ILLINOIS STATE BAR ASSOCIATION

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Rural Practice

The newsletter of the Illinois State Bar Association's Section on Rural Practice

Welcome to the Rural Practice Section

BY ANGEL WAWRZYNEK

WELCOME! AS MANY OF YOU KNOW, my name is Angel Wawrzynek, and I am the Chair of the ISBA Rural Practice Section Council. I am very excited to be a part of this brand new section. The goal and purpose of the Section Council is to leverage ISBA resources to benefit rural and small town practitioners across the state. Thank you for joining me on this adventure!

In my opinion, the most important service that the Rural Practice Section can and should provide is connections: both to various ISBA resources and to each other and our respective networks of contacts and information. If in addition to other ISBA benefits, the Rural Practice Section can facilitate our ability as rural practitioners to share resources, contacts, and information amongst ourselves, we all stand to benefit enormously.

This newsletter is sent to members of the Rural Practice Section. We intend to use this newsletter to circulate articles and information from the various sections addressing substantive legal updates as well as addressing law practice management and other topics of interest to general rural practitioners.

So, I encourage each of you to: (1) tell your network of rural attorneys about the ISBA Rural Practice Section (and the fact that membership in this Section is free

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A Rural Practitioner's Plea for Action

BY LINDY A. GIESLER

SOME PRACTITIONERS ARGUE rural Illinois is a desolate place in regard to practicing attorneys. While rural Illinois was once the home to a greater number of legal practitioners and law firms, these firms have struggled in recent years to attract new attorneys that are willing to take positions in rural areas.

The lack of attorneys in rural Illinois is not only an issue in private practice, but also an issue for government-funded positions in offices like the state's attorney or public defender. For example, multiple counties have the funding for positions like assistant state's attorney or assistant public defender, however, these positions remain open, likely due to a lack of interest.

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to ISBA members through June of 2026); and (2) join the ISBA Central Community for Rural Practice. The more attorneys in the section and the more attorneys who are a part of the ISBA Central Community, the better our reach will be for spreading the word about new ISBA services/information/etc. (and the better the possible responses to inquiries and information on this listserve).

I intend to use the ISBA Central Community for Rural Practice for several purposes initially. First, while I hope to develop a more formal system at some point, in the meantime, the ISBA Central Community should be able to help us refer cases to other rural practitioners.

Second, the ISBA Central Community is a great place to share information about upcoming CLE opportunities and interesting articles. To that end, if something of interest crosses your desk, I encourage you to share same with the Rural Practice Central Community.

Beyond that, hopefully you are all aware of the ISBA Rural Practice Initiative Fellowship Program, which was initiated during the 2020-21 bar year. The Fellowship Program consists of two programs: the Rural Practice Summer Clerk Fellows Program and the Rural Practice Associate Fellows Program. If you are interested in hiring a summer law clerk and/or an associate attorney, please consider applying to be part of the program. The ISBA award grants of $5,000 to law clerks and $10,000 to associate attorneys who are matched and selected through the Fellowship Program. As such, the program has generated a lot of interest from law students and attorneys interested in considering rural practice. Applications will be available in mid-November, with a deadline of February 7, 2025. Please contact me or Krista Appenzeller with questions regarding this program.

In addition to the above, I would like to highlight two benefits that the ISBA has rolled out in the past six months for rural practitioners. First, the ISBA has created a Law Practice For Sale page on the ISBA website, with the goal of allowing practitioners with goals of retirement to post general information about their law firms so that attorneys in other regions of the state can consider relocating to become part of the transition plan. Just last week, we saw the first ISBA member successfully sell their practice through the program. Second, the ISBA is offering a 50% discount on job postings when the job is located in a rural area. For more details, please visit https://isba-jobs.careerwebsite.com/employer/pricing/?site_id=10624.

Please stay tuned as the Rural Practice Section Council works with ISBA staff to create and roll out additional benefits. And in the meantime, thank you again for joining the Rural Practice Section! I look forward to working together to improve the practice of law for each and every one of us! ■

Rural Practice

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A Rural Practitioner's Plea

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Some might argue that less attorneys just means less competition for business. While less competition sounds great to some in the legal community, there is nonetheless the troublesome issue that rural counties are running out of attorneys to keep up with the legal needs in those communities. There are not enough attorneys willing to locate to rural Illinois to replace those that are retiring from the legal practice. There is simply too much demand and not enough attorneys.

