

12

Posttrial Issues Following Trial in Preparation for Appeal

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I. [12.1] Introduction**II. [12.2] Preserving Error During Trial**

- A. [12.3] Motions in Limine Are Valuable Tools But Require Follow-Up During Trial
- B. [12.4] Objections Must Be Made When Error Occurs
- C. [12.5] Objections Must Be Specific
- D. [12.6] Failure To Connect Evidence Later Requires Two Objections
- E. [12.7] Excluded Evidence Requires Offers of Proof
- F. [12.8] Objections Must Be Handled During Closing Argument To Preserve Error
- G. [12.9] Jury Instructions Must Be Objected to at Instruction Conference

III. [12.10] Postjudgment Motions

- A. [12.11] Purpose of Postjudgment Motions
- B. [12.12] Types of Postjudgment Motions and Grounds for Relief
 - 1. [12.13] Judgment Notwithstanding the Verdict and Reserved Motion for Directed Verdict
 - a. [12.14] Illinois Procedure
 - b. [12.15] Federal Procedure
 - 2. [12.16] Motion for New Trial
 - a. [12.17] Verdict Is Against Manifest Weight of Evidence
 - b. [12.18] Motion for New Trial Based on Procedural Errors
 - (1) [12.19] Defects in pleadings
 - (2) [12.20] Errors in rulings
 - (3) [12.21] Errors of law
 - c. [12.22] Evidentiary Error
 - d. [12.23] Erroneous Jury Instructions
 - e. [12.24] Attorney Misconduct
 - f. [12.25] Juror Misconduct
 - g. [12.26] Inadequate or Excessive Damages
 - 3. [12.27] Postjudgment Relief Regarding Amount of Damages
 - a. [12.28] Remittitur
 - b. [12.29] Additur
 - 4. Other Motions After Trial
 - a. [12.30] Setoffs
 - b. [12.31] Motion for Penalties
 - c. [12.32] Costs and Attorneys' Fees
 - d. [12.33] Relief from Judgments

- C. [12.34] Postjudgment Motion Procedure — Timeliness
 - 1. [12.35] Extension of Time in Which To File Under Illinois Law
 - 2. [12.36] Timely Filing by Mail
 - 3. [12.37] Successive Postjudgment Motions
 - 4. [12.38] Postjudgment Motions and Notice of Appeal
 - 5. [12.39] Tolling Time for Notice of Appeal
 - 6. [12.40] Piecemeal Judgments
- D. Contents of Postjudgment Motions
 - 1. [12.41] Form of Postjudgment Motion
 - 2. [12.42] Specificity
 - 3. [12.43] Waiver of Issues Not Raised in Postjudgment Motions Following Jury Trials
 - 4. [12.44] Amendments to Postjudgment Motions
- E. [12.45] Disposition of Postjudgment Motions

IV. [12.46] Stays Following Judgments

- A. Posttrial Motions as Stays
 - 1. [12.47] Illinois Law
 - 2. [12.48] Federal Law
- B. [12.49] Importance of Stays When Judgment Is Not for Money
 - 1. Failure To File an Appeal Bond
 - a. [12.50] Illinois Law
 - b. [12.51] Federal Law
 - 2. Stays of Money Judgments
 - a. Illinois Law
 - (1) [12.52] In general
 - (2) [12.53] Stay automatic if S.Ct. Rule 305(a) requirements are met
 - b. Federal Law
 - (1) [12.54] Stay automatic if appealing party posts bond in compliance with Fed.R.Civ.P. 62(d)
 - (2) [12.55] Federal court flexibility in setting appropriate bond amounts
 - (3) [12.56] Waiver of bond requirement
 - c. [12.57] Courts May Not Refuse To Set Bond
 - d. [12.58] Failure To Obtain Stay
 - 3. [12.59] Stays of Nonmoney Judgments
- C. [12.60] Staying a Self-Executing Judgment
- D. [12.61] Use of Insurance Policy as Bond
- E. [12.62] Effect of Stay Following Amendment to Notice of Appeal

V. [12.63] Conclusion

I. [12.1] INTRODUCTION

In representing a client in any type of commercial litigation, counsel must always bear in mind that obtaining a verdict in your favor may only be the first step in achieving success. Keeping it is the next. Or, conversely, having a verdict entered against your client is not the end of the process. From an appellate lawyer's perspective, it is just the beginning.

Preserving your case for appeal is especially important when the parties are business clients and are hoping to reach a business solution. In assessing a possible settlement post-verdict, the lawyers on both sides will examine their clients' chances on appeal, and part of that analysis will include whether errors have been made during the trial and objections to those errors preserved; whether there was sufficient evidence to support the verdict; whether the jury's verdict can be reconciled with the claims and proofs (this becomes particularly true when breach of contract claims are made, which are subject to a more exact determination of damages than more speculative elements of damages in personal injury cases); whether there are possible setoffs to the verdict or additional damages, such as prejudgment interest or attorneys' fees; or whether certain damages are constitutionally permissible, such as punitive damages. These are just some of the issues that are considered posttrial by the trial lawyer (or, by this stage, by the appellate lawyer) that should be taken into account.

The first step in preserving your case for appeal is to make a record of possible errors during the trial. The second step is to file a postjudgment motion raising these same issues for appeal and adding any additional errors as a result of the verdict. And, the third step, but not a necessary one to file the appeal, is to assess what the bond may be should an appeal be taken.

II. [12.2] PRESERVING ERROR DURING TRIAL

By the time you read this chapter, you are more than likely searching for guidance as to what to do after a verdict has been entered. Sections 12.10 – 12.62 below discuss the steps counsel must take postjudgment to preserve error and to avoid enforcement of the judgment before and after an appeal is taken. But, in deciding what errors one can raise in a postjudgment motion, counsel must first make an assessment of what errors occurred during the trial that were preserved either by motion or timely objections.

There are many good sources that discuss how to preserve error properly during trial. Three that the author recommends are Thomas L. Sanders, Ch. 5, *Preserving the Record During Trial*, III ILLINOIS CIVIL PRACTICE (IICLE, 2003, Supp. 2006); Charles E. Joern, Jr., and Robert W. Vyverberg, Ch. 12, *Protecting the Record and Perfecting the Appeal*, FEDERAL CIVIL PRACTICE (IICLE, 2006), and John E. Corkery, ILLINOIS CIVIL AND CRIMINAL EVIDENCE §103 (2000). But, at the conclusion of trial, in assessing errors that may be viable for posttrial or appellate relief, the discussion in §§12.3 – 12.9 below may be helpful.

A. [12.3] Motions in Limine Are Valuable Tools But Require Follow-Up During Trial

A motion in limine permits a party to obtain, in advance, an order excluding inadmissible evidence and prohibiting interrogation concerning this evidence. The moving party will thereby be protected from any prejudicial impact the mere asking of the questions and making of the objections may have on the jury. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill.2d 545, 416 N.E.2d 268, 271, 48 Ill.Dec. 237 (1981). *See also Cunningham v. Millers General Insurance Co.*, 227 Ill.App.3d 201, 591 N.E.2d 80, 83, 169 Ill.Dec. 200 (4th Dist. 1992).

A motion in limine is an interlocutory order, however, and may remain subject to reconsideration by the court throughout the trial. *Reid v. Sledge*, 224 Ill.App.3d 817, 587 N.E.2d 1156, 1161, 167 Ill.Dec. 541 (5th Dist. 1992). Consequently, a party whose motion in limine has been denied must object when the challenged evidence is presented at trial in order to preserve the issue for review, and the failure to raise such an objection constitutes a waiver of the issue on appeal. *People v. Pantoja*, 231 Ill.App.3d 351, 596 N.E.2d 205, 207, 172 Ill.Dec. 926 (2d Dist. 1992). *See also Krengiel v. Lissner Corp.*, 250 Ill.App.3d 288, 621 N.E.2d 91, 96 – 97, 190 Ill.Dec. 222 (1st Dist. 1993). Even though a motion in limine has been granted, an objection to any attempt to introduce the challenged evidence must be made again at the time of the admission, or it will be treated as waived. *Jacobs v. Holley*, 3 Ill.App.3d 762, 279 N.E.2d 186, 187 (2d Dist. 1972).

When a motion in limine is denied, the unsuccessful movant must specifically object to the evidence when it is offered at trial. *Department of Public Works & Buildings v. Roehrig*, 45 Ill.App.3d 189, 359 N.E.2d 752, 759, 3 Ill.Dec. 893 (5th Dist. 1976). *See also Cunningham, supra*, 591 N.E.2d at 83.

B. [12.4] Objections Must Be Made When Error Occurs

The Illinois Supreme Court has clearly indicated that a challenge to evidence must be made at the time the error occurs, or it will be treated as waived. *Jacobs v. Holley*, 3 Ill.App.3d 762, 279 N.E.2d 186, 187 (2d Dist. 1972).

C. [12.5] Objections Must Be Specific

General objections are insufficient to preserve an issue for appeal. Objections should be sufficiently specific to inform the court of the grounds for the objection, and a general objection, if overruled, will not preserve the issue for review on appeal. *People v. Queen*, 56 Ill.2d 560, 310 N.E.2d 166, 168 (1974). A specific objection to evidence, based solely on particular grounds, also amounts to a waiver of objections to all grounds not specified or relied on. *Barreto v. City of Waukegan*, 133 Ill.App.3d 119, 478 N.E.2d 581, 88 Ill.Dec. 266 (2d Dist. 1985).

D. [12.6] Failure To Connect Evidence Later Requires Two Objections

For objections relating to evidence not connected to any proof that is subject to later connection, when the proof of this evidence is never presented, the party that opposes it must both

object to the lack of the proof at the time the evidence is introduced and later renew this objection by making a timely motion to strike the evidence. *Kloster v. Markiewicz*, 94 Ill.App.3d 392, 418 N.E.2d 986, 987, 49 Ill.Dec. 966 (1st Dist. 1981). *See also Gillespie v. Chrysler Motors Corp.*, 135 Ill.2d 363, 553 N.E.2d 291, 296, 142 Ill.Dec. 777 (1990).

E. [12.7] Excluded Evidence Requires Offers of Proof

It is well settled that the key to saving for review of error in the exclusion of evidence is an adequate offer of proof in the trial. *People v. Andrews*, 146 Ill.2d 413, 588 N.E.2d 1126, 1131, 167 Ill.Dec. 996 (1992) (“The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper.”). An offer of proof is not required, however, when the circumstances and the question itself sufficiently indicate the purpose and substance of the evidence sought and when the question is in proper form and clearly admits of a favorable answer. A statement of counsel will suffice, particularly when there is no statement by the court, opposing counsel, or any witness to dispute the remarks of counsel. *In re A.M.*, 274 Ill.App.3d 702, 653 N.E.2d 1294, 1299, 210 Ill.Dec. 832 (1st Dist. 1995).

