Commitment Litigation and the Illinois Credit Agreements Act	7 — 1
LaVon M. Johns	
David Aguilar	
Peter McGrath Zagotta	
8. Condominium, Townhome, and Homeowners’ Association Litigation	8 — 1
Nicholas R. Mitchell	
9. Real Estate Broker Litigation	9 — 1
LaVon M. Johns	

10. Property Tax Litigation **10 — 1**
 Ares G. Dalianis
 Scott R. Metcalf

11. Construction Litigation **11 — 1**
 Eric L. Singer
 Ryenne Bush Dent
 Michael D. Pisano

12. Litigation Related to Real Estate Installment Contracts **12 — 1**
 David R. Gray, Jr.

Index **a — 1**

Preface

As General Editor of this edition of REAL ESTATE LITIGATION, I have had the opportunity once again to stretch my legal mind! As the real estate market over the past decade has been challenged, so too have there been significant challenges in the courts and real estate regulations. The COVID years and the aftermath have certainly presented us with its own real estate challenges. Once again, the authors of this 2024 edition were asked to step up to the plate and showcase their breadth of experience during these challenging times. And we did it!

The law related to real estate litigation continues to be codified into new rules, regulations, and decisions. As with our prior editions of REAL ESTATE LITIGATION, our goal in this 2024 edition is to educate both the experienced and the newly licensed practitioner about those issues that are commonly the subject of litigation with regard to real property. It is our goal to provide an introduction and, in many cases, a framework for filing an action in which the subject at issue is real property.

I want to thank the excellent editorial staff of IICLE® for keeping us on task. Each of you has demonstrated an extraordinarily professional approach to the publication of this handbook, especially in these challenging times. You all have made this process seamlessly enjoyable.

To all of the authors, I am honored and privileged that you accepted the challenge to contribute to this publication. I congratulate each of you on another job well done and thank you for the countless hours you provided in order to make this edition a success.

Finally, I want to personally thank my son, Luke, who has always had enough patience and understanding to afford me the privilege to commit to the hours required to take on this worthwhile project. It is your support that keeps me encouraged as I blaze new trails in my career.

LaVon M. Johns
General Editor
June 2024

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1

Reformation

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- I. [1.1] Scope of Chapter**
- II. [1.2] Introduction**
- III. [1.3] Presumption of Validity of a Writing**
- IV. [1.4] Elements of Reformation**
 - A. [1.5] Parties' Meeting of Minds
 - B. [1.6] Agreement Reduced to Writing
 - C. [1.7] Variance Between Agreement and Writing
 - D. [1.8] Legal Basis for Reformation
- V. [1.9] Reformation Is *Not* Rescission**
- VI. Instruments Subject to Reformation**
 - A. [1.10] In General
 - B. [1.11] Examples
- VII. [1.12] Instruments Not Subject to Reformation**
- VIII. [1.13] Grounds for Relief**
 - A. [1.14] Mutual Mistake of Fact
 - B. [1.15] Unilateral Mistake Accompanied by Fraud
 - C. [1.16] Mutual Mistake of Law
- IX. [1.17] Parties to Reformation**
- X. Pleading**
 - A. [1.18] In General
 - B. [1.19] Checklist for Drafting Complaint with Sample Language
- XI. Defenses to Reformation**
 - A. [1.20] Equitable Defenses
 - B. [1.21] Other Defenses

XII. [1.22] Non-Defenses to Reformation

XIII. [1.23] Burden of Proof and Findings

XIV. [1.24] Appellate Standard

XV. [1.25] Conclusion

I. [1.1] SCOPE OF CHAPTER

This chapter reviews the law relating to reformation of contracts. Specifically, this chapter examines the elements of reformation, the various instruments subject to reformation, the legal bases for reformation, and the presumption of validity accorded writings. Additionally, this chapter presents a checklist for drafting a reformation pleading as well as common defenses (and non-defenses) to a reformation action.

II. [1.2] INTRODUCTION

Illinois and federal law respect the sanctity of arm's-length contracts. Parties are permitted to contract as they see fit, with whom they see fit, and on terms they see fit to accept. Neither the law nor courts become involved in the sufficiency of the bargain because courts do not extricate parties from bad deals entered into willingly. *Speed District 802 v. Warning*, 242 Ill.2d 92, 950 N.E.2d 1069, 1106, 351 Ill.Dec. 241 (“Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of regulatory agencies or the courts to interfere with the parties’ choice.”), *reh’g denied* (May 23, 2011); *Potomac Leasing Co. v. Chuck’s Pub, Inc.*, 156 Ill.App.3d 755, 509 N.E.2d 751, 754, 109 Ill.Dec. 90 (2d Dist. 1987) (“In an arms-length business transaction, the parties’ freedom to contract is an important right that must be jealously guarded and left free from unnecessary interference by the courts.”).

Although contracts are a matter of personal agreement, if an arm's-length written contract does not conform to the agreement of the parties — despite its outward and unambiguous appearance — relief may be available to change or “reform” the writing to be in accord with the agreement of the parties. Such relief, in the form of reformation, only changes the writing to be consistent with the agreement; it is not a device to change to a different, better, or more favorable agreement.

An action to reform a written agreement rests upon a theory that the parties came to an understanding, but in reducing it to writing, through mutual mistake, or through mistake of one side and fraud on the other, some provision agreed upon was omitted, and the action is to so change the instrument as written as to conform it to the contract agreed upon, by inserting the provisions omitted or striking out the one inserted by mutual mistake. *Suburban Bank of Hoffman-Schaumburg v. Bousis*, 144 Ill.2d 51, 578 N.E.2d 935, 939, 161 Ill.Dec. 289 (1991), quoting *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 37 N.E.2d 760, 765 (1941).

Contractual reformation is an equitable remedy by which a party changes the written contract so that it conforms to the agreement actually intended and agreed to by the parties. *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶46, 107 N.E.3d 240, 423 Ill.Dec. 869; *Magnus v. Barrett*, 197 Ill.App.3d 931, 557 N.E.2d 252, 255, 145 Ill.Dec. 482 (1st Dist. 1990). Thus, reformation is available only when the subject of reformation is a written document. “Reformation of a contract should be allowed only when clear and convincing evidence compels the conclusion that the instrument as it stands does not properly reflect the true intention of the

parties and that there has been either a mutual mistake or a mistake by one party and fraud by the other.” [Citations omitted.] *First Mercury*, *supra*, 2018 IL App (1st) 171532 at ¶46, quoting *Elson v. State Farm Fire & Casualty Co.*, 295 Ill.App.3d 1, 691 N.E.2d 807, 817, 229 Ill.Dec. 334 (1st Dist. 1998).

III. [1.3] PRESUMPTION OF VALIDITY OF A WRITING

Although reformation seeks to conform writings to agreements reached between contracting parties, there is a presumption that a written instrument shows the intention of the parties. *Illinois Insurance Guaranty Fund v. Nwidor*, 2018 IL App (1st) 171378, ¶36, 105 N.E.3d 1035, 423 Ill.Dec. 627; *Biskupski v. Jaroszewski*, 398 Ill. 287, 76 N.E.2d 55, 58 – 59 (1947). *See also* *Loberg Excavating, Inc. v. Cincinnati Insurance Co.*, 652 F.Supp.3d 946, 951 (N.D.Ill. 2023), quoting *Cage v. Harper*, 42 F.4th 734, 739 (7th Cir. 2022)) (“Illinois law imposes a strong presumption against provisions that easily could have been included in the contract but were not.”). However, this presumption is rebuttable, and the party seeking to change the writing has the burden of proving that the instrument does not express the intent (*i.e.*, the agreement) of the parties. *Law v. Bank of Galesburg*, 28 Ill.App.3d 98, 327 N.E.2d 609, 610 – 611 (3d Dist. 1975). Because of the presumption of validity, to prevail in an attempt at reformation requires carrying a heavier burden than in a typical civil lawsuit. *Farmer City State Bank v. Guingrich*, 139 Ill.App.3d 416, 487 N.E.2d 758, 765, 94 Ill.Dec. 1 (4th Dist. 1985); *U.S. Bank Trust, N.A. v. Colston*, 2015 IL App (5th) 140100, ¶26, 37 N.E.2d 850, 395 Ill.Dec. 14. Depending on the instrument sought to be reformed, the burden varies. “Reformation of instruments affecting personal obligations [requires] clear and convincing evidence.” *Guingrich, supra*, 487 N.E.2d at 766. This standard has also been stated as “very strong, clear and convincing evidence” (*319 South LaSalle Corp. v. Lopin*, 19 Ill.App.3d 285, 311 N.E.2d 288, 291 (1st Dist. 1974)) or “strong and convincing” (*Law, supra*, 327 N.E.2d at 611). Reformation of a deed or other instrument affecting land requires evidence leaving no reasonable doubt as to the mutual intention of the parties. *Guingrich, supra*, 487 N.E.2d at 766, citing *Pulley v. Luttrell*, 13 Ill.2d 355, 148 N.E.2d 731 (1958), and *Quist v. Streicher*, 18 Ill.2d 376, 164 N.E.2d 44 (1960).

IV. [1.4] ELEMENTS OF REFORMATION

The law in Illinois is well settled that “the party seeking reformation must prove [by clear and convincing evidence or evidence leaving no reasonable doubt as to the mutual intention of the parties to an instrument affecting land] that there has been a meeting of the minds which resulted in an actual agreement between the parties, and that when the agreement was reduced to writing and executed, an agreed-upon provision was omitted or one not agreed upon was inserted as a result of the mutual mistake of the parties” or as a result of a unilateral mistake accompanied by fraud. *LaSalle National Bank v. 850 De Witt Condominium Ass’n*, 211 Ill.App.3d 712, 570 N.E.2d 606, 609, 156 Ill.Dec. 130 (1st Dist. 1991). *See also* *LaSalle National Bank v. Kissane*, 163 Ill.App.3d 534, 516 N.E.2d 790, 114 Ill.Dec. 635 (1st Dist. 1987). RESTATEMENT (SECOND) OF CONTRACTS §155 (1981) similarly provides that contractual reformation is available “[w]here a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing[.] [T]he court may at

the request of a party reform the writing to express the agreement.” Thus, a party seeking to reform a contract must technically establish (a) the existence and substance of an agreement between the parties and the identity of the parties to that agreement, (b) that the parties agreed to reduce their agreement to writing, (c) the substance of the written agreement, (d) that a variance exists between the parties’ original agreement and the writing, and (e) the basis for reformation. *Briarcliffe Lakeside Townhouse Owners Ass’n v. City of Wheaton*, 170 Ill.App.3d 244, 524 N.E.2d 230, 235, 120 Ill.Dec. 465 (2d Dist. 1988). See *Aetna Screw Products Co. v. Borg*, 116 Ill.App.3d 206, 451 N.E.2d 1260, 1264, 71 Ill.Dec. 893 (1st Dist. 1983); *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶29, 49 N.E.3d 869, 401 Ill.Dec. 167.

A. [1.5] Parties’ Meeting of Minds

Contractual reformation is a remedy to correct a writing so that it is consistent with an underlying agreement. Therefore, reformation is available only when the parties actually reached an agreement (or “meeting of the minds”) and the written manifestation of that agreement was not properly expressed. Specifically, Illinois courts routinely hold that “[f]or a written instrument to be reformed, the party seeking reformation must prove by clear and convincing evidence that there has been a meeting of the minds resulting in an actual agreement between the parties.” *LaSalle National Bank v. Kissane*, 163 Ill.App.3d 534, 516 N.E.2d 790, 793, 114 Ill.Dec. 635 (1st Dist. 1987).

B. [1.6] Agreement Reduced to Writing

Because the “[r]elief of reformation rests upon the theory that the parties came to an understanding [or agreement], but *in reducing it to writing*, through mutual mistake, some provision agreed upon was omitted, and the action is to add to the contract agreed upon by inserting the provision omitted, or strike out one mistakenly inserted,” the parties must necessarily establish by clear and convincing evidence that there was in fact an agreement that was reduced to writing. [Emphasis added.] *Almer Coe & Co. v. American National Bank & Trust Company of Chicago*, 44 Ill.App.2d 104, 194 N.E.2d 14, 17 (1st Dist. 1963). In other words, it must be established that there is in fact a writing to be reformed.

C. [1.7] Variance Between Agreement and Writing

Perhaps most important, a party seeking reformation must establish that the writing does not accurately reflect the actual or true agreement reached between the parties. See *Friedman v. Development Management Group, Inc.*, 82 Ill.App.3d 949, 403 N.E.2d 610, 612, 38 Ill.Dec. 379 (1st Dist. 1980) (“For reformation to be available as a remedy, both the mistake *and an actual agreement other than that expressed in the writing* must be shown.” [Emphasis added.]); *In re Marriage of Braunling*, 381 Ill.App.3d 1097, 887 N.E.2d 759, 764, 320 Ill.Dec. 615 (2d Dist. 2008) (“Thus, what is sought to be reformed is not the understanding between the parties, but rather the written instrument which inaccurately reflects it.”), quoting *Briarcliffe Lakeside Townhouse Owners Ass’n v. City of Wheaton*, 170 Ill.App.3d 244, 524 N.E.2d 230, 235, 120 Ill.Dec. 465 (2d Dist. 1988). See also *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶29, 49 N.E.3d 869, 401 Ill.Dec. 167. Significantly, a party is not required to allege in express terms that the written

instrument was erroneously executed. *Schaffner v. 514 West Grant Place Condominium Ass'n*, 324 Ill.App.3d 1033, 756 N.E.2d 854, 864, 258 Ill.Dec. 580 (1st Dist. 2001). Rather, the party's pleadings must "set[] out specific facts from which 'such a conclusion is inevitable or fairly deducible.'" *Id.*, quoting *Briarcliffe*, *supra*, 524 N.E.2d at 235.

D. [1.8] Legal Basis for Reformation

As discussed more fully in §§1.13 – 1.15 below, a party may seek reformation when there has been a mutual mistake of fact or when there has been a unilateral mistake of fact accompanied by fraud.

V. [1.9] REFORMATION IS NOT RESCISSION

Because contractual reformation requires an actual agreement between the parties, it is important to recognize the distinction between rescission and reformation. *See Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill.App.3d 100, 640 N.E.2d 961, 966, 203 Ill.Dec. 811 (2d Dist. 1994). While reformation seeks to make the writing express the actual agreement of the parties, rescission seeks to invalidate or avoid the contract in whole. With rescission, there is no original valid agreement because the contract is voidable (due to mistake, misrepresentation, etc.). In *Beynon Building Corp. v. National Guardian Life Insurance Co.*, 118 Ill.App.3d 754, 455 N.E.2d 246, 250, 74 Ill.Dec. 216 (2d Dist. 1983), the court explained this distinction: "It is not a fundamental mistake relating to an essential element of the contract, which would prevent a meeting of the minds of the parties; rather, it occurs when an actual good-faith agreement is reached but, due to error, is not expressed in the written reduction of the agreement." Thus, rescission stands in stark contrast to reformation. With reformation, the original agreement is valid, but the subsequent writing does not conform to the parties' agreed intention. In contrast, an action for rescission seeks to avoid a contract altogether; whereas a party seeking reformation merely asks the court to change a written contract to conform to the agreement of the parties, a party seeking rescission seeks to find that there is no valid contract.

VI. INSTRUMENTS SUBJECT TO REFORMATION

A. [1.10] In General

In general, almost any instrument can be reformed, assuming, of course, the elements necessary for reformation are present. However, "[w]here a writing expresses an actual agreement it cannot be reformed." *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 37 N.E.2d 760, 765 (1941). Phrased somewhat differently, because reformation requires an agreement and a writing at variance with that agreement, "[e]quity cannot make a new agreement for the parties under the color of reforming the one made by them, nor can it be used to add a provision to the contract that was never agreed upon." *Klemp v. Hergott Group, Inc.*, 267 Ill.App.3d 574, 641 N.E.2d 957, 965, 204 Ill.Dec. 527 (1st Dist. 1994). Contractual reformation is not a substitute for amendment to change or modify a preexisting agreement. But voluntary reformation by agreement is always permissible and even encouraged to effectuate the agreement between the parties. *St. Paul Mercury Insurance Co. v. Foster*, 268 F.Supp.2d 1035, 1043 (C.D.Ill. 2003).

B. [1.11] Examples

A number of instruments are subject to reformation, including deeds, conveyances, leases, insurance policies, negotiable instruments, bonds, releases, mortgages, sales agreements, and dissolution settlement agreements. Deeds are the most common instrument in real estate subject to reformation.

The following list represents a sampling of instruments in which a court has found reformation to be an appropriate remedy.

Insurance policies. A contract of insurance is subject to reformation in a proper case so as to make it conform to the actual agreement entered into between the parties. *Hartford Casualty Insurance Co. v. Moore*, 731 F.Supp.2d 800, 806 (2010), *reconsideration denied*, 2010 WL 5573694 (Oct. 12, 2010), *order clarified on reconsideration*, 2010 WL 5344621 (C.D.Ill. Dec. 20, 2010); *Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill.App.3d 100, 640 N.E.2d 961, 203 Ill.Dec. 811 (2d Dist. 1994); *Magnus v. Barrett*, 197 Ill.App.3d 931, 557 N.E.2d 252, 145 Ill.Dec. 482 (1st Dist. 1990). If a mutual mistake of fact occurred regarding the coverage provided by an insurance contract, the contract will be interpreted consistent with the intentions of the parties. *Mid-Century Insurance Co. v. Founders Insurance Co.*, 404 Ill.App.3d 961, 936 N.E.2d 780, 344 Ill.Dec. 251 (1st Dist. 2010).

A court may reform a policy of insurance that has been improperly drawn through fraud, accident, or mutual mistake (*Burlington Insurance Co. v. Barefield*, No. 09 CV 5280, 2010 WL 4386836 (N.D.Ill. Oct. 28, 2010); *Metropolitan Life Insurance Co. v. Henriksen*, 6 Ill.App.2d 127, 126 N.E.2d 736 (1st Dist. 1955)) or when there has been an omission contrary to the intention of the parties (*Tri-City Transp. Co. v. Bituminous Casualty Corp.*, 311 Ill.App. 610, 37 N.E.2d 441 (4th Dist. 1941)).

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93-406, 88 Stat. 829, 29 U.S.C. §1132(a)(3), “authorizes equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener’s error that does not reflect participants’ reasonable expectations of benefits.” *Young v. Verizon’s Bell Atlantic Cash Balance Plan*, 615 F.3d 808, 819 (7th Cir. 2010), *cert. denied*, 131 S.Ct. 2924, *reh’g denied*, 132 S.Ct. 47 (2011). An ERISA provision allowing a participant or beneficiary of an ERISA plan “to obtain other *appropriate equitable relief*” authorized the district court to reform the terms of the pension plan and enforce the terms of the reformed plan as a remedy for alleged false and misleading information provided by the plan about its conversion from a traditionally defined “pension plan” to a “cash balance” retirement plan. [Emphasis added by *CIGNA* Court.] *CIGNA Corp. v. Amara*, 563 U.S. 421, 179 L.Ed.2d 843, 131 S.Ct. 1866, 1876, 1878 (2011), quoting 29 U.S.C. §1132(a)(3).

Promissory notes. In *In re Estate of Hurst*, 329 Ill.App.3d 326, 769 N.E.2d 55, 263 Ill.Dec. 853 (4th Dist. 2002), the third wife of a deceased husband was entitled to reformation of a promissory note held by the husband and wife to avoid the result that the note would pass into the husband’s estate. The factual bases supporting reformation were that the husband and wife held the note as tenants in common rather than as joint tenants; the husband and wife sold a jointly owned

interest in a corporation and took the promissory note, instructed the lawyer to draft the note with a right of survivorship, and commonly believed it was so drafted when they signed it; the corporation paying the note made payments into a joint bank account; and the wife's malpractice action against the lawyer did not give her an adequate remedy at law.

Voluntary conveyances. Voluntary conveyances may be reformed at the instance of one grantee under the conveyance as against other grantees under the same conveyance when the grantor has no interest in the controversy. *Reinberg v. Heiby*, 404 Ill. 247, 88 N.E.2d 848 (1949). In *Reinberg*, the court noted that equity will not interfere in favor of a voluntary grantee against his or her grantor and those claiming under the grantor because it would enlarge the bounty of a recipient at the expense of and against the interest of the donor grantor. However, when the grantor's interest in the property itself is not involved and the litigation involves co-beneficiaries of a voluntary trust agreement, reformation of the trust agreement to correct a scrivener's error is not adverse to the interest of the grantor. The court found that reformation was "in harmony with [the grantor's] interest, since it effectuate[d] his manifest intention to divide the property . . . equally between his two daughters." 88 N.E.2d at 852 – 853.

Involuntary conveyances. Equity may properly reform conveyances not classified as voluntary when it appears that due consideration has been given for the conveyance. *Gromer v. Molby*, 385 Ill. 283, 52 N.E.2d 772 (1944).

Mortgages. Allegations by the successor mortgagee that its predecessor in interest intended the mortgage to encumber interests of both the husband and wife in property they held as tenants by the entirety, and that the husband and wife intended that both of their interests would be encumbered by the mortgage, stated a claim for reformation of the mortgage, which only named the wife as mortgagor. *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶¶29 – 32, 49 N.E.3d 869, 401 Ill.Dec. 167. *See also U.S. Bank Trust, N.A. v. Colston*, 2015 IL App (5th) 140100, ¶¶24 – 27, 37 N.E.3d 850, 395 Ill.Dec. 14.

Condominium declarations. Unit owners stated a claim for reformation of a condominium declaration when they alleged that the developer and original purchasers of the condominium units agreed that two units would have exclusive right to use two outdoor parking spaces, that the developer and original purchasers agreed to reduce their agreement to writing, that the condominium declaration did not reflect the true intention of the parties, and that maps and surveys omitting the parking spaces were attached to the declaration by mistake. *Schaffner v. 514 West Grant Place Condominium Ass'n*, 324 Ill.App.3d 1033, 756 N.E.2d 854, 258 Ill.Dec. 580 (1st Dist. 2001). In addition, the Condominium Property Act, 765 ILCS 605/1, *et seq.*, provides for statutory reformation to correct scriveners' errors in condominium documents. 765 ILCS 605/27.