Before diving deeper into the issue of the legal field in rural communities, it is important to clarify what makes a community "rural." According to the Illinois Primary Health Care Association, a "rural county" is a county in Illinois that has a population of 60,000 or fewer people.[1] While there are multiple opinions on what makes a county "rural," for the purposes of this article, "rural Illinois" is any county with less than 60,000 residents.

Affected Rural Communities

According to a 2020 census by the Illinois Department of Public Health, approximately 79ounties in Illinois had fewer than 60,000 residents. Illinois is home to 102 counties. This means that many of the counties in Illinois are considered "rural." The author of this article practices in Mason County, Illinois, and therefore, this article focuses on rural counties in Central Illinois.

Mason County, Illinois is located along the Illinois River and according to a 2022 census, is home to just under 13,000 residents.[2] Mason County was once home to a number of practicing attorneys. Today, there are only four attorneys that have their primary office in Mason County, and among those attorneys, only one is under the age of 50. Thus, it is expected that the number of practicing attorneys in Mason County will only continue to decline without further action.

Another example of a declining legal community in rural Illinois sits just across the Illinois River: Fulton County, Illinois. The county seat of Fulton County is Lewistown – an incorporated city with a population of approximately 2,000 residents.[3] While Lewistown's population is small compared to many other county seats, Fulton County is made up of six cities and/or villages and is home to approximately 33,000 thousand residents.[4] Fulton County is home to approximately fifteen lawyers, some of which are no longer practicing full time or practice very limited areas of law.

Representation for Indigent Clients

Circuit court judges are among those in the legal sphere that have witnessed how the legal community has changed in rural Illinois. While the list of attorneys in rural counties continues to decline, some Judges are struggling to find attorneys willing to take court appointments. Attorneys willing to take court-appointed cases are paramount to ensuring that low-income citizens have competent representation when it comes to protecting their rights in Illinois Courts.

Money Talks

One of the reasons for attorneys being reluctant to practice in rural Illinois could be that smaller firms typically pay associate attorneys less than bigger firms in urban areas. Even though most rural attorneys would prefer to have a successor to take over their practice upon retirement, these small firms simply cannot compete with salaries of large firms in bigger cities. As a result, many young attorneys are attracted to jobs in bigger cities because they provide more financial stability. While small practices can end up being quite lucrative, young attorneys do not usually reap the benefits of a small practice until years later when they are a partner or own a firm. In the meantime, those young attorneys have student debt that they struggle to pay off and are forced to take higher-paying jobs out of law school.

A Step in the Right Direction

While there may not be an immediate resolution to the issues presented in this article, one thing remains true, the need for legal help in rural areas is an issue that must continue to be addressed. The downward trend in the number of practicing attorneys in rural areas simply cannot continue or these small rural practices will cease to exist. The efforts of the Rural Practice Initiative Committee are recognized and a step in the right direction. It is imperative the Illinois State Bar Association continue supporting the Rural Practice Initiative to help attract young lawyers to these small practices in desperate need of attorneys. ■

Lindy A. Giesler is an attorney at Perbix and Morgan in Havana, Illinois and an Assistant State's Attorney for the Mason County State's Attorney.

This article was originally published in YLDNews (February 2024, Vol 68, No. 7), the newsletter of ISBA's Section on Young Lawyers Division.

1. www.idph.state.il.us/RuralHealth/Rur_Urb_2021.pdf.
2. *United States Census Bureau "QuickFacts" 2022.*
3. *Id.*
4. *Id.*

Nice Trust, But What's in It? Analyzing Funding for Revocable Trusts

BY CAMERON T. LYTHBERG

EVERY EXPERIENCED ESTATE PLANNING attorney begins to, at some point in their career, realize that the practical execution of trust funding can be very different from simple execution of the documents with only a basic schedule of assets attached. I often tell my clients that the execution of their trust documents is only the first step to setting up their estate plan. The second, and equally important, step is making sure that the trust receives initial funding and is properly funded after execution while the client still has the time and ability to do so. To be certain, a trust should include a schedule of assets so that a successor trustee knows what assets are in the trust they have been tasked with administering, but more work is often required.