F. [12.8] Objections Must Be Handled During Closing Argument To Preserve Error

Generally, the failure to object to alleged errors in an opponent’s closing arguments is considered a waiver of objection. *Kenny Construction Co. v. Hinsdale Sanitary District*, 111 Ill.App.3d 690, 444 N.E.2d 510, 516, 67 Ill.Dec. 274 (1st Dist. 1982). In some instances, a reviewing court may consider claims of improper statements during closing argument to the extent that these statements prevented a fair trial. *Ryan v. Katz*, 234 Ill.App.3d 536, 600 N.E.2d 1206, 1211, 175 Ill.Dec. 748 (2d Dist. 1992).

G. [12.9] Jury Instructions Must Be Objected to at Instruction Conference

All objections to tendered instructions must first have been raised at the jury instruction conference with a proper instruction tendered in order to preserve the error. *Frankenthal v. Grand Trunk Western R.R.*, 120 Ill.App.3d 409, 458 N.E.2d 530, 76 Ill.Dec. 130 (1st Dist. 1983). Fed.R.Civ.P. 51 provides in part as follows:

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

Again, as noted in §12.2 above, it is important to review this §12.9 and §§12.3 – 12.8 above in deciding what issues are still usable to raise in your posttrial motion (because, in most instances, you cannot raise errors during the trial unless an objection was made) and in deciding what issues were preserved properly for appeal. Even if you conclude errors were presented for further review either by the trial or appellate court, the next step is also critical — filing a timely postjudgment motion raising these errors.

III. [12.10] POSTJUDGMENT MOTIONS

The postjudgment motion is filed after entry of judgment and is designed to consolidate all requests for postjudgment relief. Submission of a thorough postjudgment motion may be critical in jury cases because, for example, under Illinois state court procedure, only those issues raised in the postjudgment motion may be raised on appeal. Any party may make a postjudgment motion. Those postjudgment motions that seek the types of relief enumerated in §§2-1202 and 2-1203 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, or Fed.R.Civ.P. 50(b), 52, and 59 will toll the time for appeal. A motion that seeks another form of relief is not technically a postjudgment motion. Postjudgment motions are governed by 735 ILCS 5/2-1202 and 5/2-1203 and by Fed.R.Civ.P. 50, 52, 59, and 60.

A. [12.11] Purpose of Postjudgment Motions

A postjudgment motion is a motion filed after entry of judgment that seeks relief from the judgment. Under Illinois state court procedure, a postjudgment motion may, but need not, be filed in a bench trial case. In a jury case, however, a postjudgment motion must be filed pursuant to

735 ILCS 5/2-1202 in order to preserve issues for appeal. See Illinois S.Ct. Rule 366(b)(2)(iii), discussed in §§12.42 and 12.43 below. Under federal procedure, a postjudgment motion may, but is not required to, be filed after either a bench or jury trial. *Fuesting v. Zimmer, Inc.*, 448 F.3d 936 (7th Cir. 2006) (post-verdict motions are unnecessary to preserve claims of error for appeal that have been preserved by objections or motions in limine during trial). An exception to this rule is if a party is seeking a reversal based on the sufficiency of the evidence. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 163 L.Ed.2d 974, 126 S.Ct. 980 (2006) (renewing motion after verdict under Fed.R.Civ.P. 50(b) or motion for new trial under Fed.R.Civ.P. 59 is required in order to allow circuit courts of appeal to consider issue of legal sufficiency to support verdict). See also *Fuesting, supra*. A posttrial motion is also required when the verdict is claimed to be inadequate or excessive. *Baker v. Dillon*, 389 F.2d 57 (5th Cir. 1968). See also *Hahn v. Becker*, 588 F.2d 768 (7th Cir. 1979) (absent timely motion for new trial and trial court's ruling thereon, court may not review alleged excessiveness of verdicts).

The postjudgment motion serves a variety of purposes. The two most important of these are (1) to allow the trial judge to correct any erroneous rulings made during the trial by granting a new trial, entering judgment notwithstanding the verdict, or granting other relief; and (2) to lay the foundation for an appeal by identifying with specificity all alleged errors that occurred at trial. Additionally, the postjudgment motion automatically tolls the execution of the judgment under Illinois state procedure, stays the time for appeal in most instances under state and federal law, and allows the judge an opportunity to grant a judgment in cases in which the jury failed to reach a verdict. The postjudgment motion may be used to seek a retrial, a rehearing, modification or vacation of the judgment, or other relief.

B. [12.12] Types of Postjudgment Motions and Grounds for Relief

The most common types of relief requested in a postjudgment motion are judgment notwithstanding the verdict, a new trial, arrest of judgment, and a ruling on a reserved motion for a directed verdict.

1. [12.13] Judgment Notwithstanding the Verdict and Reserved Motion for Directed Verdict

The relief requested by a motion for judgment notwithstanding the verdict and the relief requested by a reserved motion for a directed verdict are the same. Each presents the question of whether all the evidence, when viewed in the aspect most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on this evidence could ever stand. *Pedrick v. Peoria & Eastern R.R.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967); *Gillespie v. R.D. Werner Co.*, 71 Ill.2d 318, 375 N.E.2d 1294, 17 Ill.Dec. 10 (1978); *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196 (1st Cir. 1980). In other words, the issue raised by the motion is whether there is a total failure of proof on any necessary element of the plaintiff's case. *Pennell v. Baltimore & Ohio R.R.*, 13 Ill.App.2d 433, 142 N.E.2d 497 (4th Dist. 1957).

a. [12.14] Illinois Procedure

In ruling on a motion for judgment notwithstanding the verdict, the court may consider all of the evidence introduced in the case, whether introduced by the movant or by the opposing party.

Carter v. Winter, 32 Ill.2d 275, 204 N.E.2d 755 (1965); *Wolford Morris Sales, Inc. v. Weiner*, 75 Ill.App.2d 238, 221 N.E.2d 308 (4th Dist. 1966). The court will not, however, consider a legal presumption that has been overcome by clear evidence (*Kettlewell v. Prudential Insurance Company of America*, 4 Ill.2d 383, 122 N.E.2d 817 (1954)), and neither will it consider evidence that has no probative force (*Knudson v. Knudson*, 382 Ill. 492, 46 N.E.2d 1011 (1943)); *Day v. Barber-Colman Co.*, 10 Ill.App.2d 494, 135 N.E.2d 231 (2d Dist. 1956)). The court also cannot judge the credibility of the witnesses or consider any attempted impeachment. *Duffek v. Vanderhei*, 81 Ill.App.3d 1078, 401 N.E.2d 1145, 37 Ill.Dec. 52 (1st Dist. 1980).

If the posttrial motion raises an issue of fact for the jury, the motion must be denied. *Johanek v. Ringsby Truck Lines, Inc.*, 157 Ill.App.3d 140, 509 N.E.2d 1295, 109 Ill.Dec. 283 (1st Dist. 1987). A judgment notwithstanding the verdict is improper when reasonable minds may differ as to the credibility or resolution of conflicting evidence. *Lee v. Grand Trunk Western R.R.*, 143 Ill.App.3d 500, 492 N.E.2d 1364, 97 Ill.Dec. 491 (1st Dist. 1986). The jury is free to disregard inconsistent facts and base its verdict on alternative evidentiary facts presented at trial. *Schwachman v. Greenbaum Mortgage Co.*, 115 Ill.App.3d 234, 450 N.E.2d 750, 71 Ill.Dec. 62 (1st Dist. 1983). If an evidentiary basis for the jury's verdict can be discerned, the court must deny the postjudgment motion even if it feels that another conclusion is more reasonable.

b. [12.15] Federal Procedure

Federal courts also have the authority to enter judgments as a matter of law. Fed.R.Civ.P. 50(b). A Rule 50(b) motion must be filed to preserve the issue for appeal when the party is seeking judgment as a matter of law based on the argument that, when the evidence, including all reasonable inferences to be drawn from the evidence, points so strongly and overwhelmingly in favor of one party, reasonable and fair-minded persons in the exercise of impartial judgment could come to only one conclusion. *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196 (1st Cir. 1980). In other words, a Rule 50(b) motion should be filed only when the evidence is insufficient to create even an issue of fact requiring submission to the jury in the first place or when a jury has returned a verdict when the evidence is legally insufficient to support it. This motion must be filed to preserve this issue for appeal. See *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 163 L.Ed.2d 974, 126 S.Ct. 980 (2006).

2. [12.16] Motion for New Trial

Fed.R.Civ.P. 59 provides the authority for federal courts to grant new trials. Rule 59(a) states that a new trial may be granted “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States” or “for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.”

Unlike judgments as a matter of law, the court enjoys a greater degree of discretion when ruling on a motion for a new trial. *Crown Central Petroleum Corp. v. Brice*, 427 F.Supp. 638 (E.D.Va. 1977). Instead of merely inquiring into the sufficiency of the evidence, the court may grant a motion for a new trial if it determines that, for any reason, the trial was not fair to the movant. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189 (1940). Thus, the standard by which evidence is judged on a motion for new trial in federal courts is less

stringent than the standard by which evidence is judged on a motion for judgment as a matter of law. If the basis for the new trial is legal sufficiency of the evidence and not claims of evidentiary error or conduct of the trial, then a posttrial motion must be filed to preserve the error for appeal. See *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 163 L.Ed.2d 974, 126 S.Ct. 980 (2006); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936 (7th Cir. 2006).

Similarly, the granting of a motion for a new trial in Illinois lies in the discretion of the trial court. *In re Village of Bridgeview, Cook County, Illinois, Special Assessment*, 139 Ill.App.3d 744, 487 N.E.2d 1109, 94 Ill.Dec. 232 (1st Dist. 1985). The court will grant the motion if it believes that prejudicial error has occurred during the litigation or during the course of trial or if it determines that the jury verdict was against the manifest weight of the evidence. *Sitowski v. Buck Brothers, Inc.*, 147 Ill.App.3d 282, 497 N.E.2d 1193, 100 Ill.Dec. 831 (1st Dist. 1986).

a. [12.17] *Verdict Is Against Manifest Weight of Evidence*

When considering the merits of a motion for a new trial based on the insufficiency of the evidence, the court should weigh the evidence and set aside the verdict only if the verdict is contrary to the manifest weight of the evidence. *Tedrowe v. Burlington Northern, Inc.*, 158 Ill.App.3d 438, 511 N.E.2d 798, 110 Ill.Dec. 621 (1st Dist. 1987). The test to be applied by the court is not whether the evidence could have supported a verdict for the movant but whether a contrary verdict is clearly required. A movant who is successful in procuring a new trial should insist that the trial court include in the record a concise statement of its findings and reasons for granting a new trial so that the reviewing court will be able to identify the basis for the action. *Horton v. City of Ottawa*, 40 Ill.App.3d 544, 352 N.E.2d 23 (3d Dist. 1976). If such a statement is not present in the record, the appellate court may conclude that the trial court abused its discretion and improperly granted a new trial because it believed that another outcome or interpretation of facts was more reasonable. *Dunlavey v. Patti*, 79 Ill.App.2d 442, 223 N.E.2d 858 (3d Dist. 1967).