Deeds. Deeds are probably the most common instruments in real estate to be subject to reformation, resulting from mistakes in the property description or the type of estate conveyed. *See LaSalle National Bank v. 850 De Witt Place Condominium Ass'n*, 257 Ill.App.3d 540, 629 N.E.2d 704, 196 Ill.Dec. 159 (1st Dist. 1994) (finding legal description of adjoining parking garage to exclude bicycle rooms and storage room used by condominium when vendor and initial purchaser of parking garage testified that, at time building was converted to condominium and garage was sold as separate unit, both understood that bicycle and storage rooms were not part of garage and

intended garage purchase to include only parking stalls, ramps, and small office and document governing auction of garage at time evidenced that intent); *Roots v. Uppole*, 81 Ill.App.3d 68, 400 N.E.2d 1003, 36 Ill.Dec. 423 (3d Dist. 1980) (allowing reformation of deed when legal description in real estate contract did not conform with legal description in deed); *Korsgaard v. Elliott*, 17 Ill.App.3d 1061, 309 N.E.2d 263 (3d Dist. 1974) (same); *Upper Level, Inc. v. Provident Venture Corp.*, 209 Ill.App.3d 964, 568 N.E.2d 531, 154 Ill.Dec. 531 (5th Dist. 1991) (finding reformation appropriate when there was evidence of mistake in deed's description and noting that fact that seller of property was permitted to remain in possession of property in dispute was evidence of knowledge on buyer's part that disputed piece of property was not intentionally included in sale). *See also Department of Natural Resources v. Waide*, 2013 IL App (5th) 120340, ¶18, 992 N.E.2d 187, 372 Ill.Dec. 648 (reformation of deed warranted).

Dissolution judgments. Illinois courts have recognized a petition pursuant to 735 ILCS 5/2-1401 as a proper avenue for reformation of a marital settlement agreement when it fails to express the parties' real intentions due to mutual mistake. *Mauer v. Rubin*, 401 Ill.App.3d 630, 926 N.E.2d 947, 952, 339 Ill.Dec. 472 (1st Dist. 2010). However, the court would not allow reformation when the valid and enforceable marital settlement agreement contained a waiver provision prohibiting both parties from asserting additional claims for maintenance or property. *In re Marriage of Bolte*, 2012 IL App (3d) 110791, 975 N.E.2d 1257, 363 Ill.Dec. 948. The court has also held that forgoing formal discovery before executing a marital settlement agreement does not constitute a per se lack of diligence that would otherwise warrant dismissal of a §2-1401 petition and thus preclude reformation of the agreement. *In re Marriage of Brubaker*, 2022 IL App (2d) 200160, ¶¶ 31 – 34, 198 N.E.3d 341, 459 Ill.Dec. 551 (discussing and applying *In re Marriage of Buck*, 318 Ill.App.3d 489, 742 N.E.2d 378, 252 Ill.Dec. 128 (1st Dist. 2000)).

Plea agreements. Illinois courts have recognized that reformation of plea agreements to reflect the parties' intent is an appropriate remedy for a mutual mistake. *People v. Donelson*, 2013 IL 113603, ¶¶17 – 20, 989 N.E.2d 1101, 371 Ill.Dec. 173. However, reformation of a plea agreement is only warranted where the contracting parties “are in actual agreement and their true intent may be discerned.” *People v. Wells*, 2024 IL 129402, ¶26, quoting *People v. Donelson*, 2013 IL 113603, ¶20, 989 N.E.2d 1101, 371 Ill.Dec. 173 (rejecting defendant's argument in support of mutual mistake as to contents of his plea agreement with State, where there was no indication that parties intended to credit defendant additional 154 days spent in custody). *See also People v. Golen*, 2015 IL App (1st) 133433, ¶15, 29 N.E.3d 1119, 390 Ill.Dec. 849; *People v. Taylor*, 2015 IL 117267, ¶26, 25 N.E.3d 627, 388 Ill.Dec. 935; *People v. Young*, 2013 IL App (1st) 111733, ¶¶37 – 39, 2 N.E.3d 445, 377 Ill.Dec. 529. A contracting party's “uninduced mistake” or “change of mind” are not adequate grounds for rescission or modification of a plea agreement. *Wells, supra*, 2024 IL 129402 at ¶¶23, 27.

VII. [1.12] INSTRUMENTS NOT SUBJECT TO REFORMATION

There are several categories of writings that are not amenable to reformation. A grantee may not have a gift instrument reformed. It would be an obvious injustice to permit a grantee, who has given neither valuable nor meritorious consideration, to enlarge on or change the nature of the gift against the interest of the donor-grantor or those claiming under him or her. *Reinberg v. Heiby*, 404 Ill. 247, 88 N.E.2d 848, 852 (1949). But a grantor may reform his or her gift. *Deischer v. Price*, 148 Ill. 383, 36 N.E. 105 (1894).

Moreover, because a valid initial agreement is a prerequisite to contractual reformation, a void instrument or an instrument evidencing an agreement that is void is not subject to reformation. See 76 C.J.S. *Reformation of Instruments* §9 (1994). Similarly, an agreement that is illegal or that will result in an illegal contract is not subject to reformation as such an agreement is void ab initio. *Central Specialties Co. v. Schaefer*, 318 F.Supp. 855, 859 (N.D.Ill. 1970). In a like manner, a putative agreement when there has not been a meeting of the minds cannot be reformed as there is no agreement in such a case. *Loeb v. Gray*, 131 Ill.App.3d 793, 475 N.E.2d 1342, 1348, 86 Ill.Dec. 775 (5th Dist. 1985). Rather, these situations may give rise to rescission or a defense that no contract exists in the first instance.

The following are examples of circumstances in which courts have determined that the written instrument is not subject to reformation:

- Equity will not reform an instrument that is a voluntary conveyance so as to make a gift effective. *Legate v. Legate*, 249 Ill. 359, 94 N.E. 498 (1911).
- A parent's duty to support his or her child, or love and affection existing between parent and child, do not furnish "meritorious consideration so as to warrant reformation of" a mistake in a deed from parent to child. *Marvin v. Kelsey*, 373 Ill. 589, 27 N.E.2d 469, 470 (1940).
- Courts have refused to give relief when reformation was sought on the ground of misdescription of the property. *Stanforth v. Bailey*, 344 Ill. 38, 175 N.E. 784 (1931) (reformation refused in action by heirs of grantee against devisees of grantor).
- When a grantor makes a deed to a grantee without valuable consideration and a mistake is made in the description of the property so that the property cannot be identified or located, chancery will not lend its aid to make the gift effective by correcting the mistake. *Patterson v. McClenathan*, 296 Ill. 475, 129 N.E. 767 (1921).
- A bank was not entitled to have a savings account contract reformed to indicate that it was holding money in trust for a depositor's father absent any written instrument other than a savings account contract expressing the parties' agreement concerning the use of the funds; the tentative agreement with the depositor that funds would be used to transfer to the depositor interest in the property held to secure a debt was not an enforceable contract. *Suburban Bank of Hoffman-Schaumburg v. Bousis*, 144 Ill.2d 51, 578 N.E.2d 935, 161 Ill.Dec. 289 (1991).
- Equity will not reform a deed against subsequent bona fide purchasers for value who have no notice of the mistake or of facts that "should put them on inquiry." *Pulley v. Luttrell*, 13 Ill.2d 355, 148 N.E.2d 731, 733 (1958).
- A will cannot be reformed to conform to any intention of the testator not expressed in it, no matter how clearly a different intention may be proved by extrinsic evidence. *In re Estate of Johnson*, 2023 IL App (4th) 220488, ¶27, 228 N.E.3d 911, 471 Ill.Dec. 402 (citing *Turek v. Mahoney*, 407 Ill. 476, 95 N.E.2d 330, 333 – 334 (1950)); *Bank of America, N.A. v. Carpenter*, 401 Ill.App.3d 788, 929 N.E.2d 570, 582, 340 Ill.Dec. 919 (1st Dist.) (citing *Handelsman v. Handelsman*, 366 Ill.App.3d 1122, 852 N.E.2d 862, 870 – 871, 304 Ill.Dec. 406 (2d Dist. 2006)), *appeal denied*, 237 Ill.2d 552 (2010).

Even in certain matters in which reformation is not allowed, the parties may have available an action for rescission to argue that no contract existed in the first instance.

VIII. [1.13] GROUNDS FOR RELIEF

Reformation is appropriate if the terms of a written contract deviate materially from what the parties had agreed to. However, although it is seemingly available to “fix” all manner of variance between the agreement of the parties and the writing, there must be present a legal basis for such relief. Such a legal basis is generally found when there is a mutual mistake of fact or unilateral mistake that is accompanied by fraud. However, purely mistakes of law, even if mutual, in general do not provide a basis for reformation. See §§1.14 – 1.16 below for further discussion.

A. [1.14] Mutual Mistake of Fact

Under Illinois law, a “[m]utual mistake of fact [required for reformation of an instrument] ‘contemplates a mistake of fact at the time the instrument was drawn, not as to the legal effect of the instrument, but as to the facts of the agreement.’ ” *Hartford Casualty Insurance Co. v. Moore*, 731 F.Supp.2d 800, 807 (2010) (quoting *Friedman v. Development Management Group, Inc.*, 82 Ill.App.3d 949, 403 N.E.2d 610, 612, 38 Ill.Dec. 379 (1st Dist. 1980)), *reconsideration denied*, 2010 WL 5573694 (Oct. 12, 2010), *order clarified on reconsideration*, 2010 WL 5344621 (C.D.Ill. Dec. 20, 2010). Mutuality of mistake requires that the mistake by the parties be mutual and common to all of the parties to the writing. This mutuality should exist at the time of the execution of the instrument and show that the parties agreed to one set of terms but, by mistake, expressed a different set of terms in the writing. *West Chicago State Bank v. Rogers*, 162 Ill.App.3d 838, 515 N.E.2d 1261, 1269, 113 Ill.Dec. 954 (2d Dist. 1987); *Miller’s Blasting Service, Inc. v. Texas AGA, Inc.*, No. 99 C 50246, 2003 WL 21058344, *3 (N.D.Ill. May 9, 2003) (“[A] mutual mistake occurs when ‘the parties are in actual agreement but the agreement in its written form does not express the parties’ real intent.’”), quoting *In re Marriage of Johnson*, 237 Ill.App.3d 381, 604 N.E.2d 378, 386, 178 Ill.Dec. 122 (4th Dist. 1992).

Specifically, a plaintiff must show both the mistake and an actual agreement other than that expressed in the writing. *Goodwine State Bank v. Mullins*, 253 Ill.App.3d 980, 625 N.E.2d 1056, 192 Ill.Dec. 901 (4th Dist. 1993). A mutual mistake of fact exists when a contract has been written in terms that violate or are at odds with the understandings of both parties. *In re Marriage of Miller*, 363 Ill.App.3d 906, 845 N.E.2d 105, 111, 300 Ill.Dec. 684 (4th Dist. 2006); *Marriage of Johnson, supra*, 604 N.E.2d at 388. The Illinois Supreme Court has held:

To reform an instrument upon the ground of mistake, the mistake must be of fact and not of law, mutual and common to both parties, and in existence at the time of the execution of the instrument, showing that at such time the parties intended to say a certain thing and, by mistake, expressed another. *Schmitt v. Heinz*, 5 Ill.2d 372, 125 N.E.2d 457, 460 (1955).

Equally true, in the context of arbitrations, parol evidence may be considered to determine if there was a mutual mistake warranting reformation. *First Health Group Corp. v. Ruddick*, 393 Ill.App.3d 40, 911 N.E.2d 1201, 331 Ill.Dec. 971 (1st Dist. 2009).

Moreover, courts have held that parol evidence may be used to show the real agreement between the parties in situations of mutual mistake:

A mutual mistake

“results in the drawing of the contract itself. It is not a fundamental mistake relating to an essential element of the contract, which would prevent a meeting of the minds of the parties; rather, it occurs when an actual good-faith agreement is reached but, due to error, is not expressed in the written reduction of the agreement. . . . Thus, the mistake must have existed at the time of the execution of the instrument, must have been mutual and common to all parties, and must have been such that the parties intended to say one thing but by the written instrument expressed another. . . . A mutual mistake exists when the contract has been written in terms that violate the understanding of both parties. . . . It is well settled that the parol evidence rule is no bar to the admission of evidence on the question of mutual mistake, and this is so even when the instrument to be reformed is clear and unambiguous on its face. . . . Thus parol evidence may be used to show the real agreement between the parties when a mistake has been made and the evidence is for the purpose of making the contract conform to the original intent of the parties.” *Marengo Federal Savings & Loan Ass’n v. First National Bank of Woodstock*, 172 Ill.App.3d 859, 527 N.E.2d 121, 124, 122 Ill.Dec. 749 (2d Dist. 1988) (finding reformation appropriate because promissory notes did not reflect parties’ intentions that notes be secured by second mortgages), quoting *Beynon Building Corp. v. National Guardian Life Insurance Co.*, 118 Ill.App.3d 754, 455 N.E.2d 246, 250, 74 Ill.Dec. 216 (2d Dist. 1983).

Equity will reform a written instrument on the ground of mistake when the instrument fails to express the prior agreement of the parties due to a mistake of fact, mutual and common to both parties, existing at the time of the execution of the instrument, so that the instrument did not accurately reflect the intention of the parties. *Belvidere Distilling Co. v. Reconstruction Finance Corp.*, 109 F.Supp. 298, 299 (N.D.Ill. 1949). A “mistake of fact, against which equity will grant relief, is ‘an unconscious ignorance or forgetfulness of a fact, past or present, and material to the contract.’” *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 37 N.E.2d 760, 765 (1941), quoting 2 John Norton Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE §839 (4th ed. 1918). The mistake of fact “must have been made in the drawing of the instrument and not in the making of the contract [*i.e.*, agreement] which it evidences.” *Belvidere Distilling, supra*, 109 F.Supp. at 299, quoting *Russell v. Shell Petroleum Corp.*, 66 F.2d 864, 867 (10th Cir. 1933). Examples of typical mistakes of fact include the “insertion of the name of the correct lessor where the parties had acknowledged their obligations . . . changing the effective date of a policy . . . and correcting a numerical figure.” [Citations omitted.] *Friedman, supra*, 403 N.E.2d at 614. See *National Labor Relations Board v. Cook County School Bus, Inc.*, 283 F.3d 888 (7th Cir. 2002) (discussing reformation to correct typing error in written instrument).

The following are examples of circumstances in which courts have reformed written instruments because of a mutual mistake of fact:

- the insertion of the name of the correct lessor when the parties had acknowledged their obligations (*Friedman, supra*);
- the failure of an instrument to correctly state the monthly payment on a mortgage and promissory note (*Beynon Building, supra*, 455 N.E.2d at 249);
- an erroneous legal description in a deed that was contrary to the parties' intention (*David v. Schiltz*, 415 Ill. 545, 114 N.E.2d 691, 696 (1953); *Korsgaard v. Elliott*, 17 Ill.App.3d 1061, 309 N.E.2d 263 (3d Dist. 1974));
- an erroneous legal description in a declaration of condominium ownership (*LaSalle National Bank v. 850 De Witt Place Condominium Ass'n*, 257 Ill.App.3d 540, 629 N.E.2d 704, 196 Ill.Dec. 159 (1st Dist. 1994) (reforming legal description of parking garage));
- an error as to the location of a boundary line (*Schlenz v. Dzierzynski*, 134 Ill.App.3d 937, 481 N.E.2d 287, 89 Ill.Dec. 736 (3d Dist. 1985)); and
- an erroneous mathematical computation or the failure of a contract to correctly state the balance due (*Lux v. Lelija*, 14 Ill.2d 540, 152 N.E.2d 853 (1958); *Singer v. Murphy*, 338 Ill. 620, 170 N.E. 777 (1930); *All Brake & Drive Unit Service, Inc. v. Peterson*, 69 Ill.App.3d 594, 388 N.E.2d 93, 95, 26 Ill.Dec. 469 (1st Dist. 1979)).

In contrast, courts have found that the following situations did *not* qualify as a mutual mistake of fact and thus were not subject to reformation:

- when the modification of the lease agreement was oral and not intended to be in writing and there was no evidence that the defendant consented or agreed to the oral modification (*Schivarelli v. Chicago Transit Authority*, 355 Ill.App.3d 93, 823 N.E.2d 158, 291 Ill.Dec. 148 (1st Dist. 2005));
- when the parties had divergent views of what the contract language meant regarding whether a trade in farmland was elective or mandatory (*Lukas v. Lightfoot*, 131 Ill.App.3d 566, 476 N.E.2d 1, 3, 86 Ill.Dec. 825 (5th Dist. 1985)); and
- when the parties failed to agree on the contract price (*Friedman, supra*).

B. [1.15] Unilateral Mistake Accompanied by Fraud

Contractual reformation can also be based on unilateral mistake if it is coupled with fraud or inequitable conduct that occurs when one party knows of the mistake and fails to tell the other party. In actions for reformation based on unilateral mistake coupled with fraud, the relevant inquiry is whether the parties reached mutual agreement and whether one party, knowing that the written instrument did not accurately reflect that agreement, concealed the defect from the other at

the time of its execution. *Sheldon v. Colonial Carbon Co.*, 116 Ill.App.3d 797, 452 N.E.2d 542, 546, 72 Ill.Dec. 289 (1st Dist. 1983). Further, the fraud giving rise to the need for reformation must continue to exist or have occurred at the time the instrument to be reformed was executed. *West Chicago State Bank v. Rogers*, 162 Ill.App.3d 838, 515 N.E.2d 1261, 1269, 113 Ill.Dec. 954 (2d Dist. 1987). Reformation is generally permitted when the writing is incorrect as a result of either innocent or fraudulent misrepresentation. *Hartmann v. Prudential Insurance Company of America*, 9 F.3d 1207, 1209 (7th Cir. 1993) (“Equitable reformation is an appropriate remedy when the conduct — often the fraudulent conduct — of one party to a contract . . . causes the terms of the written contract to deviate materially from what the parties had agreed to.”). Thus, when an agreement has been made that does not reflect the true intent of the parties as a result of a mistake of one party accompanied by fraudulent knowledge and procurement of the other and the written document fails to express the real agreement, equity may grant reformation. See *Belvidere Distilling Co. v. Reconstruction Finance Corp.*, 109 F.Supp. 298 (N.D.Ill. 1949).

C. [1.16] Mutual Mistake of Law

In contrast, a mistake of law is generally not a ground for reformation of a written instrument. *Zannini v. Reliance Insurance Company of Illinois, Inc.*, 147 Ill.2d 437, 590 N.E.2d 457, 462, 168 Ill.Dec. 820 (1992) (“In order for a court to reform an instrument on the ground of mistake, ‘the mistake must be of fact and not of law.’”), quoting *Wilcox v. Natural Gas Storage Company of Illinois*, 24 Ill.2d 509, 182 N.E.2d 158, 160 (1962); *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill.App.3d 743, 681 N.E.2d 552, 559 – 560, 224 Ill.Dec. 237 (1st Dist. 1997) (“Before a court may reform an instrument on the ground of mistake, the mistake must be of fact and not of law, common to both parties, and in existence at the time of the execution of the instrument.”). There have, however, been exceptions to this general rule. Some courts have permitted reformation based on mistake of law when the interests of justice so demand.

In *Barkhausen v. Continental Illinois Nat. Bank Trust Co. of Chicago*, 3 Ill.2d 254, 120 N.E.2d 649, 657 – 658 (1954), the Illinois Supreme Court stated that reformation of written instruments is not barred merely because the mistake is one of law. See also *In re Estate of Hurst*, 329 Ill.App.3d 326, 769 N.E.2d 55, 60, 263 Ill.Dec. 853 (4th Dist. 2002) (“[E]ven when the mistake is one of law equity sometimes intervenes. . . . Courts of equity have aided mistaken parties because of the demands of justice. . . . [R]elief is not barred in a proper case because the mistake is one of law.”), quoting *Peter v. Peter*, 343 Ill. 493, 175 N.E. 846, 849 (1931), and *Darst v. Lang*, 367 Ill. 119, 10 N.E.2d 659, 662 (1937). Although *Barkhausen* seemed to open the door to reformation based on mistake of law, the First District in *Friedman v. Development Management Group, Inc.*, 82 Ill.App.3d 949, 403 N.E.2d 610, 613, 38 Ill.Dec. 379 (1st Dist. 1980), cast doubt on the availability of reformation for mistake of law and observed that *Barkhausen* has been virtually ignored by the Illinois Supreme Court, which, in subsequent cases, has required a factual mistake as a prerequisite for reformation. Subsequently, however, the Fourth District permitted reformation based on a mistake of law because the mistake worked an injustice, and “such an injustice under these facts may be avoided by the equitable remedy of reformation.” *Estate of Hurst, supra*, 769 N.E.2d at 62. Thus, although technically a basis for reformation, a simple mistake of law is most probably not available as a ground for contractual reformation, as one is under a duty to learn or know the contents of a written contract before signing it and to learn or know the law. *Leon v. Max E. Miller & Son, Inc.*, 23 Ill.App.3d 694, 320 N.E.2d 256 (1st Dist. 1974).

IX. [1.17] PARTIES TO REFORMATION

Reformation is usually available only to the parties to the instrument and those in privity with them. *Uhlmann Grain Co. v. Fidelity & Deposit Co. of Maryland*, 116 F.2d 105 (7th Cir. 1940); *Krabbenhof v. Gossau*, 337 Ill. 396, 169 N.E. 258 (1929) (party injured by mistake in written instrument may demand correction); *L.E. Myers Co. v. Harbor Insurance Co.*, 67 Ill.App.3d 496, 384 N.E.2d 1340, 24 Ill.Dec. 182 (1st Dist. 1978). Those parties include personal representatives, heirs, devisees, legatees, donees or voluntary transferees, or subsequent purchasers or encumbrancers with notice of the facts. *L.E. Myers, supra*.

However, it is possible for a third party to seek reformation if it is a party in interest to the contract. In such an action, all persons who may have an interest are necessary parties to the proceedings. *Moore v. Munn*, 69 Ill. 591 (1873); *Brosam v. Employer's Mutual Casualty Co.*, 61 Ill.App.2d 183, 209 N.E.2d 350 (4th Dist. 1965) (finding that when insureds under liability policy tendered defense of suit to insurer but insurer refused defense and third-party claimant procured judgment against insureds, insureds were proper parties to bring action to reform liability policy, though judgment creditor also would have been proper party). For example, reformation has been permitted against the intervening rights of third persons, such as sureties (*Henkleman v. Peterson*, 154 Ill. 419, 40 N.E. 359 (1895)), assignees for the benefit of creditors (*Willis v. Henderson*, 5 Ill. (4 Scam.) 13 (1842)), and general or judgment creditors (*Brosam, supra*).