Real Property

The most common funding source for trusts that I see is real property, which can be transferred via deed in trust or via assignment of a beneficial interest should a fee simple transfer of the real property not be feasible/advisable. Particularly for a fee simple transfer it is highly recommended that the last deed of record be pulled, not just to verify the legal description and grantor language, but also to be certain that your client(s) is/are the sole title holders with the right to make the transfer. A title commitment is also preferable to ascertain that your clients have the ability to make the transfer or, should running a title search not be an option, language in your deed in trust stating that the documents were prepared without title examination.[1] A further examination of tax implications should also be had to determine if the transfer should be *inter vivos* or upon the passing of the grantors via a transfer on death instrument. Depending on what type of trust is being employed, and what tax exemptions the client is currently receiving, a transfer during their lifetime could cause significant complications with future property tax bills. Finally, for real property, it is a good idea to see what the client's intent for the real property is. If it is to be sold upon the grantor's passing, this can be accomplished without further funding. However, if the intent is for the real property to be held for the benefit of another, it is key to advise the client that the trust needs liquidity to maintain the real estate for however long the real property is to remain in trust. Otherwise, the trustee may be forced to liquidate the real property rather than incur holding costs the trust cannot pay.

Interest/Ownership in Corporation or LLC

Another common funding source is stock in a corporation or membership interest in a limited liability company (LLC). Corporations and LLCs have many fundamental differences. However, for purposes of trust funding, the outline of what steps need to be taken is relatively similar. For corporations the first step is ascertaining ownership. It is advisable to request copies of the articles of incorporation, stock certificates and any other proof that your client holds the stock in the corporation the client claims to have. If the proposed corporation is small or closely held (especially those not set up by attorneys) it might very well be that the articles of incorporation refer to shares of stock that your client never made certificates for. The creation of stock certificates is a best practice irrespective of any estate planning needs and should be an automatic first step for any estate planning pertaining to a corporation. Next, if not spelled out in the articles of incorporation, a review of any shareholder agreements and the corporation's bylaws is critical to make sure that the shares have no restriction upon their transfer. Should there be such a restriction then the next step is to see whether the governing documents can be amended with the authority of your clients (which could be a separate article). If there is no shareholder agreement or bylaws these should be created and expressly state that the stock/ownership is freely transferable. Once it is ascertained there is no restriction an assignment can be prepared transferring the ownership into trust. It is advisable that this transfer be kept with your client's estate planning documents ***and*** with the corporation's records. Should the stock be on a registry this should also be updated immediately.

For LLCs the process is similar. As with corporations you should first look at the articles of organization to determine the members of the LLC and if it is member managed or manager managed (and ascertain the manager if need be). Similarly to the corporation, if an operating agreement exists it should be reviewed to make sure membership interest is freely transferable to the proposed trust. For small or single member LLCs, it is not uncommon for the member(s) to not have an operating agreement. I highly recommend one be drafted to (a) sort out any conflicts between the members; and (2) make it expressly clear that a member can freely transfer or assign their interest without the consent of the other member(s).[2] Finally, as with corporations, the proposed assignment of membership interest should be kept with both the estate planning documents and with company records. If need be, notice of the transfer should be given to the other members.[3]

Personal Property

While personal property is, seemingly, one of the simplest assets to fund a trust with, that same purported ease also makes it one of the most overlooked matters when it comes to trust funding. Some personal property items of value, such as expensive watches, gems, etc., may have certificates of ownership that should be reviewed if your client can produce them. Upon review to ascertain ownership (if there is any proof of ownership), one should create a personal property assignment listing all items with as much specificity as possible assigning all right and title to said items to the proposed trust. Those same items should be listed in the asset schedule of the trust as well. Keep in mind for other items, such as vehicles, the title transfer may have to be effectuated through a secondary agency such as the office of the Secretary of State. This article, of course, is not meant to weigh in on the wisdom of such transfers, in particular transfers of known liability magnets such as automobiles.