Under Fed.R.Civ.P. 59, a trial judge may weigh the evidence and consider the credibility of witnesses in ruling on a motion for a new trial. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980). In *Wyatt*, the trial court granted the defendant a new trial on the basis of inadequate evidence to support the jury's verdict and excessive damages. The Fourth Circuit affirmed the granting of a new trial, stating that "a trial judge has a duty to set aside a verdict and grant a new trial even though it is supported by substantial evidence, 'if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice.'" 623 F.2d at 891 – 892, quoting *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959).

b. [12.18] *Motion for New Trial Based on Procedural Errors*

Grounds that may be specified in support of a motion for a new trial include every conceivable form of error. In order to preserve any error for review in state court proceedings following a jury trial, the error must be raised with specificity in the postjudgment motion. Due to the trial court's better opportunity to gauge the effect on the jury of the significance of the alleged errors, the appellate court will accord deference to the trial court's assessment of them.

(1) [12.19] Defects in pleadings

A serious defect in a pleading is one of the many types of errors that may be grounds for a new trial. *Tonchen v. All-Steel Equipment, Inc.*, 13 Ill.App.3d 454, 300 N.E.2d 616 (2d Dist. 1973). In *Tonchen*, the first count of the complaint set forth a claim for breach of an employment agreement. The record, however, disclosed various allegations of fraud as a basis for recovery under the first count, and counsel treated this count at times as a breach of contract claim and at other times as a fraud claim. The court held that the jury was likely confused and that the basis for its verdict was unclear (*i.e.*, contract or fraud). The Second District therefore remanded the cause for a new trial on the first count.

(2) [12.20] Errors in rulings

An erroneous ruling that unfairly prejudiced the unsuccessful party may lead the trial court to grant a new trial. A new trial may be granted, for example, when a motion for a continuance is wrongfully denied or when a motion for a directed verdict is either improperly denied or improperly granted. See *Thomas Brass & Iron Works v. Leonard*, 91 Ill.App. 599 (2d Dist. 1900); *Parks v. Nichols*, 20 Ill.App. 143 (1st Dist. 1886); *Adamsen v. Magnelia*, 280 Ill.App. 418 (2d Dist. 1935). Erroneous rulings by a court are also grounds for a new trial under federal law. *Kehm v. Procter & Gamble Co.*, 580 F.Supp. 890 (N.D. Iowa 1982).

(3) [12.21] Errors of law

If the trial court adopts an erroneous view of the law and conducts the proceedings in accordance with this view, it is appropriate to award a new trial to the parties. *Robertson v. Travelers Insurance Co.*, 100 Ill.App.3d 845, 427 N.E.2d 302, 56 Ill.Dec. 222 (5th Dist. 1981), *rev'd on other grounds*, 95 Ill.2d 441 (1983). See also *Segal v. Grooms (In re Grooms)*, 13 B.R. 376 (Bankr. D. Utah 1981) (proper to grant new trial under federal law for legal errors).

c. [12.22] Evidentiary Error

Evidentiary error (*i.e.*, the improper admission or exclusion of evidence) is an important ground for a new trial when the error was prejudicial. *Ballweg v. City of Springfield*, 114 Ill.2d 107, 499 N.E.2d 1373, 102 Ill.Dec. 360 (1986); *Kehm v. Procter & Gamble Co.*, 580 F.Supp. 890 (N.D. Iowa 1982). The admission of improper evidence will not itself be grounds for a new trial, however, if no timely objection was made at trial to the evidence. *Akers v. Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 201 Ill.App. 14 (3d Dist. 1915) (abst.). If an objection was made at trial, the admission of the evidence must appear to have affected the outcome of the case before a new trial will be granted. *J.L. Simmons Co. ex rel. Hartford Insurance Group v. Firestone Tire & Rubber Co.*, 108 Ill.2d 106, 483 N.E.2d 273, 90 Ill.Dec. 955 (1985). When proper evidence was excluded, on the other hand, it must appear that the evidence was offered and was competent and sufficiently material to have affected the outcome of the case. *Karsten v. McCray*, 157 Ill.App.3d 1, 509 N.E.2d 1376, 109 Ill.Dec. 364 (2d Dist. 1987).

The evidence erroneously excluded or admitted must be specifically identified in the postjudgment motion. Merely stating that evidence was improperly admitted or excluded will not preserve the errors for review. *See Graves v. North Shore Gas Co.*, 98 Ill.App.3d 964, 424 N.E.2d 1279, 54 Ill.Dec. 376 (2d Dist. 1981).

Under federal procedure, errors in the admission or exclusion of evidence are also grounds for a new trial. *Givens v. Lederle*, 556 F.2d 1341 (5th Cir. 1977).

d. [12.23] Erroneous Jury Instructions

Erroneous jury instructions or instructions improperly refused are often grounds for a new trial, particularly if the errors are combined with other trial errors or if the case is a close one. *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976); *Panepinto v. Morrison Hotel, Inc.*, 71 Ill.App.2d 319, 218 N.E.2d 880 (1st Dist. 1966); *Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc.*, 775 F.Supp. 893 (E.D.Va. 1991), *rev'd on other grounds*, 974 F.2d 545 (4th Cir. 1992). All objections to tendered instructions must first have been raised at the jury instruction conference in order to preserve the error (*Frankenthal v. Grand Trunk Western R.R.*, 120 Ill.App.3d 409, 458 N.E.2d 530, 76 Ill.Dec. 130 (1st Dist. 1983)) and must be renewed in the postjudgment motion. If the objections are not raised again in the postjudgment motion, they are waived. *Boone v. Baker*, 9 Ill.App.3d 509, 292 N.E.2d 461 (1st Dist. 1972). General objections to a jury instruction are insufficient, as is merely listing the numbers of the objectionable instructions. *Micklos v. Highsmith*, 149 Ill.App.3d 779, 500 N.E.2d 1154, 103 Ill.Dec. 83 (3d Dist. 1986); *Turney v. Ford Motor Co.*, 94 Ill.App.3d 678, 418 N.E.2d 1079, 50 Ill.Dec. 85 (1st Dist. 1981).

To preserve for review the question of an erroneous instruction, the instruction accepted or refused should be quoted in full in the postjudgment motion, and it should be supported by a statement of the factual or legal basis for the belief that the instruction was improperly tendered or refused. Failure to include such a statement has been considered a waiver of issues regarding jury instructions. *Schultz v. Republic Insurance Co.*, 124 Ill.App.3d 342, 464 N.E.2d 767, 79 Ill.Dec. 863 (1st Dist. 1984).

Under federal law, jury instructions must be objected to *before* the jury retires to consider the verdict if the issue is to be preserved for appeal. See Fed.R.Civ.P. 51(c), 51(d). Accordingly, in the federal courts, as in Illinois state courts, an objection to a jury instruction will be deemed to have been waived if it is raised for the first time in a postjudgment motion.

e. [12.24] Attorney Misconduct

Misconduct of counsel may be grounds for a new trial when the opponent objects or takes exception to the conduct at the time it occurs and renews the objection with specificity in the postjudgment motion. *Ruggio v. Ditkowsky*, 147 Ill.App.3d 638, 498 N.E.2d 747, 101 Ill.Dec. 423 (2d Dist. 1986). Even if the objection is sustained, counsel is admonished, and the jury is instructed to disregard the behavior and remarks, prejudice may nevertheless result, and a new trial may still be appropriate. *Appel v. Chicago City Ry.*, 259 Ill. 561, 102 N.E. 1021 (1913); *Draper v. Airco, Inc.*, 580 F.2d 91 (3d Cir. 1978).

Prejudicial misconduct warranting a new trial may consist of inflammatory remarks, improper appeals to sentiment or prejudice, reading improper documents or statements outside the record or evidence to the jury, or improper argument.

Under federal procedure, improper or intemperate argument by counsel (*see City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980)) or questioning by counsel that conveys improper information to the jury (*see Harris v. Zurich Insurance Co.*, 527 F.2d 528 (8th Cir. 1975)) also may be grounds for a new trial.

f. [12.25] Juror Misconduct

Certain conduct on the part of jurors may warrant a new trial. When jurors, after only part of the evidence is in, comment that they would find for the plaintiff regardless of arguments or instructions, a new trial must be granted. *Jewsbury v. Sperry*, 85 Ill. 56 (1877). Corrupt attempts to influence the jury are always grounds for a new trial. *West Chicago Street R.R. v. Luka*, 72 Ill.App. 60 (1st Dist. 1897). Jurors' reading of prejudicial newspaper articles may also be grounds for a new trial (*Cox v. Aetna Casualty & Surety Company of Hartford, Connecticut*, 261 Ill.App. 394 (2d Dist. 1930)), as may be party or witness communication with jurors during trial. *See Lyons v. Lawrence*, 12 Ill.App. 531 (1st Dist. 1883); *McLaughlin v. Hinds*, 151 Ill. 403, 38 N.E. 136 (1894); *United States v. Harry Barfield Co.*, 359 F.2d 120 (5th Cir. 1966).

g. [12.26] Inadequate or Excessive Damages

Although the amount of the verdict is largely within the discretion of the jury, the court may award a new trial if the verdict is so large as to shock the judicial conscience (*Harris v. Day*, 115 Ill.App.3d 762, 451 N.E.2d 262, 71 Ill.Dec. 547 (4th Dist. 1983)), if the award is unjustly low, or if it is obvious that the jury failed to consider proper elements of damage that were clearly proven (*Meyers v. Louthan*, 114 Ill.App.3d 770, 449 N.E.2d 904, 70 Ill.Dec. 557 (3d Dist. 1983); *Duncan v. Peoria Yellow Checker Cab Corp.*, 45 Ill.App.3d 653, 359 N.E.2d 1242, 4 Ill.Dec. 290 (3d Dist. 1977); *United States v. 329.73 Acres of Land, Situated in Grenada & Yalobusha Counties, State of Mississippi*, 666 F.2d 281 (5th Cir. 1982)).

If the verdict on the question of liability was proper but the damages awarded were either inadequate or excessive, a partial new trial only on the issue of damages may be proper. *Hartseil v. Calligan*, 40 Ill.App.3d 1067, 353 N.E.2d 10 (3d Dist. 1976).

Under federal procedure, a party also may file a motion for a new trial under Fed.R.Civ.P. 59(a) when the issue is the adequacy or excessiveness of the damages. *See Peacock v. Board of Regents of Universities & State College of Arizona*, 597 F.2d 163 (9th Cir. 1979) (excessive damages are grounds for new trial); *Ajax Hardware Manufacturing Corp. v. Industrial Plants Corp.*, 569 F.2d 181 (2d Cir. 1977). These motions are particularly appropriate when the verdict appears to be the result of the bias or prejudice of the jury.

Although postjudgment motions are generally not required following a jury or bench trial in federal court, when the amount of verdict or the sufficiency of evidence is at issue, a

postjudgment motion is necessary to preserve this issue for appeal. See *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 163 L.Ed.2d 974, 126 S.Ct. 980 (2006); *Fuesting v. Zimmer, Inc.*, 448 F.3d 936 (7th Cir. 2006).