Thus, reformation will generally be granted “(e)xcept as to bona fide purchasers without notice and those standing in similar relations” [quoting 76 C.J.S. *Reformation of Instruments* §93 (1952)], such as mortgagees or any ‘subsequent encumbrancers or lienholders for a present consideration’ [quoting 66 AM.JUR.2d *Reformation of Instruments* §65 (1973)].” *L.E. Myers, supra*, 384 N.E.2d at 1346. See also *Pulley v. Luttrell*, 13 Ill.2d 355, 148 N.E.2d 731 (1958); *Novak v. Smith*, 197 Ill.App.3d 390, 554 N.E.2d 652, 143 Ill.Dec. 717 (5th Dist. 1990); *Department of Conservation v. Nevois*, 234 Ill.App.3d 227, 600 N.E.2d 91, 175 Ill.Dec. 468 (5th Dist. 1992) (bona fide purchaser for value of several real estate parcels was not on inquiry notice that one parcel was not owned by vendor when all parcels were contiguous, under cultivation, and unimproved; neither separation of disputed parcel from others by township road nor allegation that disputed parcel was less weed infested than others was sufficient to put purchaser on inquiry notice).

X. PLEADING

A. [1.18] In General

A proper complaint in equity is necessary for the reformation of a contract. A cause of action for reformation of a contract requires the pleading of the existence and substance of the agreement between the parties, the identity of the parties to the agreement, that the parties agreed to reduce their agreement to writing, the substance of the written agreement, that a variance exists between the parties’ original agreement and writing, and mutual mistake or some other basis for reformation. *Schafer v. UnionBank/Central*, 2012 IL App (3d) 110008, ¶¶21 – 25, 973 N.E.2d 449, 362 Ill.Dec. 349; *Schivarelli v. Chicago Transit Authority*, 355 Ill.App.3d 93, 823 N.E.2d 158, 291 Ill.Dec. 148 (1st Dist. 2005); *Schons v. Monarch Insurance Company of Ohio*, 214 Ill.App.3d 601, 574 N.E.2d 83, 86 – 87, 158 Ill.Dec. 289 (1st Dist. 1991).

However, reformation cannot be used to put an oral contract or understanding into writing if the parties did not seek to do so. “The province of reformation is to make a writing express the bargain which the parties desired *to put in writing*. . . . Agreements of which they did not desire written expression will not be put into writing by decree of the court.” [Emphasis added by *Aetna* court.] *Aetna Screw Products Co. v. Borg*, 116 Ill.App.3d 206, 451 N.E.2d 1260, 1265, 71 Ill.Dec. 893 (1st Dist. 1983), quoting 13 Samuel Williston, *A TREATISE ON THE LAW OF CONTRACTS* §1549 (W. Jaeger 3d ed. 1970).

B. [1.19] Checklist for Drafting Complaint with Sample Language

1. Description of the plaintiff:

a. If an individual:

Plaintiff is a resident of [city and state where plaintiff resides].

b. If a corporation:

Plaintiff is incorporated under the laws of the State of [state of plaintiff’s incorporation] **and has its principal place of business in** [city and state where plaintiff has principal place of business].

2. Description of the defendant:

a. If an individual:

Defendant is a resident of [city and state where defendant resides].

b. If a corporation:

Defendant is incorporated under the laws of the State of [state of defendant’s incorporation] **and has its principal place of business in** [city and state where defendant has principal place of business]. **Defendant was authorized to and does conduct business in the State of** [state where defendant conducts business].

3. Existence of an agreement between the parties:

On [date of oral agreement], **Plaintiff and Defendant orally agreed to** [describe terms of oral agreement].

4. Agreement reduced to writing (describe how the writing is not consistent with the oral understanding of the parties):

On [date of written contract], **the parties entered into a written contract, the terms of which were** [describe terms of written contract]. **(A copy of the contract is attached as Exhibit ____.)**

5. Writing does not reflect the agreement reached between the parties:

The written contract between Plaintiff and Defendant is at variance with the terms of the oral agreement and does not otherwise express the true intent of the parties. [Describe how writing is at variance with terms of oral agreement.]

6. Demonstration of the legal basis for reformation (*i.e.*, mutual mistake of fact or unilateral mistake coupled with fraud):

- a. If mutual mistake:

- (1) Identify the mistake and how and when it occurred as well as the party who drafted the instrument.
- (2) State that the mistake existed at the time of the execution of the written instrument.
- (3) Indicate the date the plaintiff discovered the mistake.
- (4) Describe all the steps taken by the plaintiff to compel the defendant to correct the instrument and to conform to the true agreement.
- (5) State the relationship between the mistake and the result that the written contract is at variance to the agreement.
- (6) Describe how the mistake benefits the defendant or is to the detriment of one of the parties.
- (7) State that the defendant has refused to correct the instrument.

- b. If unilateral mistake coupled with fraud:

- (1) Describe the discovery by the plaintiff of the mistake, including when discovered.
- (2) Describe the fraud with particularity.
- (3) Describe the demand by the plaintiff to the defendant to correct the writing to conform to the agreement and the defendant's refusal to consent.
- (4) State the unfair advantage or unjust enrichment to be gained by the defendant as a result of the fraud.
- (5) State the relationship between the mistake and the result that the written contract is at variance to the agreement.
- (6) State how the mistake benefits the defendant or is to the detriment of one of the parties.

(7) State that the defendant has refused to correct the instrument.

7. Statement that there is a legal basis for reformation:

Based on the foregoing, there is a legal basis to reform the written contract between the parties (Exhibit ___) to conform to the parties' true intentions.

8. No adequate remedy at law:

Plaintiff has no adequate remedy at law.

9. Prayers for relief:

WHEREFORE, Plaintiff, [name of plaintiff], respectfully requests that this Court enter judgment in [his] [her] [its] favor and against Defendant and order:

- A. that the written contract between the parties is reformed in the following manner:**
[describe reformation sought; specificity is beneficial so that the final reformed writing is clear];
- B. that Plaintiff recover the costs of this action; and**
- C. such other and further relief as is just and equitable.**

XI. DEFENSES TO REFORMATION

A. [1.20] Equitable Defenses

Reformation is an equitable remedy, and the usual equitable defenses apply. Laches is an equitable principle that bars an action when, because of delay in bringing suit, a party has been misled, has been prejudiced, or has taken a course of action different from that which it otherwise might have taken absent the delay. *Schons v. Monarch Insurance Company of Ohio*, 214 Ill.App.3d 601, 574 N.E.2d 83, 89, 158 Ill.Dec. 289 (1st Dist. 1991). The defense of laches is available if the party seeking reformation has unreasonably delayed in bringing the action and the delay is prejudicial to the non-reforming party or the other party has benefitted from the delay and the variance from the agreement of the parties. To demonstrate that the delay was prejudicial, the defending party must have adversely changed its position, been prejudiced, or experienced hardship rather than simply have experienced the mere passage of time. To that end, it is essential that the party asserting the defense plead and prove not only that a considerable period of time has elapsed and that prejudice has resulted, but also that the opposing party had prior knowledge of the facts giving rise to the claim. However, the delay by the party seeking reformation may be excused if there was concealment, fraud, or inequitable conduct by the other party or if there was a reasonable lack of awareness of the facts giving rise to relief. Laches begins to run from the time the plaintiff has knowledge that a right has been infringed. *Id.*

The defense of unclean hands is also available if the party seeking reformation is chargeable with improper conduct with respect to the same transaction involved in the litigation.

B. [1.21] Other Defenses

In addition to the equitable remedies noted in §1.20 above, consideration should be given to other defenses, such as statutes of limitation, ratification by the plaintiff of the writing by acceptance of the benefits of the writing, assignment or purchase by a bona fide purchaser for value, estoppel, and waiver.

The statute of limitations, if any, that governs the reformation claim is the ten-year period for actions on written contracts. See 735 ILCS 5/13-206. However, the Illinois Supreme Court has not yet decided when a reformation claim based on mutual mistake accrues, and the appellate decisions are mixed. *JPMorgan Chase Bank, N.A. v. Alecta Real Estate North Michigan Avenue, Inc.*, No. 08 C 3018, 2010 WL 375615 (N.D.Ill. Jan. 21, 2010).

XII. [1.22] NON-DEFENSES TO REFORMATION

In contrast to the defenses listed in §§1.20 and 1.21 above, negligence is not a bar to reformation. *Harden v. Desideri*, 20 Ill.App.3d 590, 315 N.E.2d 235, 240 – 241 (1st Dist. 1974). The rationale is that if negligence were a bar, then there would be no ground for reformation because of mutual mistake, inasmuch as mistakes nearly always presuppose negligence by one or both parties to the writing. *Blumenfeld v. Neuman*, 350 Ill.App. 306, 112 N.E.2d 742, 745 (4th Dist. 1953). However, in cases in which the negligence is so great as to amount to the violation of a positive legal duty, courts may bar reformation even for mutual mistake. *Covey v. Citizens Savings Bank (In re Pak Builders)*, 284 B.R. 663, 677 (Bankr. C.D.Ill. 2002) (negligence so gross as to establish violation of legal duty bars reformation).

Most notably, the parol evidence rule — which protects the sanctity of written instruments — is not applicable in reformation actions. Rather, parol evidence is admitted “to prove by clear and convincing evidence the actual agreement in light of the allegation that the written instrument, in spite of the apparent agreement expressed by its language, fails to express the actual agreement entered into between the parties.” *Brady v. Prairie Material Sales, Inc.*, 190 Ill.App.3d 571, 546 N.E.2d 802, 807, 137 Ill.Dec. 857 (2d Dist. 1989). See also *Camelot, Inc. v. Burke Burns & Pinelli, Ltd.*, 2021 IL App (2d) 200208, ¶43, 184 N.E.3d 384, 451 Ill.Dec. 797 (stating that, while a party is generally “barred from contradicting the terms of a written contract by parol evidence .°.°. the court’s consideration of such evidence is permissible where it is not objected to at trial.” [Citation omitted.]). Because contractual reformation presupposes a writing, “where mutual mistake or fraud is alleged, parol evidence is admissible to show the true intent and understanding of the parties.” *Ballard v. Granby*, 90 Ill.App.3d 13, 412 N.E.2d 1067, 1070, 45 Ill.Dec. 485 (3d Dist. 1980). Because of the nature of the remedy of reformation, parol evidence can be used to demonstrate that the writing does not express the true agreement of the parties. In *Darst v. Lang*, 367 Ill. 119, 10 N.E.2d 659, 661 (1937), the Supreme Court explained that “[p]arol evidence is admissible to show a mistake in a written instrument. A court of equity would be of little value if it could suppress only positive fraud, and leave mutual mistakes, innocently made, to work intolerable mischief, contrary to the intention of the parties.” Similarly, the statute of frauds is not applicable in reformation actions. *Schmitt v. Heinz*, 5 Ill.2d 372, 125 N.E.2d 457, 460 – 461 (1955).

XIII. [1.23] BURDEN OF PROOF AND FINDINGS

The issue of whether the party seeking reformation of an instrument has satisfied the clear and convincing burden of proof is primarily a question of fact. *Illinois Insurance Guaranty Fund v. Nwidor*, 2018 IL App (1st) 171378, ¶36, 105 N.E.3d 1035, 423 Ill.Dec. 627; *Upper Level, Inc. v. Provident Venture Corp.*, 209 Ill.App.3d 964, 568 N.E.2d 531, 532, 154 Ill.Dec. 531 (5th Dist. 1991). Any findings of fact should support the judgment (*Gromer v. Molby*, 385 Ill. 283, 52 N.E.2d 772, 775 (1944)), and the judgment should set forth sufficient details of the need for reformation (*Gray v. Merchants' Insurance Company of Newark*, 125 Ill.App. 370 (2d Dist. 1906)). Most important, the judgment must describe, with sufficient specificity, the manner by which the writing is changed. After having reformed the instrument, the court may retain jurisdiction for enforcement (*Sallo v. Boas*, 327 Ill. 145, 158 N.E. 364 (1927)) and to settle the rights of the parties in compliance with justice and equity (*Keith v. Henkleman*, 173 Ill. 137, 50 N.E. 692, 693 (1898)).

Fermazin v. Cothorn, 2019 IL App (2d) 180572-U, is instructive as to the burden of proof. In *Fermazin*, the claim was that there was a mutual mistake of fact purportedly evidenced by the fact that the writing included a large space after a named beneficiary and before the next section. The plaintiff argued that this demonstrated that another beneficiary was to have been inserted. Unconvinced, the court dismissed, finding that the burden of proof had not been met.

XIV. [1.24] APPELLATE STANDARD

Appellate courts review reformation as a question of fact. “The question whether plaintiff has presented sufficient evidence to meet his burden of proof and overcome the presumption that the instrument as written expresses the parties’ true intention is primarily a question of fact, and we will not disturb the trial court’s decision unless it is against the manifest weight of the evidence.” *Novak v. Smith*, 197 Ill.App.3d 390, 554 N.E.2d 652, 656, 143 Ill.Dec. 717 (5th Dist. 1990). Thus, a reviewing court will not disturb a decision regarding reformation unless it is against the manifest weight of the evidence. *Farmer City State Bank v. Guingrich*, 139 Ill.App.3d 416, 487 N.E.2d 758, 766, 94 Ill.Dec. 1 (4th Dist. 1985).

XV. [1.25] CONCLUSION

The remedy of contractual reformation is a powerful tool to enforce the true agreement between contracting parties. Far from invading the traditional sanctity of the written word, contractual reformation reinforces the often-ignored principle that the contract between the parties is their actual agreement, not a later writing. Thus, despite a natural hesitancy to invade the believed unassailable province of a writing, contractual reformation gives appropriate vibrancy to actual agreements reached, rather than false worship to written instruments.

2

Breach of Real Estate Contract: Specific Performance

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I. In General

- A. [2.1] Cause of Action
- B. [2.2] General Principles
- C. [2.3] Elements

II. [2.4] Defenses to Specific Performance

- A. [2.5] Laches and Statute of Limitations
- B. [2.6] Unfair Terms or Conduct or Lack of Consideration
- C. [2.7] Incomplete or Uncertain Terms
- D. [2.8] Fraud, Oppression, or Misrepresentation
- E. [2.9] Failure to Waive Condition Precedent
- F. [2.10] Other Defenses

III. [2.11] Oral Contracts and Option Contracts

IV. [2.12] Some Cases of Interest

V. [2.13] Conclusion

VI. Sample Complaints for Specific Performance for Sale of Real Property

- A. [2.14] Complaint 1
- B. [2.15] Complaint 2 (Real Estate Option)

I. IN GENERAL

A. [2.1] Cause of Action

Specific performance is an equitable remedy requiring a defendant to perform an affirmative act to fulfill a contract. *Goodwine State Bank v. Mullins*, 253 Ill.App.3d 980, 625 N.E.2d 1056, 1078, 192 Ill.Dec. 901 (4th Dist. 1993). The province of a court in a specific performance action is to enforce the contract the parties have made, not to make a contract for them and then enforce it. *Butler v. Kent*, 275 Ill.App.3d 217, 655 N.E.2d 1120, 1127, 211 Ill.Dec. 737 (1st Dist. 1995). “In other words, ‘the contract must be enforced according to its terms or not at all.’” *Id.* (quoting *Sweeting v. Campbell*, 8 Ill. 2d 54, 132 N.E.2d 523, 525 (1956)). “Illinois courts have long held that where the parties have fairly and understandingly entered into a valid contract for the sale of real property, specific performance of the contract is a matter of right and equity will enforce it, absent circumstances of oppression and fraud.” *Schwinder v. Austin Bank of Chicago*, 348 Ill.App.3d 461, 809 N.E.2d 180, 195, 284 Ill.Dec. 58 (1st Dist. 2004).

B. [2.2] General Principles

Specific performance is an equitable remedy that may not be granted when the seeking party has an adequate remedy at law. *People v. Perry*, 224 Ill. 2d 312, 864 N.E.2d 196, 226, 309 Ill.Dec. 330 (2007). The decision to grant specific performance rests within the sound discretion of the court. *Ruffolo v. Jordan*, 2015 IL App (1st) 140969, ¶14, 41 N.E.3d 536, 397 Ill.Dec. 125; *Omni Partners v. Down*, 246 Ill.App.3d 57, 614 N.E.2d 1342, 1346, 185 Ill.Dec. 657 (2d Dist. 1993).

A party seeking specific performance must have substantially performed all contractual obligations or show that the party was ready, willing, and able to perform the obligations at the time they were due but was prevented by the other party. *Lovins v. Kelley*, 19 Ill. 2d 25, 166 N.E.2d 69, 71 (1960); *LaSalle Bank, N.I. v. First American Bank*, 316 Ill.App.3d 515, 736 N.E.2d 619, 628, 249 Ill.Dec. 425 (1st Dist. 2000). The other party’s repudiation of the contract does not excuse this showing. *Mitchell v. White*, 295 Ill. 135, 128 N.E. 803, 805 (1920); *Tantillo v. Janus*, 87 Ill.App.3d 231, 408 N.E.2d 1000, 1005, 42 Ill. Dec. 291 (1st Dist. 1980). A party may not rely on his or her own nonperformance of a condition precedent, included in the contract for his or her own benefit, to prevent specific performance under a claim that the contractual duties never ripened. *Grill v. Adams*, 123 Ill.App.3d 913, 463 N.E.2d 896, 900, 79 Ill.Dec. 342 (1st Dist. 1984). When there has been partial performance, the case may be brought outside the statute of frauds, allowing for an order of specific performance. *John O. Schofield, Inc. v. Nikkel*, 314 Ill.App.3d 771, 731 N.E.2d 915, 926 – 927, 247 Ill.Dec. 142 (5th Dist. 2000).

Illinois law requires a greater specificity regarding the essential terms when a party is seeking specific performance. *Cinman v. Reliance Federal Savings & Loan Ass’n*, 155 Ill.App.3d 417, 508 N.E.2d 239, 244, 108 Ill.Dec. 78 (1st Dist. 1987). Specific performance requires as a prerequisite a clear and precise understanding of the terms of the contract. 508 N.E.2d at 243 – 244. This is so that a court can require the specific thing contracted for to be done. *Lobo IV, LLC v. V Land Chicago Canal, LLC*, 2019 IL App (1st) 170955, ¶64, 138 N.E.3d 824, 435 Ill.Dec. 210. When there is ambiguity, doubt, or uncertainty with respect to its terms, courts will deny equitable enforcement by specific performance. *Schilling v. Stahl*, 395 Ill.App.3d 882, 918 N.E.2d 1077, 1080, 335 Ill.Dec. 264 (2d Dist. 2009).

A contract for the sale of real estate can be specifically enforced when a writing contains the essential contract terms, which include the names of the parties, a description of the property sufficient to identify it, the sales price or a means of determining it, the terms and conditions of the sale, and the signature of the party to be charged. *Kane v. McDermott*, 191 Ill.App.3d 212, 547 N.E.2d 708, 712, 138 Ill.Dec. 541 (4th Dist. 1989). Essential terms of a real estate contract must be wholly in writing. *Calvary Temple Assembly of God v. Lossman*, 200 Ill.App.3d 102, 557 N.E.2d 1309, 1311 – 1312, 146 Ill.Dec. 122 (2d Dist. 1990).

If the parties have yet to reach agreement on essential terms — for example, if a court finds the contract requires further negotiation by the parties — then specific performance is not available. *Hoxha v. LaSalle National Bank*, 365 Ill.App.3d 80, 847 N.E.2d 725, 730, 301 Ill.Dec. 715 (1st Dist. 2006) (“Where the court would be left to order further negotiations and where the parties have yet to reach agreement on essential terms, specific performance is not available.”) (quoting *Cinman, supra*, 508 N.E.2d at 244). Parol evidence may not be used to supply missing terms. *Kane, supra*, 547 N.E.2d at 711 – 712.

The general rule is that a party injured by a breach of a real estate contract may not obtain both specific performance and damages. *Yonan v. Oak Park Federal Savings & Loan Ass’n*, 27 Ill.App.3d 967, 326 N.E.2d 773, 780 (1st Dist. 1975). However, if a decree of specific performance does not provide complete relief, the injured party may recover damages that will make him or her whole, including monetary damages incidental to and caused by a delay in performance. *Lobo IV, supra*, 2019 IL App (1st) 170955 at ¶77.

The fact that a contract provides an option for liquidated damages in the event of nonperformance does not itself prevent a court from granting specific performance, so long as the contract does not make liquidated damages an exclusive remedy. *O’Shield v. Lakeside Bank*, 335 Ill.App.3d 834, 781 N.E.2d 1114, 1120, 269 Ill.Dec. 924 (1st Dist. 2002). Finally, the principles governing the specific performance of a contract for the sale and purchase of real estate are equally applicable to a contract for the exchange of realty. *Yonan, supra*, 326 N.E.2d at 780.

C. [2.3] Elements

The specific performance remedy requires that the plaintiff not have an adequate remedy at law. *Parker v. Garrison*, 61 Ill. 250 (1871); *Schwinder v. Austin Bank of Chicago*, 348 Ill.App.3d 461, 809 N.E.2d 180, 195, 284 Ill.Dec. 58 (1st Dist. 2004). Additionally, to be entitled to specific performance, a plaintiff must allege and prove the following elements:

1. the existence of a valid, binding, and enforceable contract;
2. the plaintiff complied with the terms of his, her, or its part of the contract or is ready, willing, and able to perform his, her, or its part of the contract; and
3. the defendant’s failure or refusal to perform the defendant’s part of the contract.

See Lobo IV, LLC v. Land Chicago Canal, LLC, 2019 IL App (1st) 170955, ¶64, 138 N.E.3d 824, 435 Ill.Dec. 210; *Happy R Securities, LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶42, 988 N.E.2d 972, 370 Ill.Dec. 616; *Schilling v. Stahl*, 395 Ill.App.3d 882, 918 N.E.2d 1077, 335 Ill.Dec. 264 (2d Dist. 2009); *Cohn v. Mitchell*, 115 Ill. 124, 3 N.E. 420 (1885).

Entitlement to the equitable remedy of specific performance must be proved by clear and convincing evidence. *Butler v. Kent*, 275 Ill.App.3d 217, 655 N.E.2d 1120, 211 Ill.Dec. 737. In the context of a complaint for specific performance, “clear and convincing evidence” means evidence greater than a preponderance of the evidence but not quite as high as the evidence necessary for a criminal conviction. *Bazydlo v. Volant*, 164 Ill.2d 207, 647 N.E.2d 273, 276, 207 Ill.Dec. 311 (1995).

Federal court practitioners should be aware that courts in the Seventh Circuit hold that specific performance is a remedy, not a separate cause of action. See *LaSalle National Bank v. Metropolitan Life Insurance Co.*, 18 F.3d 1371, 1376 (7th Cir. 1994); *MKV Investments LLC v. Sierra Consulting Inc.*, No. 18 C 4815, 2019 U.S. Dist. LEXIS 21515, *2 (N.D.Ill. Feb. 11, 2019). Therefore, when filing a claim for specific performance in federal court, it is prudent to plead the count as breach of contract, include the specific performance elements, and specifically request specific performance in the prayer for relief.