Liquid Capital

As stated above, for the preservation of certain assets held in trust, or as one possible probate alternative, your clients may look to fund the trust with liquid capital. Follow up once the trust documents are executed is critical here as your client will need to set up a bank account in the name of the trust and transfer funds. While this sounds, and in fact is, rather easy to accomplish, as is the case with personal property, this step is often overlooked because it requires your client to take steps after your final meeting to set up the account and transfer funds. I highly recommend you mention the need for funding your client's trust as well as steps to accomplish this funding to your client in any close out letters you send. Ideally, this will remind your clients to work on the funding process after the estate planning is "out of sight, out of mind" for them.[4]

Cynically, this letter also serves to cover your firm in the event the funding is never accomplished and you have to deal with angry heirs or beneficiaries. I also recommend you get the name of the bank from your client they will set this account up at and mark it for your file.

Good files make for good trust administration. I highly recommend that your office keep a list of all trust assets, where they are held, and status on funding. It is not rare for a trustee to have the regrettable task of having to administer a trust without knowing what exactly is in said trust. Proper attention to detail and planning can make sure that your clients' trusts are properly funded to make the administration as easy as possible.

Appendix
September 21, 2024

Jane Doe
123 State Street
Windy City, IL 60060

Re: Estate Planning Follow Up

Dear Jane:

Thank you for choosing Lythberg Law for your estate planning needs. At our last appointment on XX/XX/2024 we executed the following documents: a Revocable Living Trust, two Deeds into Trust, an Assignment of Personal Property, a Last Will and Testament, and powers of attorney for health care and property.

I have returned your original executed documents to you. Please keep them where you keep the rest of your safe and secure belongings. Original documents carry particular legal weight in Illinois, so it is imperative to keep these secure. Should you wish to amend your estate plan at any time please let me know. I shall have your estate planning documents scanned into my system for point of reference or absolute emergency but must emphasize they do not carry the same weight as the originals. The original deeds will be mailed to you after they are properly recorded. As discussed during our appointment, you have already paid the recording fee for all documents. You may receive letters in the mail purporting to have a "certified" copy of your deeds available for a fee. Often times these letters are scams and, should you receive one, we ask that you contact our office prior to expending any funds for an alleged deed copy.

In order to receive the full benefit of your trust documents it is imperative that your trust be funded, meaning that assets you wish to have placed into trust must be formally transferred into trust. Our office is handling the real estate transfers, but needs action on your part to transfer your accounts at Vanguard and Chase Bank. Our office requests that you bring a copy of these documents to your financial planner and banker so that these transfers can be coordinated. Please feel free to contact our office to help assist with this process or help coordinate with your financial planner and banker.

If you have any questions regarding anything stated in this letter, please contact me immediately at 815-239-0200. It was a pleasure working with you.

Very truly yours,

Cameron T. Lythberg

Cameron T. Lythberg is a solo practitioner at Lythberg Law, LLC in Joliet, Illinois. His practice includes real estate, estate planning and administration, business law, and litigation. In addition to his work on the Trusts and Estates Section Council, Cameron is also a member of the Real Estate Section Council and ISBA General Assembly. He is also active in the Will County Bar Association where he currently chairs the county's Civil Litigation Committee and is an incoming Director. Cameron is also an enthusiastic member of the Joliet Estate Planning Council.

This article was originally published in Trusts & Estates (June 2024, Vol 70, No. 12), the newsletter of ISBA's Section on Trusts & Estates.

1. The language in my deeds in trust (where I have not done a title search / had a commitment issued is as follows: "This Deed was prepared without benefit of title examination or opinion. No warranty or guaranty of any kind whatsoever is made by its preparer as to the state of the title of the property which is described in this Deed."
2. The Limited Liability Company Act is somewhat vague about interest transfers. Is it a distributional interest? An ownership interest? Are there now legal obligations or capital contributions required? All parties (the transferor, other Members/Managers, and the trustee/successor trustees) should understand what is occurring.
3. For further information, *see* Sherwin D. Abrams, *Introduction to LLCs for Estate Planning & Probate Lawyers*, ISBA Trusts and Estates Newsletter (December 2023).
4. A sample close out letter from my office is appended. Each letter is slightly tailored for the client but this should be a good reference point.

The Corporate Transparency Act: A New Era of Business Accountability

BY NIKHIL A. MEHTA

THE FEDERAL CORPORATE TRANSPARENCY ACT ("CTA") goes into effect on January 1, 2024. This legislation aims to enhance transparency among business entities by combatting illicit financial activities and bolstering efforts by the U.S. federal government to prevent money laundering and other financial crimes.