In a case involving compensatory damages, the Illinois Supreme Court remitted the amount of the damages when the verdict was more than three times the amount the plaintiff asked for. “Jurors do not possess a roving commission to find such damages as they please. . . . [W]hile the amount of recoverable damages is a question of fact for the jury, the measure of damages upon which the jury’s factual computation is based is a question of law.” *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218, 856 N.E.2d 389, 408 – 409, 305 Ill.Dec. 584 (2006). Courts have also found awards of punitive damages to be excessive and have reduced amounts accordingly. Reviewing courts will review a defendant’s appeal based on excessive punitive damages under a de novo standard of review when there is a constitutional challenge that the punitive award violates due process. *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, No. 101231, 2006 Ill. LEXIS 1657 (Nov. 30, 2006). However, courts will apply an abuse of discretion standard when the appellant’s claim that the punitive damages are excessive is not based on a constitutional argument, but instead that there was either no basis for the award or that there was trial error in allowing prejudicial, irrelevant, or inflammatory evidence. *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917, 930 (7th Cir. 2004).

In *Lowe Excavating, supra*, the Illinois Supreme Court reduced the punitive damage award from \$325,000 to \$50,000 because the defendant’s conduct was merely “minimally reprehensible” and there was no injury sustained of a personal nature and no comparable civil penalty. 2006 Ill. LEXIS 1657 at *54. The court believed that the 11:1 ratio of compensatory to punitive damages was “reasonable and constitutional.” *Id.*

3. [12.27] Postjudgment Relief Regarding Amount of Damages

In addition to partial or entirely new trials that may be granted in the face of an excessive or inadequate verdict, a movant may request other forms of relief from the amount of judgment, specifically remittitur and additur.

a. [12.28] Remittitur

When a court considers the jury’s verdict to be excessive, it may diminish that amount by an act of remittitur. Remittitur often occurs when the defendant moves for a new trial on the ground that the verdict is excessive but is unsuccessful. Both a new trial and remittitur should be requested by a defendant because the court may allow the defendant to elect between the two. Upon entry of a remittitur, the judgment becomes appealable by the defendant.

Under S.Ct. Rule 366(b)(2)(ii), a party who consents to a remittitur as a condition of the denial of a motion for a new trial is not precluded from asserting on appeal that the amount of the verdict was proper. The plaintiff may raise the issue, however, only if the defendant appeals the case. *Anderson v. Greyhound Lines, Inc.*, 34 Ill.App.3d 643, 339 N.E.2d 465 (2d Dist. 1975). Upon the defendant’s appeal, the plaintiff may argue that the damages awarded by the jury before remittitur were proper and may request reinstatement of the original award.

In *Mikolajczyk v. Ford Motor Co.*, ___ Ill.App.3d ___, 859 N.E.2d 201, 307 Ill.Dec. 201 (1st Dist. 2006), the appellate court overturned a \$25 million jury award for loss of society in compensatory damages because it exceeded fair and reasonable compensation and shocked the judicial conscience. In remanding for remittitur, the court opined as to what it would consider to be a reasonable range of damages. *See also Peter J. Hartmann Co. v. Capital Bank & Trust Co.*, 353 Ill.App.3d 700, 817 N.E.2d 913, 922 – 923, 288 Ill.Dec. 263 (1st Dist. 2004) (ruling that jury award above contested amount was excessive and constituted adequate grounds for remittitur if plaintiff consented or, alternatively, new trial if plaintiff did not consent), and discussion in §12.26 above of remittitur of compensatory and punitive damages when amount of damages in considered excessive.

b. [12.29] Additur

If the trial court feels that the verdict is inadequate, it may, with the defendant’s consent, add to the verdict. At least one Illinois court has held that a trial court has no authority to impose an additur in a case involving unliquidated damages; additur may be proper only in cases involving definitely calculable damages. *See Yep Hong v. Williams*, 6 Ill.App.2d 456, 128 N.E.2d 655 (1st Dist. 1955). In Illinois, additur is therefore allowed only by consent to correct a verdict when a definitely calculable item of damages has been omitted. *Ross v. Cortes*, 95 Ill.App.3d 772, 420 N.E.2d 846, 51 Ill.Dec. 432 (1st Dist. 1981). One appellate court has held that consent by the defendant is not necessarily required for additur of “undisputed” compensation. In *Rice v. McDonald’s Corp.*, 268 Ill.App.3d 201, 644 N.E.2d 482, 205 Ill.Dec. 926 (5th Dist. 1994), the court held that the trial court properly used additur to compensate a plaintiff for undisputed medical expenses that were not included on an itemized verdict form after a general verdict in favor of the plaintiff.

In the federal courts, additur has been held unconstitutional as violative of the Seventh Amendment right to a trial by jury. *Dimick v. Schiedt*, 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296 (1935). It has, however, been held permissible under the Federal Tort Claims Act. *Davis v. United States*, 716 F.2d 418 (7th Cir. 1983).

4. Other Motions After Trial

a. [12.30] Setoffs

The Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*, provides that when one or more joint tortfeasors pay damages to the plaintiff or are released from liability, the recovery available on any claim against the remaining defendants is reduced by that amount. 740 ILCS 100/2(c). After trial, a defendant may request the setoff against the verdict of any amount paid by a joint tortfeasor. The defendant must specifically request the reduction in his or her postjudgment motion in order to receive the relief. *De Lude v. Rimek*, 351 Ill.App. 466, 115 N.E.2d 561 (1st Dist. 1953). A setoff also may be appropriate in other cases when there are multiple parties, so it is important to remember to request this relief.

The Illinois Supreme Court has determined, however, that a request for a setoff is not a postjudgment motion that seeks to modify the judgment, but rather is a motion directed toward satisfaction of the judgment. Therefore, the court held that the 30-day time limit applicable to posttrial motions did not apply. *See Star Charters v. Figueroa*, 192 Ill.2d 47, 733 N.E.2d 1282, 248 Ill.Dec. 284 (2000).

b. [12.31] Motion for Penalties

Parties may recover expenses and attorneys' fees accrued due to their opponents' bad-faith pleadings under S.Ct. Rule 137, which provides as follows:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

All proceedings under this rule shall be brought within the civil action in which the pleading, motion or other paper referred to has been filed, and no violation or alleged violation of this rule shall give rise to a separate civil suit, but shall be considered a claim within the same civil action. Motions brought pursuant to this rule must be filed within 30 days of the entry of final judgment, or if a timely post-judgment motion is filed, within 30 days of the ruling on the post-judgment motion.

This rule shall apply to the State of Illinois or any agency of the State in the same manner as any other party. Furthermore, where the litigation involves review of a determination of an administrative agency, the court may include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue.

Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

The purpose of Rule 137 is to penalize attorneys and parties who bring suit without any basis in law or truth, causing another party to spend money in defense of the suit. An award of fees by the trial court under this rule lies in the court's discretion and will not be disturbed absent abuse of this discretion.

The corollary to Rule 137 in federal courts is Fed.R.Civ.P. 11. Fed.R.Civ.P. 11 was the predecessor to S.Ct. Rule 137, and the Illinois decisions that have interpreted Rule 137 (and its statutory predecessor, former 735 ILCS 5/2-611) have looked to federal court decisions that have interpreted Federal Rule 11. Rule 11 also provides for sanctions (attorneys' fees and costs) based on frivolous motions or frivolously filed cases. A Rule 11 motion may be appropriate in some cases following the entry of a summary judgment if the case had no merit from the beginning.

c. [12.32] Costs and Attorneys' Fees

A prevailing party may often recover certain of its costs and occasionally its attorneys' fees. The statutes relevant to the cause of action, as well as the procedural rules, may dictate which costs may be recovered as well as the availability of attorneys' fees. The successful party must affirmatively request the award of any fees or costs to which it is entitled.

d. [12.33] Relief from Judgments

Under federal law, a party may file a motion seeking relief from a judgment or order if it was a result of mistake, excusable neglect, or fraud. Fed.R.Civ.P. 60(b)(6) states that a party may petition for relief from a judgment or order for "any . . . reason justifying relief from the operation of the judgment." The rule allows courts to relieve a party from a final judgment, order, or proceeding for a number of reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) void judgment; or (5) satisfied judgment. A motion filed pursuant to Rule 60 must be made within a reasonable time and, for reasons 1, 2, and 3 above, not more than one year after the judgment, order, or proceeding was entered or taken.

C. [12.34] Postjudgment Motion Procedure — Timeliness

Under 735 ILCS 5/2-1202(c), a postjudgment motion must be filed within 30 days after the entry of judgment or the discharge of the jury if no verdict is reached. In an Illinois criminal case, it is important to note that postjudgment motions must be filed within 30 days of the date of verdict, *not* the date of the final judgment. 725 ILCS 5/116-1(b). In both jury and bench trials, the court may grant extensions of the time period during which the motion may be filed. The timeliness of a postjudgment motion is extremely important to an appellant, as only timely filed postjudgment motions will toll the time for filing a notice of appeal.

Fed.R.Civ.P. 50(b) provides that a motion for judgment notwithstanding the verdict must be filed within 10 days after entry of the judgment. Fed.R.Civ.P. 6(b), which permits a court to extend the time in which certain motions may be filed, does not apply to Rule 50(b) motions, and therefore, the trial court lacks authority to enlarge the 10-day period within which Rule 50(b) motions must be made. If a Rule 50(b) motion is not timely, it cannot be allowed.

Pursuant to Fed.R.Civ.P. 59(b), a motion for a new trial must be filed within 10 days after the entry of judgment. The motion may be filed before entry of judgment, but if the motion is filed after the 10-day period, it will be denied as untimely. *John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co.*, 239 F.2d 815 (3d Cir. 1956). The time period for filing the motion is jurisdictional and, like a Rule 50(b) motion, cannot be extended. *de la Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3d Cir. 1983). A timely filed motion for a new trial under Rule 59 or a motion for judgment as a matter of law under Rule 50(b) tolls the time for filing a notice of appeal as under the Illinois rule.

1. [12.35] Extension of Time in Which To File Under Illinois Law

An extension of time under Illinois law in which to file a postjudgment motion must be sought, and an order granting the motion must be entered, within 30 days after the entry of judgment. *Kwak v. St. Anthony De Padua Hospital*, 54 Ill.App.3d 719, 369 N.E.2d 1346, 12 Ill.Dec. 332 (1st Dist. 1977). *See also Trentman v. Kappel*, 333 Ill.App.3d 440, 775 N.E.2d 1041, 1044, 266 Ill.Dec. 969 (5th Dist. 2002), in which the court held the following:

If a party cannot file his or her posttrial motion within the original 30-day period, that party must obtain the trial court's extension within that same 30-day period. If a party does not obtain an extension and the 30 days are allowed to pass, then the trial court no longer has jurisdiction to allow an extension of time. If a party obtains an extension of time and needs an additional extension or extensions of time in which to file a posttrial motion, the additional extension(s) of time must be secured prior to expiration of the previously extended deadline.

If a judge grants a party's postjudgment motion, the opposing party has 30 days after the order granting the motion to file its own motion attacking the order. Again, any extension of the 30-day period must be granted within the initial 30-day period after the postjudgment motion was granted. See §12.37 below.

In civil cases, the 30-day period begins to run from the time judgment is entered, not the date of the verdict. By contrast, in criminal cases, postjudgment motions must be filed within 30 days of the date of the verdict.