II. [2.4] DEFENSES TO SPECIFIC PERFORMANCE

Standard contract and equitable defenses are available for suits seeking specific performance. See §§2.5 – 2.11 below.

A. [2.5] Laches and Statute of Limitations

Being equitable in nature, the remedy of specific performance is subject to laches. When there is an unreasonable delay between the time of breach and the institution of a suit for specific performance, and the delay is attended by circumstances rendering it inequitable to grant relief, laches may be successfully invoked to bar enforcement of the contract. *Cities Service Oil Co. v. Viering*, 404 Ill. 538, 89 N.E.2d 392 (1949); *People ex rel. Nelson v. Village of Long Grove*, 169 Ill.App.3d 866, 523 N.E.2d 656, 119 Ill.Dec. 900 (2d Dist. 1988).

Illinois courts often evaluate laches by looking to the statute of limitations. Thus,

[a]lthough statutes of limitation, applicable in legal actions, are not directly controlling in suits seeking equitable relief, courts ordinarily follow statutes of limitation as convenient measures for determining the length of time that ought to operate as a bar to an equitable cause of action. . . . However, depending upon the particular circumstances before the court, equitable relief may be refused although the time fixed by the statute of limitations has not expired, or conversely, relief may be granted even though the limitation period has long since elapsed. [Citation omitted.] *Sundance Homes v. County of Du Page*, 195 Ill.2d 257, 746 N.E.2d 254, 262, 253 Ill.Dec. 806 (2001).

B. [2.6] Unfair Terms or Conduct or Lack of Consideration

Specific performance may be denied when the contract is not fair or equitable, inequitable advantage was taken of a party, or the contract is not supported by valuable consideration. *Wrobel v. Wojtasiek*, 341 Ill. 330, 173 N.E. 348, 352 (1930); *Joseph v. Evans*, 338 Ill. 11, 170 N.E. 10, 13 (1929); *Hunter v. De May*, 124 Ill.App.2d 429, 259 N.E.2d 291 (2d Dist. 1970).

C. [2.7] Incomplete or Uncertain Terms

Denial of specific performance may also result when the contract is not complete; is not clear, certain, and definite in its terms; contains a description of the property insufficient to locate it; or was entered into as a result of a mistake. *Pocius v. Fleck*, 13 Ill. 2d 420, 150 N.E.2d 106, 110 (1958); *Cinman v. Reliance Federal Savings & Loan Ass'n*, 155 Ill.App.3d 417, 508 N.E.2d 239, 244, 108 Ill.Dec. 78 (1st Dist. 1987); *Mansell v. Lord Lumber & Fuel Co.*, 348 Ill. 140, 180 N.E. 774, 778 (1932).

D. [2.8] Fraud, Oppression, or Misrepresentation

Fraud, oppression, or misrepresentation as to material matters may result in the denial of specific performance. *Stofer v. First National Bank of Effingham*, 212 Ill.App.3d 530, 571 N.E.2d 157, 163, 156 Ill.Dec. 570 (5th Dist. 1991).

E. [2.9] Failure to Waive Condition Precedent

The failure to waive a condition precedent may result in the denial of specific performance. A condition precedent is “an event which must occur, or an act which must be performed by one party to an existing contract before the other party is obligated to perform.” *Maywood Proviso State Bank v. York State Bank & Trust Co.*, 252 Ill.App.3d 164, 625 N.E.2d 83, 87, 192 Ill.Dec. 123 (1st Dist. 1993).

F. [2.10] Other Defenses

Of course, a standard defense to a suit for specific performance is that the plaintiff has an adequate remedy at law. This defense can be raised at the motion stage and/or again as an affirmative defense. Other affirmative defenses that counsel for a defendant in a suit for specific performance should not forget are the statute of frauds, impossibility or commercial impracticability of performance, and the plaintiff’s unclean hands.

III. [2.11] ORAL CONTRACTS AND OPTION CONTRACTS

Oral contracts for the sale of real estate are generally unenforceable under the statute of frauds. *John O. Schofield, Inc. v. Nikkel*, 314 Ill.App.3d 771, 731 N.E.2d 915, 926, 247 Ill.Dec. 142 (5th Dist. 2000). However, they may be enforced in equity under the doctrine of part performance. *Id.* To grant specific performance of an oral contract, the court must find that “the terms of the contract are clear, definite, and unequivocal . . . the contract has been at least partially performed by the party seeking the remedy . . . and . . . the acts allegedly done in performance are positively attributable exclusively to the contract.” *Anderson v. Kohler*, 397 Ill.App.3d 773, 922 N.E.2d 8, 19, 337 Ill.Dec. 150 (2d Dist. 2009) (quoting *Intini v. Marino*, 112 Ill.App.3d 252, 445 N.E.2d 460, 464, 68 Ill.Dec. 12 (1st Dist. 1983)). The existence and terms of an oral contract may be proved by circumstances, acts by the parties, and the parties’ declarations made in the presence of others. *Phillips v. Britton*, 162 Ill.App.3d 774, 516 N.E.2d 692, 698, 114 Ill.Dec. 537 (5th Dist. 1987). The contract must appear certain in all of its terms. *Id.* The doctrine of part performance requires more

than the payment of earnest money. *Cain v. Cross*, 293 Ill.App.3d 255, 687 N.E.2d 1141, 1143, 227 Ill.Dec. 659 (5th Dist. 1997). Moreover, actions taken in anticipation of a contract are not sufficient as partial performance. *Leekha v. Wentcher*, 224 Ill.App.3d 342, 586 N.E.2d 557, 563, 166 Ill.Dec. 599 (1st Dist. 1991).

Specific performance of a purchase option may be granted if the option agreement is based on valuable and sufficient consideration and is a bilateral agreement. *Rendl v. Anderson*, 103 Ill.App.2d 255, 242 N.E.2d 767, 773 (2d Dist. 1968); *Morris v. Goldthorp*, 390 Ill. 186, 60 N.E.2d 857, 862 (1945). See also *Terraces of Sunset Park, LLC v. Chamberlin*, 399 Ill.App.3d 1090, 929 N.E.2d 1161, 1165, 341 Ill.Dec. 82 (2d Dist. 2010) (“An option contract is an agreement in which one party (the optionor), based upon consideration given to him by the optionee, binds himself to perform a certain act, at the sole power and discretion of the optionee to accept upon terms specified, at which time it is converted from a bilateral to a unilateral contract and cannot be withdrawn by the optionor during the option period.”). A contract is definite and certain for the purpose of specific performance when the option provisions in the lease give the lessee the right to buy the property at a fixed price within a certain time. *White Hen Pantry, Inc. v. Cha*, 214 Ill.App.3d 627, 574 N.E.2d 104, 108, 158 Ill.Dec. 310 (1st Dist. 1991). The terms and conditions of sale, including provisions for the apportionment of taxes, the type of warranty deed, and the closing date, are nonessential and can be implied from the circumstances or from custom. *Id.* If time is of the essence, however, failing to timely exercise the option may preclude equitable relief. See *Michigan Wacker Associates, LLC v. Casdan, Inc.*, 2018 IL App (1st) 171222, ¶45, 100 N.E.3d 596, 421 Ill.Dec. 579 (equitable relief precluded “where an option contract indicates that time is of the essence or where a contracting party loses its legal right through the negligence of its agent or mere forgetfulness”).

IV. [2.12] SOME CASES OF INTEREST

In *McGoey v. Brace*, 2022 IL App (1st) 210322, 207 N.E.3d 1099, 462 Ill.Dec. 796, neighbors in Winnetka, Illinois entered into a settlement agreement to resolve a lawsuit involving the relocation of a driveway easement. 2022 IL App (1st) 210322 at ¶¶3 – 5. The settlement agreement entered in 2012 included provisions for a parking pad, with costs and maintenance to be equally shared by the neighbors, and specified how the pad would be used. 2022 IL App (1st) 210322 at ¶5. In 2016, after work was completed on the relocated driveway easement, one neighbor obtained a quote to install the parking pad; however, the neighbors could not agree on the materials to be used for the pad and postponed its installation. 2022 IL App (1st) 210322 at ¶8. In 2019, the other neighbor filed suit seeking an order of specific performance to install the parking pad. 2022 IL App (1st) 210322 at ¶10. The neighbor opposing specific performance argued the remedy was improper because the agreement lacked specificity — namely, it did not specify the legal description of the parking pad, its size, when it would be installed, who would install it, or the nature and quality of the installation materials. 2022 IL App (1st) 210322 at ¶25. The trial court and appellate court rejected these arguments, finding that the documents submitted identified the size and location of the parking pad. The appellate court further explained that “[t]he name of the contractor and the installation materials are collateral matters that should not prevent specific performance.” 2022 IL App (1st) 210322 at ¶29. Finally, the court looked to the defendants’ conduct to find specific performance appropriate: “The [defendants] unilaterally violated the settlement agreement and now

contend that their unwillingness to agree on minor unresolved issues is sufficient to ignore a valid contract and leave [the plaintiff] with no real legal recourse. We reject that proposition; no contract would have any effect otherwise.” 2022 IL App (1st) 210322 at ¶29.

In *Lobo IV, LLC v. V Land Chicago Canal, LLC*, 2019 IL App (1st) 170955, 138 N.E.3d 824, 435 Ill.Dec. 210, the parties entered into an agreement to sell three properties at a later date. The contracts contained provisions permitting an adjustment of the purchase price as the date of sale approached. 2019 IL App (1st) 170955 at ¶7. To this end, the contracts required that each party to the agreement provide the other with a “Permanent Lender’s” appraisal of the properties by a specific date. 2019 IL App (1st) 170955 at ¶¶7 – 8. After the plaintiff-purchaser submitted appraisals from a bank that were *lower* than the contract price, the defendant-seller informed the plaintiff that it was in default under the purchase contracts because it had failed to obtain appraisals from a “Permanent Lender” as required by the contracts. 2019 IL App (1st) 170955 at ¶¶9 – 10. As a result of this alleged default, the defendant-seller informed the plaintiff-buyer that it was terminating the agreement. 2019 IL App (1st) 170955 at ¶10. The plaintiff sought specific performance, claiming it was in compliance with the terms of the contract. *Id.* The trial court determined the plaintiff had complied with the contracts’ terms and awarded specific performance. 2019 IL App (1st) 170955 at ¶22. The appellate court determined the plaintiff’s bank qualified as a “Permanent Lender” as defined by the contracts’ terms. 2019 IL App (1st) 170955 at ¶¶65 – 69. Further, the court determined the provisions at issue were best characterized as “mortgage contingency clauses,” which are waivable by purchasers in a real estate sale 2019 IL App (1st) 170955 at ¶70. Accordingly, the appellate court affirmed the trial court’s decision to grant specific performance at the lower, appraised purchase prices. 2019 IL App (1st) 170955 at ¶75.

In *Ruffolo v. Jordan*, 2015 IL App (1st) 140969, 41 N.E.3d 536, 397 Ill.Dec. 125, a prospective buyer sought to enforce the option to purchase a veterinary clinic contained within a lease. Pursuant to the option agreement, the purchase price was to be determined by either (a) an appraiser selected jointly by the parties or (b) if the parties were unable to agree on an appraiser, a third party chosen by the parties’ selected appraisers. 2015 IL App (1st) 140969 at ¶4. Due to delays attributable to the defendant, the veterinary clinic was not sold within the six-month period in which the purchase was supposed to close. *Id.* Nonetheless, the parties continued to negotiate the terms of the sale, though the plaintiff eventually stopped paying rent to the defendant. 2015 IL App (1st) 140969 at ¶5. The plaintiff sought specific performance after the third-party appraiser selected by the parties’ representatives appraised the property at \$525,000, an amount roughly in the middle of the plaintiff’s and defendant’s suggested values. 2015 IL App (1st) 140969 at ¶¶5 – 6. The trial court granted the plaintiff’s motion for summary judgment, finding the delays in selecting an appraiser and effectuating the sale were attributable to the defendant and the plaintiff was ready, willing, and able to perform within the option period. 2015 IL App (1st) 140969 at ¶7. On appeal, the court affirmed the lower court’s assessment, stating that “[t]he only material hold up in the purchase and sale was the price. The trial court appropriately accepted the third-party appraisal as the purchase price where the parties agreed that such an appraisal would be binding. Though the process of getting to the point of sale was not flawless, the result conforms to the intentions of the parties at the time of contracting.” 2015 IL App (1st) 140969 at ¶15.

In *Schilling v. Stahl*, 395 Ill.App.3d 882, 918 N.E.2d 1077, 335 Ill.Dec. 264 (2d Dist. 2009), the buyers entered a contract for sale of real property for \$675,000 and set a closing date. Two days

before the closing date, the sellers informed the buyers that the contract “was cancelled” because they “‘had decided not to sell’ the property.” 918 N.E.2d at 1079. The sellers argued that the contract was indefinite because of 13 mortgage terms that were not provided for in the contract. 918 N.E.2d at 1081. The court found that a contract existed that clearly identified the parties, the property, the price, the earnest money provided, and the fact that the parties were entering into a binding legal contract. 918 N.E.2d at 1082. Because the sellers did not show up at the closing and present a mortgage, there could have been no dispute as to the terms of the mortgage, which was never presented. 918 N.E.2d at 1083. Consequently, because the contract was so certain and unambiguous in its terms, the buyers were entitled to specific performance. *Id.*

In *Anderson v. Kohler*, 397 Ill.App.3d 773, 922 N.E.2d 8, 337 Ill.Dec. 150 (2d Dist. 2009), the alleged buyers of land sought specific performance, claiming they had entered into an oral agreement with the sellers of a parcel of land for use as an airstrip and the alleged sellers later refused to sell the land. At trial, the buyer testified that the seller agreed to sell him a parcel of land for an airstrip and that the price was to be the fair market value as determined by an appraiser. The seller, however, testified that he agreed only to rent the property and that he told the buyer he would “maybe” sell if they “could work out a deal.” 922 N.E.2d at 15. The court determined there was never an agreement to convey the airstrip, and even if there was an agreement to convey, there was no agreement whether the airstrip would be conveyed by trade or sale. Furthermore, even if sale was the agreed term, there was no clear agreement as to price because “fair market value” is too indefinite given fluctuations in the price of land. 922 N.E.2d at 20. Thus, the court held there was no oral contract to enforce because the price and time-for-performance terms were indefinite. *Id.*

In *Karris v. US Equities Development, Inc.*, 376 Ill.App.3d 544, 876 N.E.2d 688, 691, 315 Ill.Dec. 376 (1st Dist. 2007), the buyer sought specific performance on an amendment to a purchase agreement that he alleged gave him a right to purchase the subject property for \$25.85 million. The buyer, however, did not accept the terms unconditionally. Instead, his acceptance was “conditional on certain factors, including an opportunity to analyze the property and subtraction from the price of a brokerage commission.” 876 N.E.2d at 694. The seller never accepted the terms of the counteroffer before it expired. The court held that no real estate contract was formed, and in the absence of an enforceable contract, the buyer’s claim for specific performance could not overcome the requirements of the Illinois statute of frauds. *Id.*

In *Hoxha v. LaSalle National Bank*, 365 Ill.App.3d 80, 847 N.E.2d 725, 301 Ill.Dec. 715 (1st Dist. 2006), the plaintiffs sought specific performance of a contract to sell property held in a land trust. The plaintiffs claimed that the decedent beneficial owner of the property contracted with them to sell it for a fixed price after her death. The successor beneficiary was not aware of the alleged agreement. The court found that the father and son had not met their burden of showing that they entered into a valid, binding contract with the decedent beneficial owner, much less a contract that would support specific performance, because the alleged contract did not contain the required specificity for a court to grant specific performance. 847 N.E.2d at 729.

In *WestPoint Marine, Inc. v. Prange*, 349 Ill.App.3d 1010, 812 N.E.2d 1016, 286 Ill.Dec. 1 (4th Dist. 2004), the corporation sought specific performance of the option-to-buy provision of its lease agreement with the property owner. “[T]he lease described the property only as ‘approximately’ 500 feet of riverfront property at ‘approximately mile 20’ ‘just below’” a certain

city. 812 N.E.2d at 1019. The 500 feet of riverfront property used by the corporation fluctuated to some extent. The corporation's president was not certain what he would be buying when he attempted to exercise the option to buy. Lastly, no agreement existed as to how far inland the corporation's lease extended. The appellate court found that the trial court's finding that the property was not sufficiently defined in the lease was not against the manifest weight of the evidence. 812 N.E.2d at 1018. Therefore, the denial of specific performance was affirmed. 812 N.E.2d at 1019.

In *Schwinder v. Austin Bank of Chicago*, 348 Ill.App.3d 461, 809 N.E.2d 180, 284 Ill.Dec. 58 (1st Dist. 2004), the parties signed a contract for the sale of a specific condominium unit. The contract limited the buyers' remedy to a return of their earnest money. The closing was held up due to an injunction imposed by the seller's divorce. The parties also signed an agreement modifying the contract that allowed the buyers to take possession pending closing and gave the buyers the sole right to terminate the agreement with the sales contract if the closing did not occur by a certain date by providing 30 days' notice to the seller. The buyers took possession and paid a monthly fee. The buyers sought specific performance after the seller refused to schedule a closing date and demanded payment of rent. The court found that the modification to the original agreement meant that the condominium purchasers' remedies were not limited to the return of their earnest money. 809 N.E.2d at 191. The court stated it was clear that the agreement was meant to serve as an adjunct to the contract. 809 N.E.2d at 190. The court concluded that the uniqueness of the condominium unit made it a proper subject for specific performance and made the remedy at law inadequate. 809 N.E.2d at 196. The court further concluded that it would be equitable to order specific performance when the buyers paid earnest money, made substantial improvements, and complied with all of the terms of the agreement. 809 N.E.2d at 197. Therefore, the court affirmed the order of specific performance. *Id.*

In *Talerico v. Olivarri*, 343 Ill.App.3d 128, 796 N.E.2d 1083, 277 Ill.Dec. 717 (1st Dist. 2003), the buyers filed suit seeking declaratory judgment and specific performance of a contract to purchase real estate against the sellers. The sellers voluntarily tendered specific performance. The buyers filed an amended complaint seeking damages, rents, and related expenses paid on other property during the time the contract was to be performed and loss of certain tax benefits caused by the defendants' delay in closing due to the sellers' 18-month delay in performance. The court found that such damages were not inconsistent with an order for specific performance because they occurred prior to the order. 796 N.E.2d at 1086. The court also found that such damages were reasonably foreseeable. 796 N.E.2d at 1087. Therefore, the court reversed the lower court's dismissal of the complaint. *Id.*

In *O'Shield v. Lakeside Bank*, 335 Ill.App.3d 834, 781 N.E.2d 1114, 269 Ill.Dec. 924 (1st Dist. 2002), the buyers contracted to purchase a townhouse and made two earnest money payments during its construction. However, the sellers refused to complete the sale. The buyers filed a suit seeking, among other things, specific performance and interest on their earnest money. The contract provided that the buyers' exclusive remedy was a return of money. The court found that the contract was plain and unambiguous. 781 N.E.2d at 1119. Therefore, the court affirmed the lower court's grant of summary judgment. 781 N.E.2d at 1122.

In *Bond Drug Company of Illinois v. Amoco Oil Co.*, 323 Ill.App.3d 190, 751 N.E.2d 586, 256 Ill.Dec. 196 (1st Dist. 2001), the purchaser paid the full purchase price in an escrow account to be held for the benefit of the seller. Amoco delayed the closing to remedy environmental contamination. Amoco later rescinded the contract due to the unexpected cost of the cleanup. The buyer sought specific performance. The trial court granted Amoco summary judgment. 751 N.E.2d at 588. The appellate court found that specific performance was an appropriate remedy. 751 N.E.2d at 593. The court would not have to impermissibly insert terms and obligations into the warranty clause in the contract, as it encompassed environmental violations. The court stated that one party's mistaken assumptions concerning costs are not an excuse for dishonoring the contract. 751 N.E.2d at 593 – 594. The court also found that the contract was not unconscionable, stating that no equitable principle, including unconscionability, will compel the cancellation of a valid contract merely because one party will possibly sustain a loss. *Id.*

In *LaSalle Bank, N.I. v. First American Bank*, 316 Ill.App.3d 515, 736 N.E.2d 619, 249 Ill.Dec. 425 (1st Dist. 2000), the appellant, Lopez, signed a purchase contract on the subject premises and advanced a sum of money to the now-bankrupt legal owner. The legal owner held the premises in a land trust in which Brandess Home Builders was the beneficiary. The relevant issue on appeal concerned Lopez's claim that the trial court erred in entering the judgment of foreclosure and sale without adjudicating Count I of his counterclaim, titled "Specific Performance/Breach of Contract." 736 N.E.2d at 628. While Lopez was ready, willing, and able to pay, Brandess would not be able to perform because it was in bankruptcy. Thus, the court found that specific performance of the contract was impossible. *Id.* Therefore, the court dismissed Lopez's counterclaim seeking specific performance. 736 N.E.2d at 629.

In *John O. Schofield, Inc. v. Nikkel*, 314 Ill.App.3d 771, 731 N.E.2d 915, 247 Ill.Dec. 142 (5th Dist. 2000), the plaintiff, geologist Stephen Wilson's assignee and successor in interest, claimed that the defendant orally agreed to convey to Wilson an interest in two oil and gas leases in exchange for Wilson's geological services. The defendant claimed that he agreed to convey an interest in only one lease. The plaintiff sought specific performance of the agreement to convey an interest in the second lease. The court found that Wilson's services could be adequately compensated at law. 731 N.E.2d at 927. Wilson testified as to his hourly wage and the number of hours he spent on the project. Therefore, the court found that specific performance was not warranted because of the assignment of interest in the first lease and monetary damages for Wilson's services. *Id.*

V. [2.13] CONCLUSION

A party seeking the application of equitable principles must establish that the plaintiff cannot be made whole by damages or by another adequate remedy at law. Specific performance is an equitable remedy requiring a defendant to perform an affirmative act to fulfill a contract. The remedy will be invoked only when (a) the plaintiff has a valid, binding, and enforceable contract; (b) the plaintiff is without an adequate remedy at law; (c) the plaintiff has performed his, her, or its contractual obligations or was ready, willing, and able to perform his, her, or its contractual obligations; and (d) the defendant failed or refused to perform his, her, or its part of the contract.

Illinois law requires a greater specificity regarding the essential terms when a party is seeking specific performance. A contract for the sale of real estate can be specifically enforced when a writing contains the essential contract terms, which include the names of the parties, a description of the property sufficient to identify it, the sales price or a means of determining it, the terms and conditions of the sale, and the signature of the party to be charged.