Background

The Corporate Transparency Act, signed into law in December 2020, is intended to address the challenges posed by anonymous shell companies that have been exploited for money laundering, terrorism financing, and other nefarious activities. Prior to the CTA, it was relatively easy for individuals to establish business entities without disclosing the true beneficial ownership of such entities, allowing them to conceal their identities and evade law enforcement scrutiny.

Key Provisions

Beneficial Ownership Reporting

The core of the CTA is the requirement for companies to disclose their beneficial ownership information to the Financial Crimes Enforcement Network (FinCEN). Beneficial ownership refers to the individuals who directly or indirectly own or control a significant portion of a company. This beneficial ownership information ("BOI Reports") will be maintained in a confidential database accessible only to authorized government agencies. Existing Reporting Companies created on or registered to do business before January 1, 2024, must file their initial BOI reports by January 1, 2025. Reporting Companies created or registered after January 1, 2024, must file an initial BIO Report within 30 calendar days of the earlier of (1) the date of receipt of actual notice of the entity's creation or registration; or (2) the date of first public notice provided by the applicable secretary of state or similar office.[1]

Reporting Thresholds

Not all companies will be subject to the same reporting requirements. The CTA includes thresholds and exceptions, exempting certain businesses from reporting to prevent undue burden. For example, the CTA contains 23 different exemptions for various types of entities. For the full list of exemptions, please visit: https://www.fincen.gov/boi-faqs. Companies falling within the scope of the CTA must report their beneficial ownership information in accordance with the timelines specified above.

Enhanced Customer Due Diligence

Financial institutions and other regulated entities will be required to conduct enhanced customer due diligence procedures, ensuring they have access to accurate and up-to-date beneficial ownership information when establishing business relationships.

Criminal and Civil Penalties

Non-compliance with the CTA may result in severe penalties, including fines and imprisonment. By imposing strict consequences, the legislation aims to deter individuals from attempting to circumvent the reporting requirements.

Benefits

Combatting Financial Crimes

By mandating the disclosure of beneficial ownership information, the CTA enables law enforcement agencies to more effectively investigate and prosecute financial crimes. This includes money laundering, terrorist financing, and other illicit activities that may have been facilitated through opaque corporate structures.

Conclusion

The Corporate Transparency Act represents a significant change in the reporting requirements of U.S. business entities. As it comes into effect on January 1, 2024, businesses should be prepared to comply with these requirements within the timeframes described in this article. ■

If you have any questions about this article or the CTA, please contact the author at Nikhil.Mehta@saul.com or at (312) 876-6931.

This article was originally published in Business and Securities Law Forum (January 2024, Vol 69, No. 1), the newsletter of ISBA's Section on Business and Securities Law.

1. Saul Ewing LLP; Paul, Marshall, Carnicella, Maria; *What is a "Reporting Company" Under the New Federal Corporate Transparency Act?*; November 16, 2023. https://www.saul.com/insights/alert/what-reporting-company-under-new-federal-corporate-transparency-act.

Guilty Pleas Following *People v. Wells*

BY HON. JUDGE RANDY ROSENBAUM

THE ILLINOIS SUPREME COURT recently decided *People v. Wells*, 2024 IL 129402 (March 21, 2024), and considered whether a defendant is entitled to additional jail credit after a negotiated plea. In *Wells*, the defendant plead guilty to unlawful possession of cannabis with intent to deliver for an agreed disposition of six years in prison with credit for 54 days previously served. At sentencing, the trial judge asked defendant, "Does that accurately state your agreement today?" to which defendant said, "Yes." Defendant did not file a post plea motion or a direct appeal. Instead, four months after the plea, defendant filed a motion titled "Motion for Order *Nunc Pro Tunc*" requesting that the trial court amend his mittimus to reflect credit for time he spent on GPS monitoring. The trial court denied the motion.

On appeal, the Fourth District Appellate Court discussed the principle that a "fully negotiated guilty plea constitutes a waiver of presentence custody credit not provided for in the plea agreement." See *People v. Wells*, 2023 IL App (4th) 220552-U. Based on that principle, the fourth district held that because defendant "bargained for a disposition providing for a specified amount of presentence credit and other significant benefits, he waived the right to any additional credit."