S.Ct. Rule 272 was amended in 1990 to remove any doubt as to the date a judgment is entered in a civil case. Rule 272 states as follows:

If at the time of announcing final judgment the judge requires the submission of a form of written judgment to be signed by the judge or if a circuit court rule requires the prevailing party to submit a draft order, the clerk shall make a

notation to that effect and the judgment becomes final only when the signed judgment is filed. If no such signed written judgment is to be filed, the judge or clerk shall forthwith make a notation of judgment and enter the judgment of record promptly, and the judgment is entered at the time it is entered of record.

The 1990 amendment of Rule 272 was intended to negate the inconsistent holding in *Davis v. Carbondale Elementary School District No. 95*, 170 Ill.App.3d 687, 525 N.E.2d 135, 121 Ill.Dec. 329 (5th Dist. 1988). Committee Comments, Rule 272. In *Davis*, the Fifth District held that a judgment was final when the record did not state that the judge required the submission of a written order and further held that the 30-day time period for filing a notice of appeal began to run on the date of the oral ruling. The Fifth District further held that a written order that was filed after the judge's announced decision (to comply with a local circuit court rule requiring the prevailing party to submit a written order) was superfluous and had no effect on the time period for filing a notice of appeal. *Davis* is no longer good law.

A postjudgment motion may be untimely under Rule 272 because the court or a local circuit court rule requires a formal written order but one has not yet been entered. For example, in *Archer Daniels Midland Co. v. Barth*, 103 Ill.2d 536, 470 N.E.2d 290, 83 Ill.Dec. 332 (1984), the plaintiff had filed a complaint seeking damages for breach of contract on March 10, 1980. The plaintiff filed a motion for summary judgment on August 11, 1982, and the motion was granted on August 30 with the notation in the record, "Formal order to be submitted." 470 N.E.2d at 291. On September 20, several weeks before a formal order had been submitted, the defendant filed a motion to reconsider. The motion to reconsider was denied on December 30, 1983.

On appeal, the appellate court ruled that the notice of appeal was untimely because it was filed before the entry of the formal written order. On a subsequent appeal to the Illinois Supreme Court, the court affirmed the appellate court's judgment. The court held that the trial court had required the submission of a written order and that until the order was submitted and signed, it could not be attacked by motion, appealed from, or enforced. Because the defendant's motion to reconsider was filed before the entry of the written order, it was untimely and did not, therefore, extend the time for filing a notice of appeal.

Upon expiration of the original 30-day period, if no extensions have been granted, the trial court loses jurisdiction to entertain a postjudgment motion. *Portock v. Freeman*, 53 Ill.App.3d 1027, 369 N.E.2d 201, 11 Ill.Dec. 747 (1st Dist. 1977). In a jury case, which requires the filing of a posttrial motion to preserve issues for appeal, the appellate court may not consider the alleged errors.

2. [12.36] Timely Filing by Mail

It is uncertain whether a postjudgment motion that is mailed to the trial court clerk within 30 days of the date of the judgment but received outside that same 30-day period would be considered timely. In *A.S. Schulman Electric Co. v. Village of Fox Lake*, 115 Ill.App.3d 746, 450 N.E.2d 1356, 71 Ill.Dec. 477 (2d Dist. 1983), the Second District held that a postjudgment motion mailed to the clerk within 30 days of the judgment but received after the 30-day period had expired was timely. At the time that *A.S. Schulman* was decided, there was a split among the

districts of the appellate court as to whether the mailing of a notice of appeal within 30 days was the same as filing it within 30 days. Some districts of the appellate court held that the notice of appeal had to be received by the clerk within the 30 days of judgment, and others found that a mailing of the notice within the 30 days was tantamount to filing it. The *A.S. Schulman* court found that those decisions in which the courts followed a “pro-mailing” position were the more persuasive; therefore, it adopted the same position for postjudgment motions.

The conflict in the appellate court as to the mailing of notices of appeal was resolved by the Supreme Court in *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill.2d 326, 533 N.E.2d 1072, 127 Ill.Dec. 944 (1989). In *Harrisburg-Raleigh*, the Supreme Court determined that notices of appeal mailed within the 30-day period and received thereafter are timely filed. The Supreme Court reasoned that the words “filed with the clerk of the circuit court” (S.Ct. Rule 303(a)) should be considered in light of modern policies and practices. The court believed that Rule 303(a) should take into account the widespread practice of filing documents by mail. The court also noted that S.Ct. Rule 373 states a pro-mailing preference. The court therefore concluded as follows:

It is therefore appropriate that the pro-mailing policy of Rule 373 should be applied to the filing of a notice of appeal under Rule 303(a). Moreover, a liberal pro-mailing policy is more equitable, since it places smaller firms which may lack telefax machines and messenger services on an equal footing with their larger competitors.
533 N.E.2d at 1078.

The Supreme Court stated, however, that it expressed “no opinion as to whether the same policy would apply to other papers filed in the circuit court, such as post-trial motions.” *Id.*

It would follow that the Supreme Court would adopt a similar pro-mailing policy if confronted with the issue as it relates to postjudgment motions. However, until the issue is decided, it may be safer actually to file the motion with the clerk of the circuit court within the 30-day period or to mail it so it is received within the 30-day period. *But see Wilk v. Wilmorite, Inc.*, 349 Ill.App.3d 880, 812 N.E.2d 765, 285 Ill.Dec. 945 (2d Dist. 2004) (reaffirming *A.S. Schulman, supra*); *In re Marriage of Morse*, 143 Ill.App.3d 849, 493 N.E.2d 1088, 98 Ill.Dec. 67 (5th Dist. 1986) (also following *A.S. Schulman, supra*).

In federal courts, a motion for a new trial mailed within the required ten-day period but received by the clerk’s office outside that period will be considered a timely filed motion. *Stratton v. Hatch*, 597 F.Supp. 128, 132 (D.Vt. 1984).

3. [12.37] Successive Postjudgment Motions

In Illinois procedure, a party may file only a single postjudgment motion. This motion tolls the 30-day period for filing notice of appeal. Once the last pending posttrial motion has been disposed of, the 30-day period begins to run; a party cannot file a second motion to delay filing a notice of appeal. *Sears v. Sears*, 85 Ill.2d 253, 422 N.E.2d 610, 612, 52 Ill.Dec. 608 (1981). In *Sears*, for example, the court consolidated two cases, both involving successive postjudgment motions that merely repeated what could have been or was stated in the original motions.

Judgment had been entered in the first case on August 24, 1977. The defendant moved to reopen the judgment on September 15, 1977, on the ground that he had not known about the August hearing. His motion was denied on December 6. On January 4, 1978, more than four months after entry of the judgment, the defendant filed a second motion, making the same argument in more detail. The court, after hearing evidence on the matter, denied the second motion on July 12, 1978. The defendant filed an appeal on August 1. The appellate court dismissed the appeal as untimely, and the Supreme Court affirmed, holding that a second postjudgment motion filed more than 30 days after judgment must be denied and that the time for appeal begins to run when the original postjudgment motion is disposed of. In *Jones v. Unknown Heirs or Legatees of Fox*, 313 Ill.App.3d 249, 728 N.E.2d 1157, 245 Ill.Dec. 800 (3d Dist. 2000), the court clarified that the time to appeal is tolled by a motion to reconsider the denial of a petition under either 735 ILCS 5/2-1401 or 5/2-1301(g) because a collateral attack on the judgment under these provisions constitutes a new action that cannot be considered a continuation of the prior proceeding by postjudgment motion, and thus the motion to reconsider the petition is not a successive postjudgment motion.

A second postjudgment motion may be filed and the time for appeal is tolled if the court has modified or vacated the original judgment that was the subject of the first posttrial motion. In this instance, the second posttrial motion is attacking the new judgment and is not a renewal of the first posttrial motion. Either party in this situation would have standing to file another posttrial motion, and the tolling provisions for the appeal would apply. *Gibson v. Belvidere National Bank & Trust Co.*, 326 Ill.App.3d 45, 759 N.E.2d 991, 995 – 996, 259 Ill.Dec. 930 (2d Dist. 2001) (“where a trial court amends its initial final order, the clock is reset regarding the filing of posttrial motions attacking this new final judgment and, thus, the time is reset regarding the time for the filing of a notice of appeal”).

This principle has been codified in S.Ct. Rule 274, which states as follows:

A party may make only one postjudgment motion directed at a judgment order that is otherwise final. If a final judgment order is modified pursuant to a postjudgment motion, or if a different final judgment or order is subsequently entered, any party affected by the order may make one postjudgment motion directed at the superseding judgment or order. Until disposed, each timely postjudgment motion shall toll the finality and appealability of the judgment or order at which it is directed. The pendency of a Rule 137 claim does not affect the time in which postjudgment motions directed at final underlying judgments or orders must be filed, but may toll the appealability of the judgment under Rule 303(a)(1). A postjudgment motion directed at a final order on a Rule 137 claim is also subject to this rule.

Under federal procedure, successive postjudgment motions likewise do not toll the time for filing an appeal. Only one postjudgment motion will toll the time. *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986).

4. [12.38] Postjudgment Motions and Notice of Appeal

All postjudgment motions must be disposed of before a party may file a notice of appeal. S.Ct. Rule 303(a)(2) provides, in pertinent part, as follows:

When a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion shall have no effect and shall be withdrawn by the party who filed it, by moving for dismissal pursuant to Rule 309.

A notice of appeal, therefore, *cannot* affect the rights of the parties to file postjudgment motions. If a notice of appeal is filed by one party, it does not prevent other parties from filing postjudgment motions. For example, if judgment is entered on Day 0 and Party A files a notice of appeal on Day 10, Party B may still file a postjudgment motion until Day 30. If B does file a posttrial motion, A's notice of appeal is considered premature and must be withdrawn. A must refile its notice of appeal motion within 30 days after B's postjudgment motion has been disposed of.

Rule 303 also provides that the 30-day period for filing a notice of appeal begins to run on the date of the entry of the order disposing of the last pending postjudgment motion. Therefore, if Party B in the preceding example files a postjudgment motion on Day 12, and Party A files a postjudgment motion on Day 15, and B's motion is denied on Day 28, and A's motion is denied on Day 32, the 30-day period for filing a notice of appeal by either A or B begins to run on Day 32.

A postjudgment motion does not extend the time for appeal if it is abandoned or if the movant consents to its denial. *Page v. Estate of Page*, 66 Ill.App.3d 214, 383 N.E.2d 615, 22 Ill.Dec. 807 (5th Dist. 1978). Likewise, one party's filing of a postjudgment motion does not extend the other party's filing period; one timely postjudgment motion does not give the court jurisdiction to consider untimely postjudgment motions. *Stotlar v. Stotlar*, 50 Ill.App.3d 790, 365 N.E.2d 1097, 8 Ill.Dec. 711 (5th Dist. 1977).