VI. SAMPLE COMPLAINTS FOR SPECIFIC PERFORMANCE FOR SALE OF REAL PROPERTY

A. [2.14] Complaint 1

Plaintiff, [name of plaintiff], **for** [his] [her] **cause of action against Defendant**, [name of defendant], **states:**

1. **Plaintiff is a resident of** [county, state].
2. **Defendant is a resident of** [county, state], **and owns a certain parcel of land, commonly referred to as** [address or legal description of property], **situated in the** [city, county, state of property] **(the “Property”).**
3. **On or about** [date plaintiff and defendant entered into contract], **Plaintiff and Defendant entered into a contract for the purchase and sale of the Property. A copy of the Real Estate Purchase Agreement is attached hereto and incorporated herein by reference thereto and marked as “Exhibit A” (the “Contract”).**
4. **The Contract was for the total purchase price of** \$[amount of purchase price].
5. **Defendant has breached the Contract by failing to perform Defendant’s obligations, including completion of the Contract and conveyance of the Property to Plaintiff.**
6. **Plaintiff has performed and satisfied all obligations and conditions of the Contract of its part to be performed or satisfied except those that Defendant’s actions prevented Plaintiff from performing.**
7. **At all relevant times, Plaintiff has been ready, willing, and able to fulfill Plaintiff’s obligations under the Contract and has demanded that Defendant comply with the terms of the Contract.**
8. **Pursuant to the Contract, Plaintiff is entitled to reasonable attorneys’ fees incurred in the enforcement of the Contract.**
9. **Plaintiff has incurred and will continue to incur attorneys’ fees with the enforcement of the Contract.**
10. **Plaintiff has no adequate remedy at law for Defendant’s failure to convey the Property to Plaintiff pursuant to the Contract.**

WHEREFORE, Plaintiff prays that this Court enter its judgment in Plaintiff's behalf and against Defendant as follows:

A. Enter judgment in Plaintiff's favor and against Defendant, directing Defendant to specifically perform the Contract.

B. Enter a temporary restraining order and preliminary injunction enjoining Defendant from transferring title to the Property to anyone other than Plaintiff.

C. Award Plaintiff attorneys' fees and costs of this suit and such further relief the Court deems just.

B. [2.15] Complaint 2 (Real Estate Option)

Plaintiff, [name of plaintiff], for its Complaint against Defendant, [name of defendant], states as follows:

1. Defendant owns real property in [county and state of property], commonly known as [address, city, and state of property] (the "Property").

2. On or about [date defendant granted Plaintiff first right and option to purchase], Defendant granted to Plaintiff the first right and option to purchase the Property, which option was extended by a written Extension of Option to Purchase Real Property on or about [date option was extended by written extension of option to purchase property] (collectively, the "Option"). A true copy of the Option to Purchase Real Property and the Extension of Option to Purchase Real Property are attached hereto as Exhibit A and incorporated herein by this reference.

3. Plaintiff exercised the option to purchase the Property by written Notice of Exercise of Option to Purchase Real Property on [date Plaintiff exercised option to purchase property by written exercise of option to purchase property] (the "Notice"). Defendant acknowledged receipt, acceptance, ratification, and approval of the Notice on [date defendant acknowledged receipt, acceptance, ratification, and approval of notice]. A true copy of the Notice is attached hereto as Exhibit B and incorporated herein by this reference.

4. Plaintiff has made demand on Defendant to perform his obligations under the Option.

5. Defendant has breached the Option by failing to close on the sale of the Property.

6. Plaintiff has fully performed its obligations under the Option and is ready, willing, and able to fulfill its obligations to purchase the Property.

7. If Defendant is not ordered to specifically perform [his][her][its] obligations and permit Plaintiff to purchase the Property, Plaintiff will suffer irreparable harm.

8. The irreparable harm that would be caused by Defendant's continued refusal to perform [his][her][its] obligations under the Option can and would be minimized by an order of this Court directing Defendant to sell the Property pursuant to the Option.

9. The Option provides that the obligations of Defendant shall be specifically enforced by order of the court in the event of any breach or default by Defendant. See Option Paragraph [#].

10. Plaintiff has no adequate remedy at law.

11. Pursuant to the Contract, Plaintiff is entitled to reasonable attorneys' fees incurred in the enforcement of the Contract.

12. Plaintiff has incurred and will continue to incur attorneys' fees with the enforcement of the Contract.

WHEREFORE, Plaintiff prays for judgment against Defendant for specific performance of the Option, damages for delay in performance, Plaintiff's reasonable attorneys' fees and costs of suit, and such further relief as the Court deems just.

3

Suits To Quiet Title in Real Estate

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- I. [3.1] Scope of Chapter**
- II. [3.2] Introduction**
- III. [3.3] Elements of Quiet Title**
- IV. Cloud on Title Is Not Slander of Title**
 - A. [3.4] Cloud on Title
 - B. [3.5] Slander of Title
- V. [3.6] Statute of Limitations**
- VI. Quiet Title Is Not Ejectment or Eviction**
 - A. [3.7] Quiet Title Is an Equitable Action To Remove a Cloud on Title
 - B. [3.8] Ejectment and Eviction Proceedings Are Possessory Actions
- VII. [3.9] Pleading**
 - A. [3.10] Venue; Parties
 - B. [3.11] Form Complaint
- VIII. Defenses**
 - A. [3.12] Good Title
 - B. [3.13] Adverse Possession
 - C. [3.14] Laches
- IX. [3.15] Presumption and Burden of Proof**
- X. [3.16] Evidence**
- XI. [3.17] Relief**
- XII. [3.18] Conclusion — Practical Considerations**

I. [3.1] SCOPE OF CHAPTER

This chapter examines the equitable remedy of “quieting title” in Illinois and in what circumstances an action for such relief can be brought. This chapter explores not only what a plaintiff must establish to prevail in an action to quiet title, but it also explains which recorded instruments are subject to such an action and how to successfully plead (and defend against) an action to quiet title in a given property.

II. [3.2] INTRODUCTION

Generally, “[a]n action to quiet title in property is an equitable proceeding wherein a party seeks to settle a dispute over ownership of property or to remove a cloud upon his title to the property.” *Ashby v. Pinnow*, 2020 IL App (2d) 190765, ¶14, 179 N.E.3d 295, 449 Ill.Dec. 376 (2d Dist. 2020), citing *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill.App.3d 792, 480 N.E.2d 1312, 1327, 89 Ill.Dec. 569 (1st Dist. 1985). See also *Gambino v. Boulevard Mortgage Corp.*, 398 Ill.App.3d 21, 922 N.E.2d 380, 337 Ill.Dec. 257 (1st Dist. 2009). Only an improperly asserted claim or interest can be a cloud on title. A valid interest in property cannot be a cloud on title. *Hill v. 1550 Hinman Ave. Bldg. Corp.*, 365 Ill. 129, 6 N.E.2d 128, 130 (1936) (valid lease cannot be cloud on title); *Illinois District of American Turners, Inc. v. Rieger*, 329 Ill.App.3d 1063, 770 N.E.2d 232, 264 Ill.Dec. 338 (2d Dist. 2002). Therefore, “[a] quiet title action does not lie where the defendant has not made an [improper] adverse claim to an interest in the plaintiff’s property.” *Stahelin v. Forest Preserve District of DuPage County*, 376 Ill.App.3d 765, 877 N.E.2d 1121, 1135, 315 Ill.Dec. 792 (2d Dist. 2007), quoting *Rieger, supra*, 770 N.E.2d at 239. Quiet title is an equitable remedy to settle a dispute over ownership of property or to remove a cloud on title to property, provided the existence of another adequate equitable remedy does not preclude the bringing of such an action. *Lakeview Trust, supra*. The relief granted by a quiet-title action is wholly equitable in nature and not granted by courts at law. *Webster v. Hall*, 388 Ill. 401, 58 N.E.2d 575, 578 – 579 (1944).

III. [3.3] ELEMENTS OF QUIET TITLE

Quiet title requires (a) that the party bringing the action has good or true title to the disputed property, (b) the existence of an instrument or record sought to be eliminated, (c) that the instrument or record is a “cloud on title,” and (d) a basis by which the cloud on title should be removed. *American Invs-Co Countryside, Inc. v. Riverdale Bank*, 596 F.2d 211, 216 – 217 (7th Cir. 1979).

Although quiet title is sometimes seen as a vehicle by which another’s claim of title is extinguished, erased, or found lacking, the true foundation of a quiet title action rests on the strength of the title held by the party bringing the action. *Smith v. Malone*, 317 Ill.App.3d 974, 742 N.E.2d 785, 788, 252 Ill.Dec. 247 (4th Dist. 2000) (“fundamental requirement in” quiet-title action is that plaintiff must recover on strength of plaintiff’s own title), quoting *Reynolds v. Burns*, 20 Ill.2d 179, 170 N.E.2d 122, 130 (1960). Thus, the threshold investigation is necessarily into the strength of the title of the plaintiff. An action to quiet or remove a cloud from title can be maintained only by a party who holds either legal or equitable title to the property that is superior to the alleged cloud or

claim. *Reynolds, supra*, 170 N.E.2d at 130; *LaSalle National Bank v. Kissane*, 163 Ill.App.3d 534, 516 N.E.2d 790, 793, 114 Ill.Dec. 635 (1st Dist. 1987). As quiet title is premised on superior title in the property in question, possession of the property by itself is not enough for a plaintiff to have standing to bring a quiet-title action. *Bennett v. Chicago Title & Trust Co.*, 404 Ill.App.3d 1088, 936 N.E.2d 1068, 344 Ill.Dec. 311 (1st Dist. 2010). However, perfect title is not required. *Diaz v. Home Federal Savings & Loan Association of Elgin*, 337 Ill.App.3d 722, 786 N.E.2d 1033, 1039, 272 Ill.Dec. 199 (2d Dist. 2002); *Reynolds, supra*.

Typically, title is founded on a deed or other instrument of conveyance; however, adverse possession may also constitute sufficient title to sustain an action to quiet or remove clouds from title. *Knauf v. Ryan*, 338 Ill.App.3d 265, 788 N.E.2d 805, 810, 273 Ill.Dec. 214 (2d Dist. 2003); *Yeates v. Daily*, 13 Ill.2d 510, 150 N.E.2d 159, 161 (1958). Property is taken by adverse possession when the following five elements exist concurrently for twenty years: “(1) continuous, (2) hostile or adverse, (3) actual, (4) open, notorious, and exclusive possession of the premises, (5) under claim of title inconsistent with that of the true owner.” *Joiner v. Janssen*, 85 Ill.2d 74, 421 N.E.2d 170, 174, 51 Ill.Dec. 662 (1981). However, mere color of title, even accompanied by possession, that has not ripened into full title, in fee or otherwise, is not a basis for a complaint to quiet title. *Schottler v. Quinlan*, 263 Ill. 637, 105 N.E. 710, 711 (1914) (mere production of deed from person not shown to have possession or title, and without proof of acts of ownership by grantee, will not establish title).

Historically, at common law, an action to quiet title could be maintained only by persons in possession of the property. *Ashby v. Pinnow*, 2020 IL App (2d) 190765, 179 N.E.3d 295, 449 Ill.Dec. 376 (2nd Dist. 2020); *Webster v. Hall*, 388 Ill. 401, 58 N.E.2d 575, 578 (1944). However, modern law makes clear that the action can also be maintained if the property is vacant or unimproved or even unoccupied. *Id.*; *McGookey v. Winter*, 381 Ill. 516, 46 N.E.2d 84, 90 (1943); *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill.App.3d 792, 480 N.E.2d 1312, 1327, 89 Ill.Dec. 569 (1st Dist. 1985). Similarly, if other grounds of equitable relief, such as mistake or fraud, are established, quiet title would lie. *Süd Family Ltd. Partnership v. Otto Baum Co.*, 2024 IL App (4th) 220782 (nonfinal opinion not yet released for publication); *Ashby, supra*. In contrast, should the land not be in the possession of the party seeking to quiet title, but is held by another, the proper remedy is ejectment. See §3.8 below. See also *Lakeview, supra*. But when there is possession, it must be actual, as opposed to constructive, to support an action to quiet title. *Eaton v. Woman’s Home Missionary Soc. of Methodist Episcopal Church*, 298 Ill. 476, 131 N.E. 583, 584 (1921); *McVey v. Unknown Shareholders of Inland Coal & Washing Co.*, 100 Ill.App.3d 584, 427 N.E.2d 215, 218 – 219, 56 Ill.Dec. 135 (5th Dist. 1981) (landowner’s pleadings sufficient to allege actual ownership of disputed property; therefore, owner had standing to bring quiet-title action). There is no general rule as to what acts are necessary to constitute possession; a variety of circumstances are taken into consideration. “Any acts of dominion exercised over the property by the party claiming to hold title thereto that clearly indicate to others an appropriation thereof to the purposes for which it may ordinarily be used are generally regarded as sufficient [to constitute possession].” *Le Sourd v. Edwards*, 236 Ill. 169, 86 N.E. 212, 213 (1908). When a party has a deed to a tract of land, actual possession of a part will, in law, constitute possession of all of the tract not in the adverse possession of another. *Dempsey v. Burns*, 281 Ill. 644, 118 N.E. 193, 195 (1917).

IV. CLOUD ON TITLE IS NOT SLANDER OF TITLE

A. [3.4] Cloud on Title

At the center of any quiet-title action is the cloud on title that is sought to be removed. A “cloud on title” is an outstanding instrument, record, claim, or encumbrance that is actually invalid or inoperative, but nevertheless impairs or puts into question another’s title to property. *Illinois District of American Turners, Inc. v. Rieger*, 329 Ill.App.3d 1063, 770 N.E.2d 232, 239, 264 Ill.Dec. 338 (2d Dist. 2002); *Stahelin v. Forest Preserve District of DuPage County*, 376 Ill.App.3d 765, 877 N.E.2d 1121, 315 Ill.Dec. 792 (2d Dist. 2007). The alleged cloud must operate to adversely affect the market value of the property. *Ames v. Sankey*, 128 Ill. 523, 21 N.E. 579 (1889). Thus, any instrument or record that adversely impacts the marketability of property or brings question to its ownership is a cloud on title. *See, e.g., Sugar v. Froehlich*, 229 Ill. 397, 82 N.E. 414 (1907) (contract for sale of land, recorded without consent of parties, is cloud on title); *Kesner v. Miesch*, 204 Ill. 320, 68 N.E. 405 (1903) (contract to convey land by unauthorized person constituted cloud on owner’s title). However, statutes and ordinances void on their face, allegedly authorizing the condemnation of land, do not constitute clouds on the title of the land claimed to be subject to condemnation. *Roby v. South Park Com’rs*, 215 Ill. 200, 74 N.E. 125 (1905).

The central characteristic of a cloud on title is that it is actually invalid or inoperative, although typically appearing as a valid recorded instrument. A “cloud on title” may also be defined as an instrument or other proceeding in writing that appears on the records of title and thereby casts doubt on the validity of the record title. *Trustees of Schools v. Wilson*, 334 Ill. 347, 166 N.E. 55, 56 (1929). Common examples of particular instruments that may constitute a cloud on title are deeds, leases, mortgages and deeds of trust, contracts, options, judgments or decrees, tax and assessment proceedings, restrictive covenants, unfounded claims of easements, or lis pendens. A “lis pendens” is a notice of a pending action concerning the property in question. Clearly, if the lis pendens is proper (*i.e.*, the pending action does in fact concern the property), it is not a cloud on title. Increasingly, however, lis pendens is being recorded against property because the property’s owner is a defendant in litigation unrelated to the real property. Such a filing is not proper and is, most probably, an inappropriate attempt at a prejudgment attachment, which is a separate remedy and governed by 735 ILCS 5/4-101, *et seq.* See also 65 AM.JUR.2d *Quieting Title and Determination of Adverse Claims* §14 (2001). Although the cloud on title may appear to be facially proper, something makes it invalid or inoperative and thereby impairs the otherwise good title of another.

“A cloud on title is the semblance of title, either legal or equitable, appearing in some legal form but which is, in fact, unfounded or which it would be inequitable to enforce.” *Woodsides v. Rodely*, 2020 IL App (5th) 190128-U, quoting *Alward v. Jacob Holding of Ontario L.L.C.*, 2019 IL App (5th) 180332, ¶15, 139 N.E.3d 1010, 435 Ill.Dec. 630, and *Gambino v. Boulevard Mortgage Corp.*, 398 Ill.App.3d 21, 922 N.E.2d 380, 410, 337 Ill.Dec. 257 (2009). The following cases illustrate the various forms of documents that, although appearing valid on their face, constitute clouds on title:

- *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill.App.3d 792, 480 N.E.2d 1312, 1327, 89 Ill.Dec. 569 (1st Dist. 1985) (“Various forms of documents which appeared valid on their face have been held to constitute clouds upon title.”);

- *Johnston v. Masterson*, 397 Ill. 168, 73 N.E.2d 401, 403 (1947) (subsequent deed to second grantee);
- *Johnson v. Riedler*, 395 Ill. 412, 70 N.E.2d 570, 572 (1947) (recorded mortgage);
- *Oswald v. Newbanks*, 336 Ill. 490, 168 N.E. 340, 342 (1929) (forged deed);
- *Farrar v. Payne*, 73 Ill. 82, 89 – 92 (1874) (deed outside chain of title);
- *Moore v. Munn*, 69 Ill. 591, 594 – 595 (1873) (deed procured by fraud).

Lis pendens. Actions commenced and lis pendens notices filed by a party to a partition suit, claiming title or right to possession of realty against the grantee of purchaser at the partition sale, constituted clouds on the title of such grantee. *Allensworth v. First Galesburg National Bank & Trust Co.*, 7 Ill.App.2d 1, 128 N.E.2d 600 (2d Dist. 1955).

Deeds. “Upon the same principle upon which courts of chancery exercise their jurisdiction for the removal of a cloud upon title they may entertain jurisdiction to declare a deed in the hands of a third person, who claims no interest therein, void as against the grantee therein, where the only effect of the delivery of the deed to the grantee would be to constitute a cloud upon the title of the grantor.” *Johnson v. Wallden*, 342 Ill. 201, 173 N.E. 790, 793 (1930). When the testator devised a life estate with the remainder to the life tenant’s surviving lineal descendants, but the life tenant conveyed reversion in fee to the same grantee, the daughter of the life tenant had no alienable interest, and her deed was a cloud on the grantee’s title. *Spatz v. Paulus*, 285 Ill. 82, 120 N.E. 503 (1918). The equity court had jurisdiction to remove a cloud on title from quitclaim deeds from a third party. *Schnellbacher v. Jobst*, 271 Ill. 319, 111 N.E. 138 (1915). In contrast, because of the lack of a recorded adverse claim, an unrecorded agreement for a warranty deed was not a cloud on title. *Hadie v. Erlandson*, 41 Ill.App.2d 328, 190 N.E.2d 848 (2d Dist. 1963) (abst.).

Mortgages. The defendant vendor’s counterclaim to have a mortgage executed by the purchasers on realty removed as a cloud on vendor’s title should be allowed. *Johnson v. Riedler*, *supra*.

Leases. Although finding that the lessor was not entitled to a decree in equity removing a trust deed executed by the lessee as a cloud on his title, the court stated that, whenever proof of extrinsic facts is necessary to establish that an outstanding recorded lease was invalid at the time of execution, such lease is a cloud on title. *Hill v. 1550 Hinman Ave. Bldg. Corp.*, 365 Ill. 129, 6 N.E.2d 128, 130 (1936).

Judgment. The chancery court may remove a judgment as a cloud on title when the original court improperly asserted personal jurisdiction over the titleholder. *Culver v. Phelps*, 130 Ill. 217, 22 N.E. 809 (1889).

Adverse possession. “A title acquired by adverse possession may be used as a basis for an [action] to quiet title . . . and the purported invalid decree is such a cloud as will, if proved, be sufficient to sustain the action.” *Yeates v. Daily*, 13 Ill.2d 510, 150 N.E.2d 159, 161 (1958).

B. [3.5] Slander of Title

Importantly, a cloud on title is not a cause of action. Rather, an action to remove a cloud on title is a quiet-title action. In contrast, a claim for damages arising out of the malicious recording of a cloud on title is an action for slander of title. *McDonald's Corp. v. American Motorists Insurance Co.*, 321 Ill.App.3d 972, 748 N.E.2d 771, 780 – 781, 255 Ill.Dec. 67 (2d Dist. 2001). Slander of title is available when (1) the defendant made a false and malicious publication either oral or written, (2) the publication disparaged the plaintiff's title to property, and (3) damages resulted from the publication. *Süd Family Ltd. Partnership v. Otto Baum Co.*, 2024 IL App (4th) 220782 (nonfinal opinion not yet released for publication); *Contract Development Corp. v. Beck*, 255 Ill.App.3d 660, 627 N.E.2d 760, 764, 194 Ill.Dec. 423 (2d Dist. 1994); *Gambino v. Boulevard Mortgage Corp.*, 398 Ill.App.3d 21, 922 N.E.2d 380, 337 Ill.Dec. 257 (1st Dist. 2009).

Unlike quiet title, in which motive is irrelevant, slander of title — similar to slander in general — requires a showing of a false and malicious publication or recording of the cloud on title. With slander of title,

the plaintiff must show that the defendant knew that the disparaging statements were false or that the statements were made with reckless disregard of their truth or falsity. . . . The defendant acts with reckless disregard if he publishes the allegedly damaging matter despite a high degree of awareness of its probable falsity or if the defendant has serious doubts as to its truth. *American National Bank & Trust Co. v. Bentley Builders, Inc.*, 308 Ill.App.3d 246, 719 N.E.2d 360, 364, 241 Ill.Dec. 499 (2d Dist. 1999).

See also *Gambino, supra*. By way of example, maliciously recording a document that clouds another's title so as to delay a sale or to gain negotiating leverage is actionable as slander of title. *Bentley Builders, supra*; *Whildin v. Kovacs*, 82 Ill.App.3d 1015, 403 N.E.2d 694, 38 Ill.Dec. 463 (1st Dist. 1980). Additionally, almost certainly because the cloud on title is improper, an action for quiet title would also lie. However, if a party reasonably believed it had legal title, then assertion of that claim does not amount to slander of title. *Weiland Tool & Manufacturing Co. v. Whitney*, 100 Ill.App.2d 116, 241 N.E.2d 533 (1st Dist. 1968), *rev'd on other grounds*, 44 Ill.2d 105 (1969).