The Illinois Supreme Court accepted petition for leave to appeal and ultimately affirmed the fourth district's decision. The court, led by Justice Neville, began by finding that Illinois Supreme Court Rule 472 allows the trial court to retain jurisdiction to correct errors in the calculation of pretrial credit. However, plea agreements are governed to some extent by contract law principles. A contract is integrated when the parties intend it to be a final and complete expression of the agreement between them. When a contract is integrated, additional terms may not be added. The supreme court therefore held that, in such situations, a "presumption arises that every material right and obligation is included and neither party may unilaterally seek modification of the agreement."

In this case, the supreme court found that the parties intended for defendant to receive exactly 54 days of credit, because that was a clear and unambiguous term of the agreement. The fully negotiated plea agreement "encompassed all relevant considerations, and the parties expected the trial court to immediately enter a final judgment consistent with the terms of the agreement." The court found no ambiguity in what the parties intended the sentence and credit to be. As such, defendant was not entitled to additional credit.

The court did note, however, that a defendant could still challenge the plea as involuntarily and not made with full knowledge of the consequences. However, in the case before the supreme court, defendant did not challenge his plea. He only sought additional credit.

Wells is significant in practice, where both bench and bar must be mindful that a fully negotiated plea constitutes a binding contract between the state and the defendant. As such, the parties must be fully aware of all sentencing credits and ensure that they are accurately encompassed in the final agreement at sentencing. Otherwise, a defendant's only hope, as suggested by the supreme court in *Wells*, is to challenge the plea as involuntary and not made with full knowledge of the consequences. Absent procedural error, this is an uphill battle for defendants. ■

Judge Randy Rosenbaum is the presiding judge in Champaign County and the chief judge of the 6th Judicial Circuit. Judge Rosenbaum handles murders and other felony matters for Champaign County.

This article was originally published in Criminal Justice (July 2024, Vol 68, No. 1), the newsletter of ISBA's Section on Criminal Justice.

Two Wrongs Do Not Make a Right: Illinois Adopts the 'Partial Breach' Doctrine

BY RONALD D. MENNA, JR.

A PARTY WHO MATERIALLY BREACHES a contract cannot take advantage of the terms of the contract which benefit it, nor can it recover damages from the other party to the contract.[1] From this, Illinois follows the "first-to-breach rule", which holds a material breach of a contract provision by one party *may* be grounds for releasing the other party from its contractual obligations.[2] This is because Illinois law "does not condone breach of contract, but it does not consider it tortious or wrongful. If a party desires to breach a contract, he may do so purposely as long as he is willing to put the other party in the position he would have been had the contract been fully performed. … Fault is irrelevant to breach of contract. Whether one intentionally, carelessly, or innocently breaches a contract, he or she is still considered to be in breach of that contract and the extent of the breaching party's liability is generally the same."[3] Generally, the purpose of contract damages is to place the nonbreaching party in a position that it would have been in had the contract been performed, not to provide the nonbreaching party with a windfall recovery.[4]

In *PML Development LLC v. Village of Hawthorn Woods,*[5] the Illinois Supreme explicitly adopted the misnamed "partial breach" doctrine as an exception to the first-to-breach rule.[6] It held, for the first time, that if an injured party elects to continue with a contract after a material breach by the other party, the injured party cannot later cease performance and then claim it had no duty to perform based on the other party's first material breach.[7] When faced with a material breach, the injured party may proceed in one of two ways: (a) repudiate the agreement, cease performing, and sue for damages; or (b) continue to perform, retaining its benefit of the bargain, and sue for damages.[8] If the injured party elects to continue to perform, it must continue to perform or incur liability for breach.[9] The *PML Development* Court summarized the doctrine as "when a party to a contract elects to continue performing despite the other party's material breach, the nonbreaching party remains bound to its obligation to perform."[10]

The court then went on to address a further question: if an injured party elects to continue performing a contract – despite the other party's material breach – what is the consequence of the injured party's subsequent material breach?[11] First, in such a case, the courts treat each material breach as a "partial", or better understood as a nonmaterial, breach.[12] Thus, if both parties breach, both parties are entitled to damages, but neither is entitled to total damages for breach.[13] The court should calculate each party's respective damages and then offset the ultimate judgment entered.[14]