Under federal law, if a party files a timely postjudgment motion, the time for filing a notice of appeal does not begin to run until the district court denies the motion. *Varhol v. National Railroad Passenger Corp.*, 909 F.2d 1557, 1561 (7th Cir. 1990). If the motion is untimely, the time for filing a notice of appeal is not tolled, and untimely appeals are normally not considered by the federal courts. *Id.*

There is, however, a narrow exception to the general rule prohibiting appeals that are untimely. The "unique circumstances doctrine" can save an untimely appeal if equitable circumstances warrant that result. For example, in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384, 11 L.Ed.2d 404, 84 S.Ct. 397 (1964), a party served a motion for a new trial 12 days after entry of judgment. Even so, the district court assured the movant that his motion was timely. The party later appealed after the time for filing an appeal had expired. The Seventh Circuit dismissed the appeal, and the United States Supreme Court reversed. In allowing

the untimely appeal, the Court held that, when a litigant performs “an act which, if properly done, postponed the deadline for the filing of his appeal” and the party relies on the court’s conclusion that it had been done, the appeal is timely if filed before the mistaken deadline. 84 S.Ct. at 398.

In a subsequent case, however, the Seventh Circuit declined to apply the *Thompson* doctrine when the district court vacated a previous order to give the moving party more time to appeal beyond what is permitted under Fed.R.App.P. 4(a)(5). *Properties Unlimited, Inc. v. Cendant Mobility Services*, 384 F.3d 917, 921 – 922 (7th Cir. 2004). The *Properties Unlimited* court found that the doctrine can be used only when a “genuine ambiguity” exists in the rules that the trial court and parties relied on. 384 F.3d at 922. In *Properties Unlimited*, the party was aware of the time limits of the rules governing notices of appeal but sought, with the trial judge’s compliance, time beyond what is permitted by the rule allowing extensions for notices of appeal. *See also Green v. Bisby*, 869 F.2d 1070 (7th Cir. 1989).

5. [12.39] Tolling Time for Notice of Appeal

The filing of any postjudgment motion does not toll automatically the time for filing the notice of appeal. The postjudgment motion must actually be seeking to modify, alter, or vacate the judgment before the tolling provision applies. *See Berg v. Allied Security, Inc.*, 193 Ill.2d 186, 737 N.E.2d 160, 249 Ill.Dec. 770 (2000) (motion to amend pleadings was not postjudgment motion to modify judgment, and therefore, no tolling was allowed); *Hayes Machinery Movers, Inc. v. REO Movers & Van Lines, Inc.*, 338 Ill.App.3d 443, 788 N.E.2d 259, 272 Ill.Dec. 955 (1st Dist. 2003) (motion for “findings” does not attack judgment to trigger tolling); *R&G, Inc. v. Midwest Region Foundation for Fair Contracting, Inc.*, 351 Ill.App.3d 318, 812 N.E.2d 1044, 286 Ill.Dec. 29 (4th Dist. 2004) (motion to “clarify” order does not stay 30-day appeal period). In *R&G*, the party’s motion requesting a clarification of the trial court’s legal reasoning for dismissing the complaint did not constitute a postjudgment motion because the motion did not request a rehearing, new trial, or order vacating or modifying the trial court’s order and thus was not directed against the judgment. *But see Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Co.*, 349 Ill.App.3d 178, 810 N.E.2d 235, 284 Ill.Dec. 582 (2d Dist. 2004) (motion to reinstate and for leave to file amended complaint qualified as postjudgment motion when it was sufficiently directed against judgment and thus was sufficient to toll 30-day period to file notice of appeal).

6. [12.40] Piecemeal Judgments

Piecemeal judgments present unique timing problems due to questions of the finality of the judgment for purposes of appeal. In Illinois and in federal courts, an interlocutory judgment may be final and appealable when judgment has been entered affecting less than all the parties or claims and the court’s order contains the language that there is no just reason for delaying enforcement or appeal. S.Ct. Rule 304(a); Fed.R.Civ.P. 54(b).

Following a Rule 304(a) finding in Illinois, the circuit court retains jurisdiction to rule on a timely filed postjudgment motion. The motion must be filed within 30 days of the Rule 304(a) order. Under amendments to Rule 304, effective January 1, 1989, a postjudgment motion filed

after the entry of a Rule 304 order tolls the running of the 30-day period in which to file a notice of appeal. The 30-day period now begins to run on the date of disposal of the postjudgment motion.

If the circuit court does *not* make a Rule 304(a) finding, a litigant seeking to attack an order that disposes of less than all the parties or claims must wait until the conclusion of the entire litigation to file its postjudgment motion. *Morton Buildings, Inc. v. Witvoet*, 70 Ill.App.3d 55, 388 N.E.2d 258, 26 Ill.Dec. 634 (3d Dist. 1979). However, in *Pempek v. Silliker Laboratories, Inc.*, 309 Ill.App.3d 972, 723 N.E.2d 803, 243 Ill.Dec. 500 (1st Dist. 1999), the court expressly declined to follow *Witvoet* on this issue and held that a litigant could bring a postjudgment motion against a judgment order that does not dispose of the entire litigation. As a result, the *Pempek* court held that a postjudgment motion filed more than 30 days following entry of the nonfinal judgment does not toll the time to appeal the nonfinal judgment (unless the trial court had granted an extension within the 30 days), but instead the time to appeal will elapse under normal rules 30 days after the eventual entry of the final judgment.

D. Contents of Postjudgment Motions

1. [12.41] Form of Postjudgment Motion

Under Illinois law, all postjudgment motions must be in writing. Motions under Fed.R.Civ.P. 50(b), 59(a), and 59(e) also must be in writing.

2. [12.42] Specificity

In jury trials, 735 ILCS 5/2-1202(b) and S.Ct. Rule 366(b)(2)(iii) create a specificity requirement for postjudgment motions. All issues and grounds for relief, as well as all relief requested, must be set forth in the motion with particularity. General statements of error are insufficient. Under Fed.R.Civ.P. 50(b), 59(a), and 59(e), when the relief sought is based on insufficiency of the evidence, the motion must be specific as to why the evidence was insufficient, or the motion will not be allowed.

Under Illinois practice, if the issues are not specifically laid out in the motion, they will not be preserved for review. *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981). Claims of error that may be waived if they are not raised in the postjudgment motion include allegations of admission of improper evidence, excessiveness of damages, insufficiency of the evidence, errors in jury instructions, defects in the pleadings, misconduct of the court, and the incorrectness of special findings. Under federal procedure, when insufficiency of the evidence is the issue being raised, failure to be specific in the postjudgment motion may waive the issue.

The postjudgment motion should provide the trial judge with a full opportunity to consider the contested issues and to award a new trial or other relief. Thus, the appellant must set forth with specificity the factual bases for any claims of error. A postjudgment motion that contains a sufficient factual basis to support the claims of error, together with the record on appeal, should demonstrate to the appellate court that the trial court had an opportunity to consider the errors and in fact did so. *Wilson, supra*, 417 N.E.2d at 1324 (allegations that “[t]he Court was in error in

allowing witnesses to answer questions on irrelevant, immaterial and prejudicial matters” and that “[t]he Court was in error in admitting improper, irrelevant, immaterial and/or prejudicial evidence” were not specific statements of factual bases of allegations and did not preserve errors for review).

General allegations and contentions of error will not preserve issues for appeal. For example, in *Brown v. Decatur Memorial Hospital*, 83 Ill.2d 344, 415 N.E.2d 337, 47 Ill.Dec. 332 (1980), the jury returned a verdict in favor of the defendant hospital in a malpractice action, and the plaintiff filed a postjudgment motion challenging the tendered jury instructions. The plaintiff’s postjudgment motion stated, “The Court refused to give Plaintiff’s tendered instructions 9, 11, and 16,” and, “The Court gave, over objection of the Plaintiff, Defendant’s tendered instructions 2, 3, and 4.” 415 N.E.2d at 339. The Illinois Supreme Court held that these allegations were inadequate under §68.1(2) of the Civil Practice Act (Ill.Rev.Stat. (1979), c. 110, ¶68.1(2), now codified at 735 ILCS 5/2-1202) and under S.Ct. Rule 366(b)(2)(iii) because they did not specify the grounds on which they were based. Mere identification of the objectionable instructions, without a description of the contents of the instructions and some explanation of why the plaintiff found the instructions objectionable, would not support a challenge to the judgment.

The specificity requirement is relaxed in appeals from other than jury verdicts. In *Kingbrook, Inc. v. Pupurs*, 202 Ill.2d 24, 779 N.E.2d 867, 269 Ill.Dec. 13 (2002), in an appeal from an entry of summary judgment, the issue was whether the appellant’s bare-bones posttrial motion asking the court to reconsider was a sufficient posttrial motion to toll the time to appeal. The Supreme Court found that 735 ILCS 5/2-1203(a), governing postjudgment motions from nonjury trials, does not require any specific content in contradiction to 735 ILCS 5/2-1202(b), which does expressly require specificity. In upholding the appeal, the court declined to hold that “post-judgment motions in nonjury cases must contain some undefined degree of detail, lest the filer risk that the reviewing court hold that the motion is not a motion at all.” 779 N.E.2d at 873. See also *Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Co.*, 349 Ill.App.3d 178, 810 N.E.2d 235, 284 Ill.Dec. 582 (2d Dist. 2004) (following *Kingbrook*, court held that bare-bones postjudgment motion requesting reinstatement of dismissed complaint sufficient to toll period of appeal).

Again, in federal court, the grounds for a motion for a new trial must also be stated with specificity. The motion must advance arguments that put the opposing party on notice of the reasons for a new trial. *Harkins v. Ford Motor Co.*, 437 F.2d 276 (3d Cir. 1970). If the motion is too vague, it will be denied. *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 826 F.2d 712 (7th Cir. 1987).

3. [12.43] Waiver of Issues Not Raised in Postjudgment Motions Following Jury Trials

Following a jury trial in Illinois state court, a party must file a postjudgment motion if it intends to file an appeal. All issues not raised in a timely filed postjudgment motion will be waived on appeal. S.Ct. Rule 366(b)(2)(iii). See also *County Board of School Trustees of Macon County v. Batchelder*, 7 Ill.2d 178, 130 N.E.2d 175 (1955); *Raabe v. Maushak*, 55 Ill.App.3d 169, 371 N.E.2d 96, 13 Ill.Dec. 401 (2d Dist. 1977); *Perez v. Baltimore & Ohio R.R.*, 24 Ill.App.2d 204, 164 N.E.2d 209 (1st Dist. 1960).

In *Raabe, supra*, for example, the plaintiff brought an action for breach of an oral agreement. The defendant appealed from a judgment in the plaintiff's favor. On appeal, the defendant stated that the trial court had erred in striking part of the defendant's counterclaim without hearing any evidence on the counterclaim. The plaintiff argued, and the appellate court agreed, that the defendant had waived this point by failing to include this alleged error in his postjudgment motion.

In nonjury cases, neither the filing of nor the failure to file a postjudgment motion limits the scope of appellate review, and therefore a motion for a new trial is unnecessary to save questions for review. *City of Alton v. Foster*, 207 Ill. 150, 69 N.E. 783 (1904), *overruled in part by Climax Tag Co. v. American Tag Co.*, 234 Ill. 179, 84 N.E. 873 (1908); *City of Evanston v. Piotrowicz*, 20 Ill.2d 512, 170 N.E.2d 569 (1960).

Under federal procedure, a postjudgment motion is not required to be filed after either a jury or bench trial unless the party is raising an issue as to the sufficiency of the evidence or the amount of the verdict. *See Wilson v. Runyon*, 981 F.2d 987 (8th Cir. 1992); *Baker v. Dillon*, 389 F.2d 57 (5th Cir. 1968).