The following cases involve slander of title:

- Action of slander of title can be brought only by a person who possesses an estate or interest in property. *Allison v. Berry*, 316 Ill.App. 261, 44 N.E.2d 929 (4th Dist. 1942).
- If a party who records a document has a reasonable belief as to his or her title or claim to property, he or she has not acted with malice. *Bentley Builders, supra*.
- A shareholder could not state a cause of action for slander of title under Illinois law when alleged published falsehoods were privileged because they were communicated by a corporation in the course of and pertaining to legal proceedings. *Caplan v. International Fidelity Insurance Co.*, 902 F.Supp. 170 (N.D.Ill. 1995).

- The plaintiff in a slander of title action can recover only those costs and fees that flow directly from wrongful disparagement. *Home Investments Fund v. Robertson*, 10 Ill.App.3d 840, 295 N.E.2d 85 (2d Dist. 1973).
- “[A]n action for slander of title is not for the words spoken, but for special damages for the loss sustained by reason of the speaking and publication of the slander.” *Midwest Glass Co. v. Stanford Development Co.*, 34 Ill.App.3d 130, 339 N.E.2d 274, 278 (1st Dist. 1975).
- In a slander of title action, for remarks to be malicious, the defendant must have known that such remarks were false or acted with reckless disregard as to their falsity. *Pecora v. Szabo*, 94 Ill.App.3d 57, 418 N.E.2d 431, 49 Ill.Dec. 577 (2d Dist. 1981).
- An essential element of a cause of action for slander of title is that the statements used be both false and malicious. Lis pendens notice was not “false” for purposes of slander of title action when the notice simply stated that litigation was pending in court concerning the property at issue. *Ringier America, Inc. v. Enviro-Technics, Ltd.*, 284 Ill.App.3d 1102, 673 N.E.2d 444, 220 Ill.Dec. 532 (1st Dist. 1996).
- The plaintiff failed to establish an action for slander of title when the complaint failed to contain any allegations regarding a cloud on title. *Suhadolnik v. City of Springfield*, 184 Ill.App.3d 155, 540 N.E.2d 895, 133 Ill.Dec. 29 (4th Dist. 1989).
- The proper recording of valid documents upon another’s title does not provide the basis for a slander of title claim. *Süd Family Ltd. Partnership v. Otto Baum Co.*, 2024 IL App (4th) 220782.

V. [3.6] STATUTE OF LIMITATIONS

Slander and libel carry a one-year statute of limitations. 735 ILCS 5/13-201. In contrast, an action for slander of title is governed by a five-year statute of limitations. 735 ILCS 5/13-205. Quiet title is equitable in nature and generally controlled by the doctrine of laches.

VI. QUIET TITLE IS NOT EJECTMENT OR EVICTION

A. [3.7] Quiet Title Is an Equitable Action To Remove a Cloud on Title

Equity jurisdiction is required to quiet title or remove a cloud on title. When an adequate remedy at law exists, Illinois courts will not assert jurisdiction to grant quiet-title relief. *Ginther v. Duginger*, 6 Ill.2d 474, 129 N.E.2d 147, 150 (1955). For example, a person in possession under an unrecorded deed may sue in equity to establish his or her title as against a subsequent grantee of the same grantor, since he or she cannot bring an ejectment action. *Morrison v. Morrison*, 140 Ill. 560, 30 N.E. 768, 770 (1892). Generally, to maintain a suit to quiet title, it must be shown that the land in controversy was either in the plaintiff’s possession (*McGookey v. Winter*, 381 Ill. 516, 46 N.E.2d 84, 89 – 90 (1943)) or vacant and undeveloped (*Hooper v. Traver*, 336 Ill. 275, 168 N.E. 326, 327 (1929)), or other grounds of equitable relief, such as mistake or fraud, must be established (*Barger v. Slayden*, 411 Ill. 237, 103 N.E.2d 645, 647 (1952)).

Assertion by a defendant of a right adverse to a plaintiff's title is essential to the maintenance of an action to quiet title. *Krile v. Swiney*, 413 Ill. 350, 109 N.E.2d 189, 191 (1952). Therefore, equity will not take jurisdiction to remove a merely verbal assertion of ownership as a cloud on title to realty, but such an assertion may give rise to a slander of title action. For property not requiring a writing to establish title, a cloud on title may be verbal. Further, as with all actions, there must be a present and existing controversy for the court to exercise jurisdiction to remove a cloud on title. *Sharp v. Sharp*, 333 Ill. 267, 164 N.E. 685, 691 (1928).

B. [3.8] Ejectment and Eviction Proceedings Are Possessory Actions

When property is not vacant and is not in the possession of the party seeking to remove the cloud from his or her title, the plaintiff has an adequate remedy at law by way of either an eviction suit (735 ILCS 5/9-102) or an action in ejectment (735 ILCS 5/6-104). *McGookey v. Winter*, 381 Ill. 516, 46 N.E.2d 84, 90 (1943); *Mahrenholz v. County Board of School Trustees of Lawrence County*, 125 Ill.App.3d 619, 466 N.E.2d 322, 329, 80 Ill.Dec. 870 (5th Dist. 1984).

An eviction proceeding is a summary statutory proceeding to adjudicate possession rights and is not burdened by matters that are not germane to the issue of possession, such as questions of title. *Sawyer v. Young*, 198 Ill.App.3d 1047, 556 N.E.2d 759, 762 – 763, 145 Ill.Dec. 141 (1st Dist. 1990); *Bismarck Hotel Co. v. Sutherland*, 92 Ill.App.3d 167, 415 N.E.2d 517, 522, 47 Ill.Dec. 512 (1st Dist. 1980). Thus, a successful eviction action does not create a bar by res judicata to a subsequent quiet-title action by a possessor of property, because the questions involved in the two proceedings are not identical (*i.e.*, possession versus title; *Gurga v. Roth*, 2011 IL App (2d) 100444, 964 N.E.2d 134, 357 Ill.Dec. 771).

Ejectment is an action at law to consider and adjudicate solely legal title and possession. *Zimmerman v. Kennedy*, 405 Ill. 306, 90 N.E.2d 756 (1950). For plaintiffs to recover in an ejectment proceeding, they “must allege (1) that they had possession of the subject premises after obtaining legal title, (2) that defendants subsequently took possession of the premises, and (3) that, at present, the defendants ‘unlawfully withhold[] from the plaintiff[s] the possession thereof.’” *Bulatovic v. Dobritchandin*, 252 Ill.App.3d 122, 625 N.E.2d 26, 31, 192 Ill.Dec. 66 (1st Dist. 1993), quoting 735 ILCS 5/6-109. All of the elements of ejectment must be proved to maintain the action. It is a “time-honored principle that a plaintiff in ejectment must recover on the strength of his own title rather than the weakness of his adversary’s title.” *Old Salem Chautauqua Ass’n v. Illinois District Council of Assembly of God*, 13 Ill.2d 258, 148 N.E.2d 777, 781 (1958). The plaintiff in an ejectment proceeding must have an interest in the premises that “is ‘higher and better’ than the defendant’s claim and which entitles him to present possession” to recover the property. *Bulatovic, supra*, 625 N.E.2d at 32, quoting *Whitham v. Ellsworth*, 259 Ill. 243, 102 N.E. 223, 224 (1913). See also *Excalibur Energy Co. v. Rochman*, 2014 IL App (5th) 130524, 22 N.E.3d 322, 387 Ill.Dec. 277; *Deutsche Bank National Trust Co. v. AXXA, Inc.*, 2015 IL (1st) 133569-U, ¶33 (action for ejectment, rather than quiet title, was proper remedy for bank that sought to remove cloud from title to property in which purported owner claimed partial interest, when bank stated in complaint that it was “in constructive possession of the premises and [had] secured it by way of a board-up service,” thereby admitting it lacked actual possession of property, as required for actions to quiet title).

VII. [3.9] PLEADING

A court cannot entertain an action to quiet title when no proper ground for equitable jurisdiction exists. *Osborne v. Gibbs*, 27 Ill.App. 246, 249 (1st Dist. 1888). Moreover, when the primary purpose of litigation is to remove a cloud or quiet title in the plaintiff, failure to allege and prove either the plaintiff's possession or the vacancy of the property at the time the suit is filed is a jurisdictional defect. *Rabus v. Calcari*, 16 Ill.2d 99, 156 N.E.2d 567, 568 (1959).

A. [3.10] Venue; Parties

An action to quiet title to real estate must be brought in the county in which the real estate or some part of it is situated. 735 ILCS 5/2-103(b). Further, all persons who have a substantial interest in the subject matter of an action to quiet title and who will be materially affected by the decree should be made parties to the action (*i.e.*, all owners or claim holders of record). *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill.App.3d 792, 480 N.E.2d 1312, 1327, 89 Ill.Dec. 569 (1st Dist. 1985), citing *Hobbs v. Pinnell*, 17 Ill.2d 535, 162 N.E.2d 361 (1959).

Persons without any material existing interest in the controversy or whose interests will not necessarily be affected by the action for quiet title, are not necessary parties. *Mills v. Ehler*, 407 Ill. 602, 95 N.E.2d 848 (1950) (finding that certain defendants were properly dismissed as parties because they had no interest in property conveyed by deed sought to be set aside, and nothing they could be compelled to do would have effect of removing any cloud from title of plaintiff that he sought to quiet). As a corollary, if a party is not named, it is not bound by a judgment in a quiet title action.

If in any action for quiet title there are persons interested whose names are unknown, the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, provides that

it shall be lawful to make them parties to the action by the name and description of unknown owners, or unknown heirs or legatees of any deceased person, who may have been interested in the subject matter of the action previous to his or her death; but an affidavit shall be filed by the party desiring to make those persons parties stating that their names are unknown. 735 ILCS 5/2-413.

Typically, a circuit court lacks jurisdiction to hear quiet-title actions brought against the state based on sovereign immunity, and the Court of Claims provides the only potential forum under Illinois law. *Township of Jubilee v. State of Illinois*, 2011 IL 111447, 960 N.E.2d 550, 355 Ill.Dec. 668. However, in *Township of Jubilee*, the Illinois Supreme Court found that the state was subject to the jurisdiction of the circuit court because the state elected to affirmatively invoke the circuit court's jurisdiction to pursue its own quiet-title action against the same property sought by the Township of Jubilee.

B. [3.11] Form Complaint

To properly state a cause of action for quiet title, the complaint must set forth facts essential to the jurisdiction of the court and to warrant the relief sought, including allegations showing that title

to the property is in the plaintiff, as well as facts alleging that the plaintiff is in possession under a claim of ownership or that the property involved is vacant and unoccupied at the time the complaint is filed and that the cloud on title is inappropriate. *Rabus v. Calcari*, 16 Ill.2d 99, 156 N.E.2d 567, 568 (1959) (finding that plaintiff failed to allege and prove either his possession or vacancy of property at time suit was filed); *Barger v. Slayden*, 411 Ill. 237, 103 N.E.2d 645, 647 (1952); *Klingel v. Kehrer*, 81 Ill.App.3d 431, 401 N.E.2d 560, 566, 36 Ill.Dec. 719 (5th Dist. 1980) (plaintiffs are entitled to sue to quiet their title only once legal title to land has been acquired). A claim to remove a cloud from title must allege that the plaintiff has title and that an invalid instrument exists that is clouding title. *Cocroft v. HSBC Bank USA, N.A.*, No. 10 C 3408, 2012 WL 1378645 (N.D.Ill. Apr. 20, 2012).

“Where a plaintiff demonstrates less than perfect title, the title held by the defendant may be considered, and the plaintiff may still prevail if able to demonstrate superior title.” *Diaz v. Home Federal Savings & Loan Association of Elgin*, 337 Ill.App.3d 722, 786 N.E.2d 1033, 1039, 272 Ill.Dec. 199 (2d Dist. 2002). While a plaintiff need not establish perfect title to the property, suit is nonetheless barred when no showing of title to the property can be demonstrated. *Id.*

The following is a sample complaint to quiet title:

Complaint To Quiet Title

1. Description of Plaintiff: [Plaintiff is a resident of (city, state).] [Plaintiff is incorporated under the laws of the State of (name of state) and has its principal place of business in (city, state).]

2. Description of Defendant: [Include unknown owners.] [Defendant is a resident of (city, state).] [Defendant is incorporated under the laws of the State of (name of state) and has its principal place of business in (city, state).] [Defendant is authorized to and conducts business in the State of (name of state).]

3. Plaintiff is the legal owner of the property described and located at [legal description of property] **(the “real estate”).** [Include allegations as to how plaintiff is legal owner of the property, including any recorded instruments, *i.e.*, when plaintiff acquired title by deed and when deed was recorded.] [Include either: (Plaintiff is in possession of the property.) or (The property is vacant.)].

4. Defendant and Unknown Owners may claim [or have claimed] a right, title, interest, or lien in or to the real estate adverse to Plaintiff. [Include allegations as to how defendant claims an interest or right in the property, including any recordings.] **However, Defendant and Unknown Owners do not have any legal or equitable right, claim, or interest in the real estate.**

5. Defendant and Unknown Owners’ claim is a cloud on Plaintiff’s title having no force and effect.

6. As legal owner of the real estate, Plaintiff seeks a declaration that the title to the real estate is vested in Plaintiff alone and that Defendant and Unknown Owners have no estate, right, title, or interest in the subject property and that said Defendant and Unknown Owners be forever enjoined from asserting any estate, right, title, or interest in the subject property adverse to Plaintiff herein.

7. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff, [name], respectfully requests that this Court enter an order finding and confirming title in [his] [her] name in fee simple, free and clear of the purported claims of interest of Defendant and Unknown Owners, and for such other relief as the Court deems just and equitable. [The request for relief may also seek a specific finding that the claim of Defendant is invalid and stricken of record.]

VIII. DEFENSES

A. [3.12] Good Title

The primary defense to an action for quiet title is superior, valid title or interest to that of all other interested parties, including the plaintiff. The determination of superior title depends on a careful examination of the chain of title. Thus, the primary focus is on the strength of the title held by the party-plaintiff, not the defendant. *See Antoniou v. Heartland Bank & Trust Co.*, 2015 IL App (1st) 150015-U (holding that plaintiff's quiet-title complaint did not sufficiently allege good or true title to property).

B. [3.13] Adverse Possession

The remedy of quieting title rests on the strength of the plaintiff's title. Therefore, if the defendant seeks to defeat a claim for quiet title based on adverse possession, it "is more properly brought as a counterclaim to quiet title and not as a basis to dismiss." *JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275, ¶13, 156 N.E.3d 98, 441 Ill.Dec. 98.

C. [3.14] Laches

Because an action quieting title to real property is an equitable action, laches may be available as a defense if it is sufficiently established. *Slatin's Properties, Inc. v. Hassler*, 53 Ill.2d 325, 291 N.E.2d 641, 643 (1972). This defense is dependent on the facts of each case and is defined as "such neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity." *Pyle v. Ferrell*, 12 Ill.2d 547, 147 N.E.2d 341, 344 (1958).

In determining the applicability of laches, four factors should be considered:

(1) Conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit, and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is held not to be barred. *Slatin's Properties, supra*, 291 N.E.2d at 643 – 644, quoting *Pyle, supra*, 147 N.E.2d at 344.

Whether the defense of laches is available is to be determined on the facts and circumstances of each case. *Nancy's Home of Stuffed Pizza, Inc. v. Cirrincione*, 144 Ill.App.3d 934, 494 N.E.2d 795, 800, 98 Ill.Dec. 673 (1st Dist. 1986). Like any affirmative defense, the burden is on the defendant to establish laches by a preponderance of the evidence. *O'Brien v. Meyer*, 281 Ill.App.3d 832, 666 N.E.2d 726, 728, 217 Ill.Dec. 57 (1st Dist. 1996). In determining whether there is laches in an action for quiet title, the court will consider, with the duration of the delay, a plaintiff's ignorance of the cause of action or claim against his or her title and the time that passed after the plaintiff's discovery thereof, as well as its effect in misleading a defendant to his or her injury. Whether a party is guilty of laches to a degree that would bar suit due to a delay in asserting a right is a matter within the trial court's discretion. *Village of Riverdale v. Nosmo Kings, LLC*, 2023 IL App (1st) 221380.

In the following cases, laches was asserted as a successful defense to quiet title:

- The plaintiff's suit to quiet title to vacant city lots was barred by laches because the defendants paid taxes on the property for 40 years, their payment of taxes was a matter of public record for nearly 9 years after the plaintiff acquired title, and the plaintiff failed to exercise required vigilance by which it could have ascertained the defendants' claim and promptly filed suit to quiet title. *Slatin's Properties, supra*.

- When a party was on notice of a defective title for period of 11 years, laches could be asserted as a defense. *Hartsman v. Abboreno*, 18 Ill.2d 467, 165 N.E.2d 338 (1960).

- The court applied laches to bar the plaintiff's suit to quiet title against the purchaser of a tax deed when the purchaser had no notice of the plaintiff's claim, was not guilty of any deception, and had paid taxes for 20 consecutive years under color of title. *Pyle, supra*, 147 N.E.2d at 344.

- Although the doctrine of laches is not ordinarily applied to the state, laches barred the state from enforcing any claim it had to three parcels of land based on a delay of over 50 years in taking action to quiet title. *People v. Weiszmann*, 185 Ill.App.3d 273, 541 N.E.2d 205, 133 Ill.Dec. 368 (2d Dist. 1989).

- The defendants were barred by laches because they waited 25 years to record an affidavit designed to challenge the plaintiff's absolute title to property. *Beckham v. Tate*, 61 Ill.App.3d 765, 378 N.E.2d 588, 19 Ill.Dec. 87 (5th Dist. 1978).

- The village's quiet-title suit was barred by laches when the defendant and its predecessors in title improved the premises and paid taxes for 23 years without any claim of title by the village to the land. *Village of Villa Park v. Strickland*, 60 Ill.App.3d 406, 376 N.E.2d 1047, 17 Ill.Dec. 718 (2d Dist. 1978).

However, in *Klingel v. Kehrer*, 81 Ill.App.3d 431, 401 N.E.2d 560, 567, 36 Ill.Dec. 719 (5th Dist. 1980), even though one of the plaintiffs acknowledged that he knew of the deed to the defendants 20 to 25 years before trial, he also testified that he never had any indication that the defendants were exerting any claim to the property until he saw a survey crew during the year the action was filed. Thus, the court found that the action was not barred by laches because the defendants were not prejudiced by any delay on the part of the plaintiffs.

Additionally, laches has no application to defeat an action for quiet title by one in undisturbed possession of the property (*Decatur Coal Co. v. Clokey*, 332 Ill. 253, 163 N.E. 702 (1928)) or by one who has not learned of the existence of the cloud on his or her title (*Scott v. Cornell*, 295 Ill. 508, 129 N.E. 94 (1920)).

IX. [3.15] PRESUMPTION AND BURDEN OF PROOF

Every presumption is made in favor of the holder of the legal title and as against him or her; no presumption will be drawn in favor of the holder of color of title only. *Le Sourd v. Edwards*, 236 Ill. 169, 86 N.E. 212, 213 (1908). But, certain instruments are presumed valid. “A recorded deed raises a presumption that it is valid and effective. . . . In order to rebut the presumption of validity, the party challenging the deed’s validity must present clear and convincing evidence that the deed is not valid.” *In re Estate of Cuneo*, 334 Ill.App.3d 594, 780 N.E.2d 325, 328, 269 Ill.Dec. 140 (2d Dist. 2002). The logic behind these presumptions is to protect our system of property recording from improper challenge and attack. Certainty is required.

X. [3.16] EVIDENCE

In a quiet-title action, the burden of proof rests with the complainant as to all issues that arise regarding the material allegations of the complaint. *Hooper v. Traver*, 326 Ill. 596, 158 N.E. 358, 360 (1927). This includes controverted allegations of title or ownership of the property, as well as possession or vacancy of the property. *Plenderleith v. Glos*, 329 Ill. 382, 160 N.E. 745, 746 – 747 (1928); *Hooper, supra*; *Gillespie v. Stoll*, 280 Ill. 130, 117 N.E. 478, 479 (1917). However, every presumption will be made in favor of the holder of the legal title, including a presumption of possession. *Vlk v. Glos*, 308 Ill. 250, 139 N.E. 401, 402 (1923). Moreover, the plaintiff must make out his or her case by sufficient evidence, and when fraud is alleged, the evidence must be clear and convincing. *Curielli v. Curielli*, 383 Ill. 102, 48 N.E.2d 360, 363 (1943); *Cole v. Guy*, 183 Ill.App.3d 768, 539 N.E.2d 436, 441, 132 Ill.Dec. 126 (1st Dist. 1989).

Once a plaintiff establishes a prima facie case for quieting title, the burden shifts to the defendant to establish that his or her claim to title to the property defeats the plaintiff’s claim. *See Le Sourd v. Edwards*, 236 Ill. 169, 86 N.E. 212, 213 (1908). Moreover, the burden rests on the defendant to establish title that he or she asserts defeats the plaintiff’s claim of ownership. *Id.*

XI. [3.17] RELIEF

Appropriate relief granted to the plaintiff may consist of a judgment or decree quieting title or removing a cloud on the property in dispute, but the court may also award to the plaintiff such incidental relief as may be proper or necessary under the circumstances. *Leonard v. Leonard*, 369 Ill. 572, 17 N.E.2d 553, 555 (1938); *Penkala v. Tomczyk*, 317 Ill. 356, 148 N.E. 64, 66 (1925). The award of costs in an action to quiet title are set forth by statute and are largely within the discretion of the court. 735 ILCS 5/5-118.

XII. [3.18] CONCLUSION — PRACTICAL CONSIDERATIONS

Title to property is typically a matter left to a review of records and the resulting determination of ownership. An early determination of the state of the record title to property is important to sort out competing claims. However, when questions arise or there are competing records clouding ownership, the action for quiet title is available to determine or quiet such conflicting claims. Based on the strength of the plaintiff's own title, the quiet-title action is an equitable remedy to silence (quiet) the claim of another. In a word, a quiet title brings a sense of quiet or certainty to property ownership.