In her special concurrence, Justice Rochford, quoting a seventh circuit case, wrote to clarify that the "partial breach" doctrine is a misnomer and "is better understood as an election of remedies."[15] There are either material or nonmaterial (minor) breaches of a contract. The remedy depends upon whether the breach is minor or material. A nonmaterial breach does not allow the injured party to terminate the contract.[16] A material breach remains material regardless of the remedy sought and cannot be "converted" into a "partial" breach by continued performance. Instead, under the doctrine, a material breach is *treated* as if it were a nonmaterial breach.[17] It is this author's opinion that Justice Rochford's preferred terminology should be adopted in future cases as it more accurately describes the law's treatment of mutual material breaches of contract when there is continued performance. ■

Ronald D. Menna, Jr. is a principal at Fischel | Kahn, Chicago, where he concentrates in commercial litigation, civil appeals, guardianships, association representation, and corporate law. He is a past chair of the ISBA Civil Practice and Procedure Section Council and chair of the Allerton 2019 and 2023 Conferences.

This article was originally published in Trial Briefs (June 2024, Vol 70, No. 8), the newsletter of ISBA's Section on Civil Practice & Procedure.

1. *Dubey v. Pub. Storage, Inc.*, 395 Ill.App.3d 342, 361-62 (1st Dist. 2009).
2. *PML Development LLC v. Village of Hawthorn Woods*, 2023 IL 128770, ¶ 50 ("In other words, the first-to-breach rule excuses the injured party from future performance and allows the injured party to pursue its breach of contract claims. Conversely, the first breaching party cannot seek to enforce the contract against the injured party."); *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 70 (2006); *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill.App.3d 324, 346 (1st Dist.), *appeal denied*, 216 Ill.2d 737 (2005)("Under general contract principles, only a material breach of a contract provision by one party will justify nonperformance by the other."); Restatement (Second) of Contracts § 229 (1981). The Appellate Court in *LB Steel, LLC v. Carlo Steel Corp.*, 2018 IL App (1st) 153501, ¶ 31, held: "A material breach of contract constitutes the 'failure to do an important or substantial undertaking set forth in a contract.' *Mayfair Construction Co. v. Waveland Associates Phase I Ltd. Partnership*, 249 Ill.App.3d 188, 202-03, 188 Ill.Dec. 780, 619 N.E.2d 144 (1993)."
3. *Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338, 350 (1st Dist. 1980).
4. *Jaime v. Nomanbhoy as Tr. of Nomanbhoy 2007 Children's Tr.*, 2023 IL App (3d) 190185-U, ¶ 92, citing, *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App.3d 277, 296 1st Dist.), *appeal denied*, 234 Ill.2d 519 (2009).
5. *PML Development*, *supra* note 2.
6. *Id*., 2023 IL 128770, ¶¶ 48, 52.
7. *Id*. at 52.
8. *Id*., 2023 IL 128770, ¶ 52 ("All of this is to say that, following a material breach, the injured party reaches a fork in the road: it may either continue the contract (retain its benefits of the bargain and sue for damages) or repudiate the agreement (cease performing and sue for damages).").
9. *Dustman v. Advocate Aurora Health, Inc.*, 2021 IL App (4th) 210157, ¶ 38.
10. *PML Development*, *supra* note 2 at ¶ 57.
11. *Id*., 2023 IL 128770, ¶ 57. "The facts relevant to the parties' remedies are straightforward: the Village and PML each materially breached the agreement, and each party, despite the mutual breaches, persisted in performing under the agreement." *Id*., 2023 IL 128770, ¶ 76 (Rochford, J., specially concurring).
12. *Id*. at ¶ 66.
13. *Id*.
14. *Id*. at ¶ 67.
15. *Id*. at ¶¶ 76-77 (Rochford, J., specially concurring), citing *Emerald Investments v. Allmerica Financial Life Insurance & Annuity Co.*, 516 F.3d 612, 618 (7th Cir. 2008).
16. *Id*. at ¶¶ 78-79 (Rochford, J., specially concurring).
17. *Id*. at ¶ 79 (Rochford, J., specially concurring).