4. [12.44] Amendments to Postjudgment Motions

Amendments to postjudgment motions have been allowed by appellate courts in some cases although they are not provided for in either the Code of Civil Procedure or the Supreme Court Rules and although the practice is not encouraged by the reported cases. Amendments should be made within the time allowed for filing the original motion. They are not likely to be allowed after the hearing on the motion has begun, and amendments made after the denial of the postjudgment motion are invalid even if made with leave of court. *Catholic Press Co. v. Ball*, 69 Ill.App. 591 (1st Dist. 1897). Federal courts may or may not, in their discretion, consider issues raised in an amended motion for a new trial. *United States v. 205.03 Acres of Land, More or Less, Situate in Warren County, State of Pennsylvania*, 251 F.Supp. 858 (W.D.Pa. 1966). If the amendment raises new issues not raised within the original motion, it generally will not be considered if the amended motion was filed outside the original ten-day period.

Litigants should take care to file a sufficient postjudgment motion that includes all possible grounds for relief in the original motion. Although there is no ban on the amendment of postjudgment motions, allowing an amendment is a matter subject to the discretion of the court, the practice is discouraged, and parties should not rely on the possibility of amendment to cure deficiencies in their motions. *Frank v. Village of Barrington Hills*, 106 Ill.App.3d 747, 436 N.E.2d 276, 62 Ill.Dec. 526 (2d Dist. 1982); *Cline v. Kirchwehm Bros. Cartage Co.*, 42 Ill.App.2d 85, 191 N.E.2d 410 (1st Dist. 1963) (abst.); *Bean v. Volkswagenwerk Aktiengesellschaft of Wolfsburg, Germany*, 109 Ill.App.3d 333, 440 N.E.2d 426, 64 Ill.Dec. 874 (5th Dist. 1982).

E. [12.45] Disposition of Postjudgment Motions

Section 2-1202(f) of the Code of Civil Procedure governs rulings on postjudgment motions and states as follows:

The court must rule upon all relief sought in all post-trial motions. Although the ruling on a portion of the relief sought renders unnecessary a ruling on other relief sought for purposes of further proceedings in the trial court, the court must nevertheless rule conditionally on the other relief sought by determining whether it should be granted if the unconditional rulings are thereafter reversed, set aside or vacated. The conditional rulings become effective in the event the unconditional rulings are reversed, set aside or vacated. 735 ILCS 5/2-1202(f).

In light of this rule, the moving party must be sure to secure rulings on all relief sought within the motion. If conditional rulings are not obtained, the party may be deemed to have waived its requests for alternative relief. *Fulford v. O'Connor*, 3 Ill.2d 490, 121 N.E.2d 767 (1954). See *Ralston v. Plogger*, 132 Ill.App.3d 90, 476 N.E.2d 1378, 87 Ill.Dec. 386 (4th Dist. 1985) (although plaintiff's posttrial motion requested judgment notwithstanding the verdict, failure to obtain ruling could be considered waiver of request).

It should be noted, however, that, if the moving party requests a ruling on its alternative pleas for relief and the trial court *refuses* to make those rulings, the reviewing court may exercise original jurisdiction and rule on the alternative grounds for relief. *Farwell Construction Co. v. Ticktin*, 84 Ill.App.3d 791, 405 N.E.2d 1051, 39 Ill.Dec. 916 (1st Dist. 1980); *Franks v. North Shore Farms, Inc.*, 115 Ill.App.2d 57, 253 N.E.2d 45 (1st Dist. 1969).

A motion for new trial under Fed.R.Civ.P. 50(c) may be joined with a motion for judgment as a matter of law under Fed.R.Civ.P. 50(b). *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189 (1940). Rule 50(c)(1) requires the court to make a conditional ruling on any new trial relief sought on the basis that its decision to order judgment notwithstanding the verdict may be reversed or vacated on appeal. This provision is intended to prevent piecemeal litigation and the delay and waste of judicial resources that would occur if parties were allowed to resuscitate dormant motions for new trial after the appeals court has once considered a judgment. *Arenson v. Southern University Law Center*, 43 F.3d 194 (5th Cir. 1995).

IV. [12.46] STAYS FOLLOWING JUDGMENTS

In both state and federal court proceedings, when a money judgment or other relief is awarded, one has to be concerned about whether the plaintiff is going to attempt to enforce the judgment before or during the appeal. Although a stay of enforcement (*i.e.*, when a bond is posted in money judgment cases) is not required to appeal, if the judgment is enforced before or during the appeal, a favorable ruling on appeal may become moot if the money cannot be collected because the plaintiff is judgment-proof, or when some other relief has been awarded and the result cannot be undone. In state court, an enforcement of judgment can occur after a verdict has been entered and before a posttrial motion has been filed, and after a posttrial motion has been

ruled on and before and during the pendency of the appeal. In federal court, absent a stay, enforcement can take place at any time after ten days following the entry of the verdict. Obtaining a stay of judgment is the last step a party should consider in safeguarding his or her client's interest before the appeal.

A. Posttrial Motions as Stays

1. [12.47] Illinois Law

In Illinois, the parties have 30 days from the date of the final judgment to file any posttrial motions. 735 ILCS 5/2-1202(c) (jury cases), 5/2-1203(a) (nonjury cases). Once a judgment is entered, however, there is nothing preventing the prevailing party from immediately enforcing the judgment. An appellant can obtain a temporary automatic stay from a final judgment by filing a timely posttrial motion directed against the judgment. A posttrial motion will stay enforcement of the judgment, and no bond or order of court is required. 735 ILCS 5/2-1202(d), 5/2-1203(b). *See In re Marriage of Schomburg*, 269 Ill.App.3d 13, 645 N.E.2d 1005, 206 Ill.Dec. 753 (1st Dist. 1995) (reversing trial court's order requiring that party filing motion to reconsider turnover order issued in garnishment action file bond to secure judgment). *See also* Howard A. London, *Stays Pending Appeal*, 3 App.L.Rev., No. 2, 1, 3 (Summer 1990). While the filing of a posttrial motion serves as an automatic stay, the stay lasts, however, only for as long as the motion is pending. If the posttrial motion is denied or an order is rendered disposing of it, the stay resulting from the posttrial motion is simultaneously dissolved.

Even though a party has 30 days after an adverse judgment to file a posttrial motion or notice of appeal, there still are several periods of vulnerability when the winning party may seek to execute on the judgment before any postjudgment relief can be obtained. Under Illinois procedure, there are two critical time periods or "windows" when a party is vulnerable to having an adverse judgment enforced against it. The first of these windows occurs immediately after the judgment is entered and lasts until the party seeking a stay pending appeal files a posttrial motion or notice of appeal and supersedes bond. The second window occurs after an appellant's posttrial motion is denied and remains open until a notice of appeal and a supersedeas bond are filed.

The first "window," in essence, creates a race to the courthouse to see whether the party that wishes to enforce the judgment or the party that wishes to file a posttrial motion is quicker. Under Illinois procedure, there is no stay on the execution of the judgment before the filing of a posttrial motion. Therefore, the winning party can begin enforcement proceedings even before the posttrial motion is filed. The fact that an appellant files a timely posttrial motion later is of no avail to undo the effects of a judgment that already has been enforced before the motion was filed.

For example, in *Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill.App.3d 1033, 365 N.E.2d 1191, 8 Ill.Dec. 805 (3d Dist. 1977), the court found that a judgment creditor may start collection proceedings at any time after judgment and before the filing of a supersedeas bond or posttrial motion. The court held, "It is the filing of the post-trial motion which stays execution; there is no stay unless a post-trial motion is filed in apt time." 365 N.E.2d at 1196.

Similarly, the appellate court in *Cochrane v. Illinois Central Gulf R.R.*, No. 84 L 1152 (5th Dist. 1988) (unpublished), would not vacate the lien the plaintiff had immediately secured against the defendant's bank following entry of judgment in the plaintiff's favor and before the timely filing of the defendant's posttrial motion. In *Cochrane*, the plaintiff commenced an action against the defendant pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* Following a jury trial, the plaintiff was awarded \$495,000.

Shortly thereafter, the trial court entered a memorandum of judgment in favor of the plaintiff. On that same day, the plaintiff immediately issued a garnishment on the defendant's accounts at two banks. Not only did the plaintiff garnish the defendant's accounts before the defendant had filed any posttrial motions, but it was also done before the time the defendant's posttrial motions were even due.

While the defendant's subsequent, yet timely, posttrial motions stayed the enforcement of the judgment, the appellate court could not vacate the lien entered by the plaintiff and, in effect, required the defendant's money to remain escrowed with the banks pending the appeal or, at the very minimum, until an appropriate supersedeas bond could be posted with the subsequent notice of appeal. The trial court held that it did not have jurisdiction to void the lien, and the appellate court held that it did not possess jurisdiction to hear the appeal (since it was an interlocutory appeal) as the postjudgment motion had not been decided.

The second "window" is activated when a posttrial motion is denied or otherwise decided. The stay effected by a posttrial motion is dissolved simultaneously with the disposal of the posttrial motion, at which time a second race to the courthouse commences. This time, rather than filing a posttrial motion, the appellant must file a notice of appeal and appropriate bond before the prevailing party enforces the adverse judgment.

Therefore, while a posttrial motion is pending, a party planning to appeal should be ready to respond quickly depending on the outcome of the motion. Arrangements should be made for obtaining an appeal bond or other security so that when a notice of appeal is filed, a stay of the enforcement of the judgment can be sought promptly if there is any likelihood that the plaintiff may commence enforcement proceedings. See S.Ct. Rule 305. Naturally, if an execution on the judgment occurs during either of these vulnerable periods and the posttrial motion or appeal is ultimately successful, the initial prevailing party must return the money as in the case of a money judgment. This relief may be illusory, however, if the money previously paid has been spent and the party is otherwise insolvent.

2. [12.48] Federal Law

The Federal Rules of Civil Procedure eliminate the "window of vulnerability," discussed in §12.47 above, present under the Illinois statutes when a party is contemplating filing a posttrial motion. Fed.R.Civ.P. 62(a) expressly provides for an automatic stay until the time for filing a posttrial motion has expired. Accordingly, "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry." *Id.*

If a party is dissatisfied with the judgment entered by the district court, it should promptly proceed within the initial ten-day period following entry of judgment, while the automatic stay is in effect, and obtain, inter alia, a stay pursuant to Fed.R.Civ.P. 62(b) arising from a motion for new trial or a motion for judgment. A party may also obtain a stay by perfecting an appeal and giving a supersedeas bond pursuant to Fed.R.Civ.P. 62(d). 12 James William Moore et al., *MOORE'S FEDERAL PRACTICE* §62.03[1] (3d ed. 1997).

When addressing a stay under the Federal Rules of Civil Procedure, a court must assess the following considerations: (a) whether the appellant has made a strong showing that it is likely to succeed on appeal; (b) whether the appellant will be irreparably injured absent a stay; (c) whether issuance of a stay will substantially injure other parties interested in the proceeding; and (d) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 95 L.Ed.2d 724, 107 S.Ct. 2113 (1987); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985).