4

Suits To Partition Interests in Real Estate

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- I. [4.1] Scope of Chapter**
- II. [4.2] Introduction — Definition of “Partition”**
- III. [4.3] Types of Ownership Interests Subject to Partition**
- IV. [4.4] Types of Interests Not Subject to Partition**
- V. [4.5] Effect of Partition**
 - A. [4.6] Partition in Kind
 - B. [4.7] Appraisal with Party Buyout
 - C. [4.8] Sale and Division of Proceeds in Pro Rata Shares
- VI. [4.9] Voluntary Partition**
- VII. Involuntary Partition**
 - A. [4.10] Involuntary Partition Contrasted with Voluntary Partition
 - B. [4.11] Procedure
 - 1. [4.12] General Procedural Considerations
 - 2. Complaint
 - a. [4.13] In General
 - b. [4.14] Sample Verified Complaint
 - 3. [4.15] Parties
 - 4. Judgment
 - a. [4.16] In General
 - b. [4.17] Sample Judgment
 - 5. Appointment of Commissioner and Surveyor
 - a. [4.18] In General
 - b. [4.19] Sample Commissioner’s Oath
 - 6. [4.20] Partition Homestead Provision
 - 7. [4.21] Election as to Shares
 - 8. [4.22] Effect of Liens
 - 9. [4.23] Eviction by Person with Better Title
 - 10. Report of Sale: Conveyances
 - a. [4.24] In General
 - b. [4.25] Sample Report of Sale
 - c. [4.26] Sample Confirmation of Sale
 - 11. [4.27] Distribution of Proceeds

- 12. [4.28] Life Estate or Homestead
- 13. [4.29] Unknown Owners
- 14. [4.30] Deposit of Proceeds of Sale
- 15. [4.31] Vesting Title
- 16. [4.32] Apportioning of Costs and Attorneys' Fees
- 17. [4.33] Adjustment of Rights After Judgment
- C. [4.34] Burden of Proof
- D. [4.35] Answer
- E. [4.36] Lis Pendens
- F. [4.37] Review on Appeal

VIII. [4.38] Conclusion

I. [4.1] SCOPE OF CHAPTER

This chapter discusses the cause of action and remedy of partition. Partition is uniquely statutory in nature, and support for it is found in Article XVII of the Illinois Code of Civil Procedure, 735 ILCS 5/17-101, *et seq.* “The purpose of a partition suit is to attain the most equitable partition which can be obtained with a preference given to partition in kind if possible, with a view to adjusting the equities of the parties by the use of owelty, if required.” *Harris v. Johnson*, 42 Ill.App.3d 751, 356 N.E.2d 1107, 1110, 1 Ill.Dec. 825 (3d Dist. 1976). In an unpublished opinion, the Illinois Appellate Court for the Fourth District reiterated that “[t]he purpose of partition is to enable those who own property in common to sever their interests so that each one may take possession of, enjoy and improve his separate estate at his own pleasure. [Citation.] Where a division of the premises cannot be made without prejudice to the rights of the interested parties, the land will be sold and the proceeds divided.” *Aaberg v Aaberg*, 2020 IL App (4th) 190382-U, ¶55, citing *Davis v. Davis*, 128 Ill.App.2d 427, 262 N.E.2d 788, 790 (1st Dist. 1970). In general terms, partition allows common owners of real property to sever (*i.e.*, partition) their interests in the entire property. In effect, a successful partition action vests in each common owner a sole and separate estate in a specific portion of the real property or an allotment of lands or tenements so that each common owner may take possession of and enjoy and improve his or her separate estate at his or her own convenience and pleasure. *Ylonen v. Ylonen*, 2 Ill.2d 111, 117 N.E.2d 98 (1954). Should physical division of the property not be feasible, Article XVII provides a means for owners to sever or partition their interests, force a sale, and recover a share of the sale value in proportion to their interests, as determined by the court.

II. [4.2] INTRODUCTION — DEFINITION OF “PARTITION”

“Partition” is the “division of legal title,” which will “sever the individual interests to a tract of land.” *Regas v. Danigeles*, 54 Ill.App.2d 271, 203 N.E.2d 730, 735 (1st Dist. 1964). It is “equitable in nature.” *Jannusch v. Rehtmeyer*, 2020 IL App (4th) 190160-U, ¶42, citing *Rothert v. Rothert*, 109 Ill.App.3d 911, 441 N.E.3d 179, 182, 65 Ill.Dec. 387 (4th Dist. 1982). Partition severs the unity of possession but does not result in the acquisition of new title. The object of a partition proceeding is to enable those owning property in common to sever or separate their interests from the interests of other common owners. From a practical standpoint, partition is a remedy that allows joint owners in total of certain property to exercise independent dominion over a portion of the property owned by them. Phrased differently, the “reason for partition is to enable those who own property in common to sever their interests so that one may take possession of and enjoy and improve his separate estate at his own pleasure and convenience.” *Stegeman v. Smith*, 67 Ill.App.2d 451, 214 N.E.2d 597, 601 (4th Dist. 1966).

Partition is an adversary proceeding to divide real property; “[t]he object of a partition is to enable those who own property in common . . . to take possession, enjoy, and improve his separate estate at his own pleasure.” *Rosenbaum v. Rosenbaum*, 38 Ill.App.3d 1, 349 N.E.2d 73, 83 (1st Dist. 1976). *Rosenbaum*, in noting the nature of the action, observed: “the law favors a division of land in kind rather than a division of the money received from its sale. . . . Accordingly, a partition sale is proper only where division cannot be made without prejudice to the rights of interested parties. . . . For these reasons, a suit for partition contemplates the entry of a judgment declaring the right, title and interest of all the parties.” [Citations omitted.] *Id.*

III. [4.3] TYPES OF OWNERSHIP INTERESTS SUBJECT TO PARTITION

Partition is limited to interests in real property. *See generally Shoup v. Cummins*, 334 Ill. 539, 166 N.E. 118 (1929). Thus, the general rule is that partition extends only to “lands, tenements, or hereditaments held in joint tenancy, tenancy in common, or coparcenary.” 166 N.E. at 121. However, certain exceptions may be found when the real property interest is tied with other interests in personalty. For example, in *Rohn v. Harris*, 130 Ill. 525, 22 N.E. 587 (1889), the court sustained a request to partition an undivided interest in a ferry, including the franchise and landings. However, partition can be denied if the interests of the parties to ownership cannot be definitely ascertained. *Ruddell v. Wren*, 208 Ill. 508, 70 N.E. 751 (1904). In other words, the specific interests in the whole held by each co-owner must be reasonably ascertainable. In addition, because partition looks to sever interests in proportion to the ownership of each co-owner, the motive underlying a request for partition is irrelevant. *Heldt v. Heldt*, 29 Ill.2d 61, 193 N.E.2d 7 (1963).

“Lands, tenements, or hereditaments” is the typical and statutory definition of property rights or interests subject to partition. *Pierce v. Pierce*, 4 Ill.2d 497, 123 N.E.2d 511, 514 (1954). However, these terms are not necessarily “equivalent either of freeholds or of estates of inheritance.” *Id.* Both equitable and legal estate holders are equally able to bring an action for partition, assuming that their interests are presently ascertainable. *Yedor v. Chicago City Bank & Trust Co.*, 376 Ill. 121, 33 N.E.2d 220 (1941).

“When lands, tenements, or hereditaments are held in joint tenancy or tenancy in common, other than in accordance with the Uniform Partition of Heirs Property Act, or other form of co-ownership and regardless of whether any or all of the claimants are minors or adults, any one or more of the persons interested therein may compel a partition.” 735 ILCS 5/17-101. *See also Blumenthal v. Brewer*, 2014 IL App (1st) 132250, 24 N.E.3d 168, 388 Ill.Dec. 260 (trial court erred in failing to resolve issue of whether property owner’s action for partition of property jointly owned by her and her former domestic partner stated required elements for partition), *reversed in part, remanded in part*, 2016 IL 118781.

IV. [4.4] TYPES OF INTERESTS NOT SUBJECT TO PARTITION

Types of interests not subject to partition include

- a. interests in personal property;
- b. interests held in tenancy by the entirety; and
- c. partnership property, trusts, non-vested future interests, mortgages, and covenants.

In *Breen v. Breen*, 411 Ill. 206 (1952), the Illinois Supreme Court held that beneficial owners of a land trust are not entitled to partition. *Accord Leoris v. Chicago Title Land Trust Company*, No. 18-CV-02575, 2023 WL 6388157, *6 (N.D.Ill. September 28, 2023).

In addition, conditional or contingent estates are not subject to partition. For example, a remainder in a life estate, which is contingent on the number of offspring at the grantor's death, cannot be partitioned because it is too indefinite until the grantor's death. *Westerdale v. Grossman*, 312 Ill.App.3d 884, 728 N.E.2d 67, 245 Ill.Dec. 336 (3d Dist. 2000).

When there is an agreement between the joint owners not to partition, courts will and do respect such a private agreement. *Ingraham v. Mariner*, 194 Ill. 269, 62 N.E. 609 (1901).

In addition, a sole life tenant and sole remainderman of real property do not have a concurrent right to possession of real property and are not considered co-owners of the property, as required for partition. *Poruba v. Poruba*, 396 Ill.App.3d 214, 919 N.E.2d 1066, 336 Ill.Dec. 141 (3d Dist. 2009). Phrased differently, a single life estate and a single remainder interest are two separate estates in land, so there is nothing to partition. *Id.*

V. [4.5] EFFECT OF PARTITION

After a court has granted a request for partition of real property, there are several ways in which the court may divide the property. These are discussed in §§4.6 – 4.8 below.

A. [4.6] Partition in Kind

“In a partition action, the law favors a division of land in kind, rather than a division of proceeds from the sale of the land.” *Harris v. Johnson*, 42 Ill.App.3d 751, 356 N.E.2d 1107, 1109, 1 Ill.Dec. 825 (3d Dist. 1976). Using the in-kind method, the court will divide the whole of the property into separate parts, giving the interested parties separate and sole title to different sections of the property. When there is an in-kind division of the property, the parties holding title to the property will remain titleholders but to different portions of the property and no longer together. Courts also allow the physical division of property when the shares to be divided are unequal. In that instance, “the court may award owelty [or additional compensation] to equalize the shares taken in the partition.” *Id.* (affirming trial court's order, which granted plaintiff's partition suit in kind plus owelty to equalize shares awarded when trial court's decision was most equitable disposition of property).

B. [4.7] Appraisal with Party Buyout

The court may partition property by ordering one party to buy out the other parties' interests in the subject property. In this case, the court will order an appraisal of the property, and the party wishing to retain title and/or possession to the property will remit payment to the other parties with interests in the property. The amount of payment depends on the purchasing party's percent of ownership. After such a buyout, the purchasing party remains in title and the sellers do not.

C. [4.8] Sale and Division of Proceeds in Pro Rata Shares

As noted in §4.6 above, “the law favors a division.” *Harris v. Johnson*, 42 Ill.App.3d 751, 356 N.E.2d 1107, 1109, 1 Ill.Dec. 825 (3d Dist. 1976). However, if such a division would be inequitable

or impractical, the property is ordered sold and the proceeds distributed pro rata. Thus, another method used by courts to effectuate the partition of property is to order a sale of the property. After the property is sold, the parties holding title to the subject property receive the proceeds of the sale. Each party receives a pro rata share of the proceeds based on the party's percentage ownership interest in the whole of the property.

VI. [4.9] VOLUNTARY PARTITION

This chapter discusses statutory partition based on a complaint, brought by an interested party, to divide the property, and without the consent of the other interested parties. However, titleholders to a particular property can also agree by contract to partition the property, in which case the court does not force the division of the property. Rather, such division is undertaken voluntarily. In *Casstevens v. Casstevens*, 227 Ill. 547, 81 N.E. 709, 711 (1907), the Supreme Court described a voluntary partition to be:

When . . . each party transfers or releases the interest which he had in all the land for an exclusive and fixed possession in a part, and he does not derive title or interest from his co-tenant by this transfer, so that either can be said to hold under the other. . . . It is well established, as a general rule, that co-tenants may partition the property among themselves by mutual agreement . . . and that the agreement in writing for partition will have the same effect as an actual partition. [Citation omitted.]

Voluntary partition may be especially relevant to settlements of disputes among co-owners and can take the form of partition in kind, one party buying out another, or sale and distribution of proceeds as agreed on by the parties.

VII. INVOLUNTARY PARTITION

A. [4.10] Involuntary Partition Contrasted with Voluntary Partition

Unlike voluntary partition, in which the parties agree by contract to divide the property among the interested parties, with involuntary partition the court enforces division (and/or sale) of the property. See 735 ILCS 5/17-101, *et seq.* In fact, it is most often a dispute over title to the property or other similar disagreement that prompts an interested party who no longer wishes to share the property with another party to file a complaint for partition of the property.

B. [4.11] Procedure

When an interested party petitions the court to partition property, the action is not voluntary and, therefore, falls under 735 ILCS 5/17-101, *et seq.* There are several requirements for filing an appropriate complaint for statutory partition, which are discussed in §§4.12 – 4.33 below.

1. [4.12] General Procedural Considerations

A complaint for partition must be verified and filed in the circuit court of the county where the property (or part thereof) is physically located. Specifically, 735 ILCS 5/17-101 provides:

When lands, tenements, or hereditaments are held in joint tenancy or tenancy in common, other than in accordance with the Uniform Partition of Heirs Property Act, or other form of co-ownership and regardless of whether any or all of the claimants are minors or adults, any one or more of the persons interested therein may compel a partition thereof by a verified complaint in the circuit court of the county where the premises or part of the premises are situated. If lands, tenements or hereditaments held in joint tenancy or tenancy in common are situated in 2 or more counties, the venue may be in any one of such counties, and the circuit court of any such county first acquiring jurisdiction shall retain sole and exclusive jurisdiction. Ownership of an interest in the surface of lands, tenements, or hereditaments by a co-owner of an interest in minerals underlying the surface does not prevent partition of the mineral estate. This amendatory Act of the 92nd General Assembly is a declaration of existing law and is intended to remove any possible conflicts or ambiguities, thereby confirming existing law pertinent to the partition of interests in minerals and applies to all actions for the partition of minerals now pending or filed on or after the effective date of this amendatory Act of the 92nd General Assembly. Nothing in this amendatory Act of the 92nd General Assembly shall be construed as allowing an owner of a mineral interest in coal to mine and remove the coal by the surface method of mining without first obtaining the consent of all of the owners of the surface to the mining and removal of coal by the surface method of mining. Ownership of an interest in minerals by a co-owner of an interest in the surface does not prevent partition of the surface. The ownership of an interest in some, but not all, of the mineral estate by a co-owner of an interest in other minerals does not prevent the partition of the co-owned mineral estate.

2. Complaint

a. [4.13] *In General*

Partition is a state cause of action. In *Stork v. Deppe*, Case No. 23-cv-2233-JPG, 2023 WL 4558514 (S.D.Ill. July 17, 2023), although recognizing that a federal court could have subject matter jurisdiction over a claim for partition if it otherwise met the requirements for diversity jurisdiction (see 28 U.S.C. § 1332(a)), the court found that

[c]omplaint for partition does not allege a cause of action arising under the Constitution, laws or treaties of the United States. It simply asserts a state law cause of action for partition of real property. . . . However, asserting . . . federal claims in response to the plaintiffs' state law claims does not infuse the complaint with a federal question. A cause of action "arises under" federal law "only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]." Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908); accord Vaden v. Discover Bank, 556 U.S. 49, 60 (2009). . . . [A] complaint for partition simply is not based on federal law. 2023 WL 4558514 at *1.

735 ILCS 5/17-102 provides the manner in which a verified complaint for partition should be pleaded:

The verified complaint shall particularly describe the premises sought to be divided, and shall set forth the interests of all parties interested therein, so far as the same are known to the plaintiffs, including tenants for years or for life, and of all persons entitled to the reversion, remainder or inheritance, and of every person who, upon any contingency, may be or become entitled to any beneficial interest in the premises, so far as the same are known to the plaintiffs, and shall ask for the division and partition of the premises according to the respective rights of the parties interested therein, or in accordance with the Uniform Partition of Heirs Property Act.

Thus, the drafter of a complaint for partition should keep the following checklist in mind:

- Is the complaint verified?
- Does the complaint set forth a particular and detailed description of the subject property? Typically, the complaint sets forth the legal description of the property and its common address.
 - Does the complaint set forth the parties with current and/or future interests in the subject property? Are the mortgages and lien claimants identified? But, under federal procedure, the “mortgagee was not a necessary party in an action for partition of land because its “interest as mortgagee” was “that the mortgage debt be paid and that the property not be destroyed” and that “[t]hose interests are protected regardless of the outcome of the partition action” *Williams v. Mackay*, S.C. Civ. No. 435/2000, 2011 WL 98401, *5 (D.V.I. 2011).
- Does the complaint set forth the particular interests of each of the parties?
- Does the complaint clearly ask the court for the division of the property or sale and distribution of the proceeds?
- Have all persons having any interest in the property, not named as a plaintiff, been made a defendant? See 735 ILCS 5/17-103.
- Do unknown persons with an interest need to be accounted for? See 735 ILCS 5/17-104.
- Is there an updated title report to account for all necessary parties?
- Has the issuance of title insurance after partition in kind been arranged?

It is not enough for a complaint to merely state that a party has a valid interest in the subject property. Rather, the verified complaint must set forth specific facts evidencing such interest that would allow a court to find that the plaintiff has title to the property or should be vested with a legal estate. See, e.g., *Jones v. McCollen*, 85 Ill.App.2d 375, 227 N.E.2d 788 (4th Dist. 1967) (to adequately state cause of action for partition, plaintiff must either allege facts showing legal estate

in himself or herself at time of filing complaint or allege facts showing that he or she is equitable owner with such additional circumstances as would justify a court of equity in vesting in him or her legal estate by decree of court and that in same proceedings may be made subject of partition and divided among beneficiaries).

b. [4.14] Sample Verified Complaint

**In the Circuit Court of _____ County, Illinois
_____ Department, _____ Division**

_____ , Plaintiff)	
)	
v.)	Case No. _____
)	
_____ , Defendants)	

VERIFIED COMPLAINT

Plaintiff, by [his] [her] attorneys, [law firm], alleges against Defendants, [names], for partition of [property address, location], and in support, states as follows:

INTERESTED PARTIES

1. Plaintiff and Defendants own in fee simple as [joint tenants] [tenants in common] real estate and premises located in _____ County, Illinois, and described as follows: [legal description]; and commonly known as _____.

2. The parties derived title to the property in the following manner: *[If joint tenants or tenants in common: by deed of conveyance executed and delivered (date), by _____, the owner in fee simple, conveying the property to them in fee simple as (joint tenants) (tenants in common).] [If tenants in common, set forth (a) the conveyances through which the plaintiff claims title, (b) that the parties are seized and entitled to equal undivided parts of the property or that the plaintiff “is seized of and entitled to an undivided _____ part of the property,” and (c) any additional allegations as to the undivided parts owned by the other parties.]*

3. The property is owned in undivided by the parties to this action.

4. [If applicable: Defendant _____ is a minor _____ years old for whom no legal guardian has been appointed, and as a result (he) (she) is incompetent to join in a voluntary partition or to consent to the sale of the property.]

5. [If plaintiff knows all interested parties: No person other than the parties named above has any interest, right, or title in or to the property, or any part of it, by possession, remainder, reversion, or otherwise.] [If plaintiff does not know all interested parties: (There are, or may be, other persons, whose names are unknown to Plaintiff and cannot be ascertained on diligent inquiry, who claim some interest, lien, right, or title in, on, or to the property, or some part of it, as heirs or devisees of

_____, deceased, who, in [his] [her] lifetime, claimed some interest in the property or some part of it. All of those heirs or devisees are made parties defendant under the name and description of “unknown heirs or devisees of _____, deceased.”) (There are, or may be, other persons whose names are unknown to Plaintiff and cannot be ascertained on diligent inquiry, who claim some interest, lien, right, or title, in fee or some lesser estate, vested or contingent, in reversion, remainder, or expectancy, in or to the property, or some part of it. All of those persons are made parties defendant under the name and description of “unknown owners.”)]

6. Plaintiff desires that the property be divided or partitioned among the parties according to their respective rights or interests, or, if division cannot be made without manifest prejudice to the parties in interest, that the property be sold and the proceeds be divided among the parties according to their respective rights or interests. Plaintiff previously requested that Defendants join in a voluntary partition or consent to the sale of the property, but they have refused or are incompetent to do so.

RELIEF REQUESTED

Wherefore, Plaintiff, _____, requests the following relief:

A. The respective rights and interests of the parties (or the parties and all other persons who may appear to have rights or interests), in whole or any part, in the real estate and premises described above, or the sale proceeds, be ascertained, be declared, and be settled by the judgment of this Court.

B. A fair division and partition of the property be made between the parties (or the parties and all other persons who may appear to have rights or interests), according to their respective rights and interests in the property.

C. A proper commissioner be appointed by this Court to make division and partition of the property.

D. If division or partition of the property, or any part of it, cannot be made without manifest prejudice to the parties in interest, the property, or the part or parts of it that cannot be divided or partitioned, be sold by or under the direction of this Court, and the proceeds of the sale, after paying the costs and charges of this action, be divided among the parties (or the parties and all other persons who may appear to have interests or rights in the property), according to their respective rights or interests in the proceeds as ascertained and declared by judgment of this Court.

E. [If applicable: A guardian ad litem be immediately appointed by this Court for Defendant minor.]

F. The Court grant any other relief it deems equitable and proper.

Respectfully submitted,

 By: _____
 Attorney for Plaintiff

[attorney information]

Verification by Certification

Under penalties as provided by law pursuant to §1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

If the parties know the specific proportion of respective ownership, the complaint should plead that percentage and the relief requested should state that the plaintiff is seeking partition consistent with that percentage.

3. [4.15] Parties

Every person or entity having an equitable and legal interest in the property, whether in possession or otherwise, who is not a plaintiff must be made a defendant in a complaint for partition. 735 ILCS 5/17-103. In a suit for partition, there are certain necessary parties that a court must consider when ruling on a complaint for partition. For example, a mortgagee is a necessary party to a complaint for partition. *See, e.g., Crull v. Federal Land Bank of St. Louis*, 281 Ill.App. 432 (2d Dist. 1935); *Barr v. Barr*, 273 Ill. 621, 113 N.E. 36 (1916). Other examples of necessary parties include parties with a contingent interest or other lien claimants.

Additionally, “[w]hen there are any persons interested in the premises whose names are unknown, or the share or quantity of interest of any of the parties is unknown to the plaintiff, or such share or interest is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is contingent, so that such parties cannot be named, it shall be so stated in the verified complaint.” 735 ILCS 5/17-104. When dealing with the federal government, reference should be made to 28 U.S.C. §§2410(a) and 1444, to determine whether the United States may be named as a party. *Gengler v. Internal Revenue Service*, No. 10-CV-689, 2010 WL 5463314 (E.D.Wis. Dec. 29, 2010).

4. Judgment

a. [4.16] In General

According to 735 ILCS 5/17-105, “[t]he court shall ascertain and declare the rights, titles and interest of all the parties in [the partition] action . . . and shall enter judgment according to the rights of the parties.” After the court enters judgment,

the court upon further hearing shall determine whether or not the premises or any part thereof can be divided among the parties without manifest prejudice to the parties in interest. If the court finds that a division can be made, then the court shall enter further judgment fairly and impartially dividing the premises among the parties with or without owelty. If the court finds that the whole or any part of the premises sought to be partitioned cannot be divided without manifest prejudice to the owners thereof and is not governed by the Uniform Partition of Heirs Property Act, then the court shall order the premises not susceptible of division to be sold at public sale in such manner and upon such terms and notice of sale as the court directs. If the court orders the sale of the premises or any part thereof, the court shall fix the value of the premises to be sold. No sale may be approved for less than two-thirds of the total amount of the valuation of the premises to be sold. If it appears to the court that any of the premises will not sell for two-thirds of the amount of the valuation thereof, the court upon further hearing may either revalue the premise and approve the sale or order a new sale. *Id.*

Judgment is an important step in a suit for partition because it results in the court’s entering a decree for partition of the property. When a party with an interest does not successfully appeal the court’s decree, that party is bound by the court’s decision. *Schuck v. Schuck*, 413 Ill. 390, 108 N.E.2d 905, 906 – 907 (1952) (effect of decree in partition is to sever unity of possession, and decree of partition definitely settles interests of parties and appoints commissioners to make partition; it is final decree, and one who does not appeal from such decree is bound by it and concluded by its findings); *Pollack v. Kuhn*, 96 Ill.App.2d 82, 237 N.E.2d 745, 746 (1st Dist. 1968) (after court enters final decree, parties are bound by its terms and cannot impeach it or set it aside in collateral proceeding).

b. [4.17] Sample Judgment

[Caption]

This action was heard on Plaintiff’s Verified Complaint, Defendants’ answer, and Plaintiff’s reply. The Court has considered the pleadings, the evidence introduced, and the exhibits offered and is fully advised.

The Court finds that:

- 1. It has jurisdiction of the parties and the subject matter of the suit.**
- 2. The material allegations contained in the complaint are true.**

3. Plaintiff, _____, and Defendants, _____, _____, and _____, a minor, are the owners in fee simple as [joint tenants] [tenants in common] of the real estate and premises mentioned in the complaint, situated in _____ County, Illinois, and described as follows: [legal description of property]. The parties are entitled to parts or shares of the property, or the proceeds, as adjudged below.

4. *[If applicable: No person other than the named parties has any interest, right, or title in or to the property, or any part of it, in possession, remainder, reversion, or otherwise] [or insert findings as to nature and extent of any interests of other persons].*

5. The equities of this cause are with Plaintiff, and the property involved should be divided and partitioned as prayed in the Complaint.

IT IS HEREBY ORDERED THAT:

1. Plaintiff, _____, and Defendants, _____, _____, and _____, a minor, are each entitled to an equal _____ part of the real estate [or set forth the particular shares each party shall receive].

2. _____, who does not appear to be connected with any of the parties by consanguinity or affinity, and who is entirely disinterested, is appointed commissioner to make a partition of the premises.

3. _____ must take and subscribe an oath or affirmation, as required by law, fairly and impartially to make partition of the premises according to the rights and interests of the parties as declared by the Court, if partition can be done consistently with the interests of the parties, and if the premises cannot be so divided without manifest prejudice to the parties in interest, fairly and impartially to appraise the value of each piece or parcel of the premises sought to be divided, and make a true report to the Court.

4. _____ must enter the premises, and if the property is susceptible of division, must take partition, allotting the several shares to the respective parties, quality and quantity relatively considered, according to their respective rights and interests as adjudged, designating the respective shares by metes and bounds, or other proper description, and may employ a surveyor with necessary assistants for that purpose. If the premises are not susceptible of division without manifest prejudice to the parties in interest, the commissioner will value each piece or parcel separately and report [his] [her] actions and doings in the premises to the Court as soon as practicable.

ENTERED:

Judge

5. Appointment of Commissioner and Surveyor

a. [4.18] *In General*

735 ILCS 5/17-106 provides:

The court in its discretion, sua sponte, or on the motion of any interested party, must appoint a disinterested commissioner who, subject to direction by the court, shall report to the court in writing under oath as to whether or not the premises are subject to division without manifest prejudice to the rights of the parties and, if so, report how the division may be made. The court may authorize the employment of a surveyor to carry out or assist in the division of the premises. The fees and expenses of the commissioner and of the surveyor and the person making the sale shall be taxed as costs in the proceedings.

Courts have uniformly held that when the court appoints a commissioner to submit a report to the court regarding partition of the property, the report is a prerequisite to a final decree for partition. *See, e.g., Peck v. Peck*, 16 Ill.2d 268, 157 N.E.2d 249, 260 (1959) (“an essential prerequisite to a decree authorizing a sale is the appointment of commissioners to make partition, and a report by them that the land is not susceptible of partition”), quoting *Coffin v. Argo*, 134 Ill. 276, 24 N.E. 1068, 1069 (1890). The final decree should be formatted for recording. Furthermore, “where partition is sought by either mode, a decree for sale is erroneous unless based upon a report of commissioners.” *Id.* Partition previously required the “appointment of one or three commissioners who [must] make the partition, if . . . possible without manifest prejudice to the owners.” *Rosenbaum v. Rosenbaum*, 38 Ill.App.3d 1, 349 N.E.2d 73, 83 (1st Dist. 1976). However, §17-106 now provides that the court must appoint a disinterested commissioner. 735 ILCS 5/17-106. If partition is not possible, the commissioner must value the premises and make a report to the court. The appointment of a commissioner is an essential prerequisite of a decree of sale such that a decree of sale is erroneous unless it is based on the report of the commissioner. *Rosenbaum, supra*, 349 N.E.2d at 83 – 84.

b. [4.19] *Sample Commissioner’s Oath*

**In the Circuit Court of _____ County, Illinois
_____ Department, _____ Division**

I, the undersigned, do solemnly swear that I will fairly and impartially partition the premises mentioned in the judgment entered by the Court in the above entitled action on [date], according to the rights and interests of the parties as declared in that judgment of the Court, if partition can be done consistent with the interests of the parties. If the premises cannot be divided without manifest prejudice to the parties in interest, I will fairly and

impartially appraise the value of each piece or parcel of the premises sought to be divided and make a true report to the Court.

[signature of commissioner]

Signed and sworn to before me this
 _____ day of _____, 20__.

NOTARY PUBLIC

6. [4.20] Partition Homestead Provision

735 ILCS 5/17-112 provides: “[i]f any party to the action is entitled to an estate of homestead in the premises, or any part thereof, and the homestead has not been set off, the homestead may be set off by the court; and if the court so directs, the premises so allotted or set off may be partitioned among the claimants, subject thereto.” See *Tucker v. Tucker*, 29 Ill.App.3d 489, 330 N.E.2d 274 (4th Dist. 1975) (homestead real property, which had been awarded to parties equally in prior divorce proceeding, was subject to partition notwithstanding that premises were occupied as home by minor children of parties); *La Placa v. La Placa*, 5 Ill.2d 468, 126 N.E.2d 239 (1955) (husband and wife entitled to equal shares upon partition of residence property, without special provision for homestead exemption, when husband previously caused their ownership of residence to be changed from joint tenancy to tenancy in common); *Rosenbaum v. Rosenbaum*, 65 Ill.App.3d 228, 382 N.E.2d 270, 21 Ill.Dec. 906 (1st Dist. 1978) (in action for partition, trial court did not err in finding that wife was not entitled to have funds set off to her for homestead, in view of fact that subject property was held by husband and wife in joint tenancy); *Phillips v. Phillips*, 56 Ill.App.3d 276, 372 N.E.2d 98, 14 Ill.Dec. 293 (4th Dist. 1977) (wife, in suit by husband to partition premises equally owned by them as joint tenants, was not entitled to setoff of homestead prior to division of property or proceeds from sale); *GMAC Mortgage LLC v. Arrigo*, 2014 IL App (2d) 130938, 8 N.E.3d 621, 380 Ill.Dec. 451 (title holder’s spouse could not claim her homestead exemption when she was not on the title to property, even though she maintained property as her primary residence; it was undisputed that spouse did not own or lease property or have any other formalized property interest to claim homestead exemption).

7. [4.21] Election as to Shares

“Several parties interested in the premises may, if they so elect, have their shares set off together or in severalty.” 735 ILCS 5/17-113. For example, the court in *Whittaker v. Porter*, 321 Ill. 368, 151 N.E. 905, 910 (1926), found:

It is impossible to make partition between the individual remaindermen, but each life tenant is entitled to partition, and each group of remaindermen is entitled to have its share set off in severalty. This decree will be binding on the remaindermen who are parties to the suit, and also on any who may be born hereafter, for such after-born grandchildren of the testator and testatrix will have the same rights as those now living who have been made parties to the suit, and their rights will have been protected by the decree in the same way and to the same extent.

8. [4.22] Effect of Liens

735 ILCS 5/17-114 provides that “[a] person having a mortgage, attachment, or other lien on the share of a part owner shall be concluded by the judgment of partition so far as it relates to the partition and the assignment of the shares, but his or her lien shall remain in full force upon the part assigned to or left for such part owner.” Consequently, care must be taken to ascertain the nature and extent of all liens against the property, and *all lienholders must be named as parties in the complaint*. In addition, a lien or mortgage against the whole of the property is not after a judgment of partition limited to a certain portion of the property but continues to be related to the entire property. Care should be taken when seeking partition of property subject to mortgages as a partition may be an event of default under the note secured by the mortgage.

9. [4.23] Eviction by Person with Better Title

“If a person to whom any share has been allotted is evicted by a person who, at the time of the partition, had a title older and better than the title of those who were parties to the action, the person evicted may have a new partition of the residue as if no partition had been made, if such new partition can be justly made.” 735 ILCS 5/17-115. Alternatively, he or she may have contribution from the others so as to make his or her share just and proportioned with the others, according to the rights in the premises. *Id.*

10. Report of Sale: Conveyances

a. [4.24] In General

If the property is sold, the officer making the sale must file a report of sale with the court within ten days. 735 ILCS 5/17-118. “The court may approve the report and confirm the sale reported if no objections have been filed or may disapprove the sale and order the real estate to be resold; if objections have been filed to the report, the court may at once proceed to hear such objections and sustain or overrule them.” *Id.*

If there are no objections and the court confirms the report of sale submitted by the officer effectuating the sale of the subject property, “the person making the sale or some person specially appointed shall execute and deliver to the purchaser proper conveyances, taking in case of sale on credit, security as required by the judgment. These conveyances shall operate as an effectual bar against all parties and privies to the proceedings and all persons claiming under them.” *Id.*

b. [4.25] Sample Report of Sale

[Caption]

REPORT OF SALE

Pursuant to the judgment entered by the _____ Court of _____ County, Illinois, in the above entitled action on [date], I, _____, Sheriff of _____ County, Illinois, respectfully submit the following report:

1. More than the required time has elapsed after the entry of judgment. I advertised, according to law and the judgment, the real estate and premises described in the judgment to be sold at public auction to the highest and best bidder, for [terms of sale], on [date], at [time] at [place of sale]. Accordingly, I caused a notice stating the title and general number of the action, the names of the parties, a description of the real estate and premises to be sold, and the time, place, and terms of sale to be published once each week for _____ successive weeks prior to date of sale in _____, a secular newspaper of general circulation published [daily] [weekly] in [city], _____ County, Illinois, which had been published regularly for more than six months prior to the first publication of the notice. The notice was published on [dates]. A printed copy of the notice, together with a certificate of publication, is attached hereto as Exhibit A.

2. At the time and place designated for the sale, I attended and offered the real estate and premises for sale at public auction to the highest and best bidder under the terms of sale specified above. I offered the property in separate lots or parcels, then in combination of two or more pieces or parcels, and afterwards en masse, to determine the highest bidder.

3. [Name of bidder] offered and bid \$ _____ for all the property, and that being the highest and best bid offered, I accordingly struck off and sold to that bidder for that amount the following described real estate and premises, situated in _____ County, Illinois, specifically, [legal description].

4. The bidder has deposited with me \$ _____ to apply on the bid account and has advised me that, on approval of this report of sale, [he] [she] will deposit with me sufficient moneys to pay the balance of the bid.

Dated: _____, 20__

 Sheriff, _____ County, Illinois

c. [4.26] Sample Confirmation of Sale

[Caption]

ORDER

This matter was heard on the motion of _____ for confirmation of the sale conducted by _____, Sheriff of _____ County, Illinois [or private selling officer], pursuant to the judgment entered in the above entitled action on [date]. The Sheriff made a report of the sale, and the Court examined the report and is fully advised.

The Court finds that the Sheriff [or private selling officer] has in every respect proceeded according to law and the terms of the judgment, and that the sale was fairly made.

IT IS HEREBY ORDERED THAT:

1. The proceedings, sale, and report are approved and confirmed.
2. The Sheriff (or private selling officer) must execute and deliver to _____, the purchaser at the sale, a proper conveyance of the sold property.
3. The Sheriff (or private selling officer) must first pay out of the proceeds of the sale the costs and charges of this proceeding and must next pay all outstanding taxes on the property sold.

ENTERED:

Judge

11. [4.27] Distribution of Proceeds

Pursuant to 735 ILCS 5/17-119, after the court approves the report of sale submitted by the officer selling the subject property (and if no interested party objects), an order shall be entered that sets forth the distribution of proceeds from the sale. Specifically, “the proceeds of the sale shall be distributed by the person making the sale . . . to the persons entitled thereto, according to their interests, or, in appropriate cases, to the persons and in the amounts and manner as now or hereafter provided in the applicable sections of the Probate Act of 1975, as amended, relating to small estates.” *Id.*

12. [4.28] Life Estate or Homestead

735 ILCS 5/17-120 provides that the court may sell an estate for life or for years, or of homestead, with the rest of the property with the consent of the person entitled to the estate. “If such persons are incapable of giving consent, the court may determine, taking into consideration the interests of all parties, whether such estate ought to be excluded from the sale or sold.” *Id.* However, this does not necessarily mean that the court will void a sale of property, or exclude the entire property from partition, merely because a person with an estate for life or of homestead did not consent to the sale of the property. *See, e.g., Wiegand v. Wiegand*, 410 Ill. 533, 103 N.E.2d 137, 139 – 140 (1951) (“[I]t is not equitable to allow the owner of the homestead estate to retain the whole of the property merely because it could not be divided, where great injustice would result to the owner or owners of the balance of the estate.”).

13. [4.29] Unknown Owners

In suits for partition, the plaintiff may not know all persons entitled to the estate, and thus a portion of the property or proceeds from its sale. In such a case, the court has the discretion to decide whether justice would be served by the sale of the property. If the court decides to sell the subject property, it has the power to enter “such order for the protection of the rights of [any unknown persons who are entitled to an estate in the property], in the same manner, as far as may

be, as if [they] were known and had appeared.” 735 ILCS 5/17-121. Courts have also allowed unknown owners who come forward after a court has granted a suit for partition leave to file an answer to a partition complaint. *See, e.g., Revzen v. Brown*, 297 Ill.App. 476, 17 N.E.2d 1011 (1st Dist. 1938) (reversing and setting aside trial court’s orders dismissing unknown owners’ answers and petitions when appellate court found that trial court was required to consider unknown owners’ rights and interests in subject property). Otherwise, publication is sufficient service as to unknown owners. It is important to default unknown owners before or at the time of judgment to cut off later claims.

14. [4.30] Deposit of Proceeds of Sale

After the court confirms the report of sale and enters the order setting forth the proper distribution of proceeds, the proper parties receive the proceeds. However, there may be instances in which an unknown party or nonresident is entitled to a portion of the proceeds but fails to claim them, in which case the court must cause the unclaimed proceeds to be deposited in the county treasury. 735 ILCS 5/17-122. When the money is deposited in the county treasury, “the person or persons entitled to the same, may at any time apply to the court making the order of sale and obtain an order for the same upon making satisfactory proof to the court of his or her right thereto.” 735 ILCS 5/17-123.

15. [4.31] Vesting Title

735 ILCS 5/17-124 provides:

In all actions for the partition of real estate, the court may: investigate and determine all questions of conflicting or controverted titles, and remove clouds upon the titles to any of the premises sought to be partitioned; vest titles, by its order, in the parties to whom the premises are allotted, without the forms of conveyances by minors or unknown heirs or other parties to the action; order a sale of the premises for the purpose of dividing the premises in proper cases, and by its order, vest the purchaser with title, and apportion incumbrances among the parties to whom the incumbered premises are allotted.

When title is disputed, the courts first make a determination of which party is properly in title.

16. [4.32] Apportioning of Costs and Attorneys’ Fees

In a partition action, the defendants, as well as the plaintiffs, benefit from the division of property. *Bargman v. Wilson*, 407 Ill.App.3d 656, 943 N.E.2d 1236, 1239, 348 Ill.Dec. 326 (5th Dist. 2011), citing *Bailey v. Bailey*, 150 Ill.App.3d 81, 501 N.E.2d 391, 103 Ill.Dec. 370 (4th Dist. 1986). Thus, 735 ILCS 5/17-125 provides that when the rights of all interested parties are properly set forth in the complaint, the court shall apportion the costs among those parties.

Attorneys’ fees may be awarded to the party whose attorney first sets forth the rights and interests of all the parties. *Bargman, supra*, 943 N.E.2d at 1240. *Cf. Clayton v. Bradford National Bank*, 250 Ill.App.3d 775, 620 N.E.2d 643, 649, 189 Ill.Dec. 675 (5th Dist. 1993) (counter-plaintiff entitled to apportionment of attorneys’ fees for being first party to properly set forth rights and interests of parties in property to be partitioned).

“To establish a right to an apportionment of attorney fees, the ‘plaintiff owes defendant a duty to establish the right to partition, to join all necessary parties as defendants, and to set forth the interests of all parties properly.’” *Bargman, supra*, 943 N.E.2d at 1240, quoting *Clayton, supra*, 620 N.E.2d at 645. When the plaintiff fairly and honestly represents the interests of all parties, there is no necessity for the defendant to employ counsel to protect his or her interest in the land, although he or she may elect to do so and pay his or her own counsel. *Bargman, supra*, 943 N.E.2d at 1240; *Bailey, supra*, 501 N.E.2d at 397. When it is not necessary for the defendants to be represented by additional counsel to protect their interests, an award of the plaintiff’s attorneys’ fees is appropriate. *Bargman, supra*, 943 N.E.2d at 1240.

However, when the rights of interests of all parties are not properly set forth in the complaint, or when the defendants insert a substantial defense to the complaint, thereby necessitating their own counsel, apportionment of the plaintiff’s attorneys’ fees is not appropriate. *Id.*; *Clayton, supra*, 620 N.E.2d at 648. “The allowance of attorney fees as apportioned costs is largely a matter resting in the discretion of the trial court.” *Clayton, supra*, 620 N.E.2d at 650.

Thus, when a plaintiff’s attorney files a petition for a partition properly setting forth the rights and interests of the parties and represents the interests of all the parties, there is no need for the defendants to employ separate counsel. *Bargman, supra*, 943 N.E.2d at 1241. Nonetheless, if the defendants decide to employ separate counsel, Illinois courts have found no hardship in the requirement that the defendants pay counsel employed by them, in addition to their proportion of the fee of the attorney who filed the petition for a partition and fairly and honestly represented the interests of all the parties seeking the partition. *Id.*

17. [4.33] Adjustment of Rights After Judgment

If, after the court has entered judgment for partition but before division or sale is effectuated, the parties “adjust the respective rights among themselves so that further proceedings leading to such actual division or sale become unnecessary, an order shall be entered terminating further proceedings.” 735 ILCS 5/17-126. However, any parties in interest have a right to notice that the proceedings will be discontinued. *Wollschlaeger v. Erdmann*, 390 Ill. 266, 61 N.E.2d 53, 55 (1945) (judgment lienholder against share of cotenant was “party in interest” within partition statute and was entitled to notice of petition for discontinuance of partition proceeding).

C. [4.34] Burden of Proof

In a suit for partition, the plaintiff bears the burden of proving the allegations set forth in the complaint. *Rosenbaum v. Rosenbaum*, 38 Ill.App.3d 1, 349 N.E.2d 73 (1st Dist. 1976) (partition action is adversary proceeding, and in such action, party making affirmative allegations has burden of proving them). Specifically, the plaintiff bears the burden of proving that it is an interested party and would be entitled to a portion of the subject property. *Tanner v. Tanner*, 326 Ill. 302, 157 N.E. 161 (1927) (complainant in partition proceedings must show that he or she is owner of undivided interest in premises sought to be partitioned, jointly or as tenant in common, with other parties against whom he or she seeks partition).

D. [4.35] Answer

In answering a complaint for partition, the relevant paragraphs set forth in the plaintiff's complaint should be admitted or denied, and a sentence should be included that states either that the defendant consents to the division and partition or sale of the property or that the defendant requests that the complaint be dismissed. The answer should be verified.

If applicable, a defendant should also include the defense of laches in the answer to a complaint for partition. *See, e.g., Schiller v. Kucaba*, 55 Ill.App.2d 9, 203 N.E.2d 710 (1st Dist. 1964) (when plaintiff and her grantors delayed actions for partition of real property until everyone connected with 1922 deed who could have testified to that transaction had died, they were guilty of laches). In addition, affirmative matter, 735 ILCS 5/2-619, may be pled in opposition to the complaint or relief. Finally, partition may be denied, and a sale ordered if partition would be inequitable. *In re County Treasurer and ex officio County Collection of Cook County*, 2023 IL App (1st) 221366, ¶14, citing *Steinbrecher v. Steinbrecher*, 197 Ill.2d 514, 517 (2001).

E. [4.36] Lis Pendens

Partition actions necessarily affect the involved real estate. Consequently, it is advisable that a lis pendens or notice of pending action be filed and recorded against the involved property.

F. [4.37] Review on Appeal

Generally speaking, because a complaint for a partition seeks equitable relief, appellate courts review the matter on a manifest weight of the evidence standard. *Robinson v. North Pond Hunting Club*, 382 Ill.App.3d 888, 890 N.E.2d 535, 321 Ill.Dec. 813 (5th Dist. 2008); *Wright v. Wright*, 131 Ill.App.3d 46, 475 N.E.2d 556, 86 Ill.Dec. 342 (3d Dist. 1985). However, individual questions of law that the trial court may or may not have resolved in reaching its decision to sustain or deny a complaint for partition will be reviewed on a de novo basis. *Robinson, supra*.

VIII. [4.38] CONCLUSION

When parties with title to a particular property (or part thereof) cannot reach an agreement as to the division of the property, 735 ILCS 5/17-101, *et seq.*, provides the methods by which interested parties may resolve disputes and receive their respective portions of the property or percentage of the proceeds from the sale of the property when physical division is not feasible.