It is imperative that counsel be prepared to act quickly following the entry of a judgment or denial of a posttrial motion when operating under Illinois law since filing a posttrial motion or notice of appeal within the statutory time period does not prevent the prevailing party from enforcing (or ensure that it already has not enforced) an adverse judgment. The federal rules, however, preempt any “windows of vulnerability” as evidenced under the Illinois statutes because the automatic stay applies during the entire period for filing a posttrial motion. Nevertheless,

logic would dictate that the bond should be posted as soon as practicable in order to protect a party against execution after the ten-day automatic stay has elapsed. The stay becomes effective once the court has approved the bond.

The filing of the bond does not have a retroactive effect. Thus, any enforcement action or execution had on the judgment before the stay becomes effective is not automatically set aside or rendered void even after the stay becomes effective. 12 James William Moore et al., *MOORE'S FEDERAL PRACTICE* §62.03[1], pp. 62-9 through 62-10 (3d ed. 1997).

Accordingly, a party governed by the federal rules also must be certain to secure its rights promptly while under the haven of the automatic stay.

B. [12.49] Importance of Stays When Judgment Is Not for Money

Failing to stay the enforcement of a judgment can have ramifications in nonmoney judgments — such as affecting the vitality of the appeal. Although an appeal bond is not required to file an appeal, the appeal itself might become moot if the judgment has already been enforced. In *Marion Hospital Corp. v. Illinois Health Facilities Planning Board*, 201 Ill.2d 465, 777 N.E.2d 924, 268 Ill.Dec. 1 (2002), the Supreme Court found that the issue of whether the defendant erroneously issued a permit for the construction of a facility challenged by the plaintiff became moot when the disputed project had been commenced and concluded at a cost of over \$6.6 million. The plaintiff had not sought a stay of the circuit court’s ruling allowing the construction to proceed.

Also, in a series of parental termination-adoption cases, the Supreme Court found that the appeal of a parental termination judgment had become moot when the party who was appealing failed to seek a stay of the effect of the termination. In each case, an adoption proceeded, and since the court could not undo the adoption on appeal, the appeal of the termination became moot. *See In re Tekela*, 202 Ill.2d 282, 780 N.E.2d 304, 269 Ill.Dec. 119 (2002); *In re India B.*, 202 Ill.2d 522, 782 N.E.2d 224, 270 Ill.Dec. 30 (2002); *In re J.B.*, 204 Ill.2d 382, 789 N.E.2d 1259, 273 Ill.Dec. 827 (2003). The harshness of such a rule in this setting was ameliorated by the subsequent addition on January 1, 2004, of S.Ct. Rule 305(e) (providing for certain automatic stays when there is an appeal from an order terminating parental rights), but the point is clear — seeking a stay may be critical if the appeal is to have any value.

A stay operates only to prevent an appellee from enforcing a final and appealable judgment during the appeal period. The object of a stay is to suspend the effect of a judgment. It is also well established that the stay only “operates against the enforcement of the judgment and not against the judgment itself.” *Gumberts v. East Oak Street Hotel Co.*, 404 Ill. 386, 88 N.E.2d 883, 885 (1949). Therefore, a stay pursuant to Rule 305 only prevents further proceedings and does “not undo what is already done. It does not, like a reversal, annul the judgment or decree itself.” *Fairfield Savings & Loan Ass’n v. Central National Bank in Chicago*, 19 Ill.App.2d 465, 154 N.E.2d 333, 335 (1st Dist. 1958).

Under the federal rules, the filing of an appeal will not automatically stay the district court’s judgment. In order for an appealing party to obtain a stay properly, it must follow the procedures outlined in Fed.R.Civ.P. 62, as discussed in §12.48 above, and Fed.R.App.P. 8.

1. Failure To File an Appeal Bond

a. [12.50] Illinois Law

The failure to stay the enforcement of a judgment by failing to file an appeal bond or by otherwise failing to seek a stay under S.Ct. Rule 305 does not invalidate an otherwise timely notice of appeal. Standing alone, a timely notice of appeal perfects an appeal. S.Ct. Rule 301 specifically provides that an “appeal is initiated by filing a notice of appeal. No other step is jurisdictional.”

It is well settled in Illinois that “[a]n appeal is perfected when the notice of appeal is filed in the lower court and no other step is jurisdictional. Thus, filing an appeal bond is not a requisite to perfection of an appeal, nor is the failure to so file jurisdictional.” *People ex rel. Anders v. Burlington Northern, Inc.*, 31 Ill.App.3d 1001, 335 N.E.2d 102, 105 (3d Dist. 1975). *See also Schulenburg v. Signatrol, Inc.*, 37 Ill.2d 352, 226 N.E.2d 624, 629 (1967) (construing Rule 301’s predecessor, former §76(2) of Civil Practice Act, Ill.Rev.Stat. (1965), c. 110, ¶76(2)); *Simon v. Balasic*, 316 Ill.App. 442, 45 N.E.2d 98 (1st Dist. 1942) (abst.) (appeal is perfected when notice thereof is filed in trial court in form and within time prescribed).

Failing to file an appeal bond affects only the right to stay the proceedings by supersedeas. Statutes that require a bond as a prerequisite to prosecuting an appeal are unconstitutional. In *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972), the Illinois Supreme Court held that

since the Illinois Constitution provides for appeal as a matter of right, statutes could not be adopted that would serve to discriminate against appellants because of their inability to furnish an appeal bond. This analysis also was reiterated by the appellate court in *Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill.App.3d 1033, 365 N.E.2d 1191, 1196, 8 Ill.Dec. 805 (3d Dist. 1977): “We do not believe that the right to appeal a court order is dependent upon the posting of a supersedeas bond. Even though appellants are unable to post a sufficient supersedeas bond, they may appeal.”

Accordingly, the right to appeal a court order is not dependent on posting a supersedeas bond. An appellant can still appeal even if the appellant is unable to post a sufficient bond.

b. [12.51] Federal Law

Fed.R.Civ.P. 62(d) allows a party to obtain a stay by presenting a supersedeas bond, which may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal. However, the mere filing of an appeal does not operate as a stay.

The federal courts have flexibility in determining the appropriate amount for an appeal bond or whether to accept alternative security. See *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986). The federal courts also have the discretion to waive the bond requirement under appropriate circumstances. See §12.56 below.

2. Stays of Money Judgments

a. Illinois Law

(1) [12.52] In general

S.Ct. Rule 305(a) specifically governs stays of enforcement of money judgments during the pendency of the appeal. The notice of appeal must be filed, and a bond “or other form of security” must be presented, approved, and filed within the time to file the notice of appeal or within any extension of time granted by the court pursuant to Rule 305(c). The bond or other form of security must be in an amount sufficient to cover the amount of the judgment, costs, and “interest reasonably anticipated to accrue during the pendency of the appeal.” *Id.*

Rule 305(a) was amended effective July 1, 2004, to provide that the appellant may, under special circumstances, post less than the full amount of the judgment, costs, and interest. If the court, after weighing all of the relevant circumstances, determines that a bond or other form of security in the full amount required by the rule is not reasonably available, then the court may approve a bond or other form of security “in the maximum amount reasonably available to the judgment debtor.” *Id.* If the court approves a bond in less than the full amount required by the rule, the court “shall impose additional conditions on the judgment debtor to prevent dissipation or diversion of the judgment debtor’s assets during the appeal.” *Id.*

The Committee Comments to the June 15, 2004, amendment to Rule 305(a) state, “In some limited instances . . . the appeal bond requirement may be so onerous that it creates an artificial

barrier to appeal, forcing a party to settle a case or declare bankruptcy.” The Committee Comments cite *Price v. Philip Morris, Inc.*, 341 Ill.App.3d 941, 793 N.E.2d 942, 276 Ill.Dec. 183 (5th Dist. 2003), *vacated*, No. 96644, 2003 Ill. LEXIS 2625 (Sept. 16, 2003), in which a \$10 billion dollar judgment was entered against Philip Morris and Philip Morris argued that it could not post the \$12 billion dollar bond that had been set to stay enforcement of the judgment pending appeal. The trial court reduced the bond, but the appellate court found that under the former Rule 305(a), the trial court had no authority to do so. The Supreme Court, however, disagreed, and in the exercise of its supervisory authority and pursuant to then Rule 305(g) (now Rule 305(h)), directed the appellate court to vacate its judgment and directed the circuit court to reinstate the reduced bond. The revisions to Rule 305(a) followed.

The Supreme Court also amended Rule 305(a) to allow some flexibility in what is needed to secure the stay. While the prior rule referred only to “bonds,” the Committee Comments note, “In recent years, changes in the insurance market have made appeal bonds costly in many cases and unavailable in some cases.” Committee Comments, Rule 305(a) (June 15, 2004). Thus, amended Rule 305(a) permits security in the form of letters of credit, escrow agreements, and certificates of deposit. Rule 305(a) does state that if the form of security is other than an appeal bond, the appellant shall have the burden of demonstrating the adequacy of the security.

Rule 305(c) provides that on motion made within the time for filing the notice of appeal or within any extension thereof granted pursuant to Rule 305(c), the time for the filing and approval of the bond or other form of security may be extended by the circuit court or the reviewing court, but any extensions of time granted by the circuit court may not aggregate more than 45 days unless the parties stipulate otherwise. The 45 days are in addition to the original 30-day period.

(2) [12.53] Stay automatic if S.Ct. Rule 305(a) requirements are met

A stay pursuant to S.Ct. Rule 305(a) is automatic as a matter of right if the requirements of the rule are satisfied. The court has no discretion to deny an otherwise satisfactory stay pursuant to Rule 305(a). There is also no need for entry of a stay order by the court. In *State Bank of St. Charles v. Burr*, 372 Ill. 114, 22 N.E.2d 941 (1939), the plaintiff bank commenced proceedings against the defendants to foreclose trust deeds on real estate, and the defendants filed a counterclaim. A decree of foreclosure was entered against the defendants. The defendants filed petitions to vacate a portion of the decree of foreclosure that offset the judgment on the counterclaim against the balance due on the mortgage indebtedness and to set aside a master’s sale of the mortgaged property and for other relief. The defendants’ petitions for relief were denied, and they appealed.

The Illinois Supreme Court in *Burr* ultimately held that even though the defendants merely filed a notice of appeal,

[t]here is no requirement that an order shall be entered making an appeal a *supersedeas*, where the notice of appeal is served within twenty days after entry of the order appealed from and a bond is filed within thirty days or within such further extended time as the trial court shall allow within such thirty days. The only

requirements under the act are that within due time the appellant “shall give and file a bond in a reasonable amount,” after notice duly served. 22 N.E.2d at 944, quoting Ill.Rev.Stat. (1937), c. 110, ¶259.37.

b. Federal Law

- (1) [12.54] Stay automatic if appealing party posts bond in compliance with Fed.R.Civ.P. 62(d)

Similar to the state court rule, the federal rules provide that a party appealing a money judgment is entitled to a stay as a matter of right upon the posting of a bond in accordance with Fed.R.Civ.P. 62(d).

- (2) [12.55] Federal court flexibility in setting appropriate bond amounts

Even though a bond is usually required in an amount that covers the judgment, costs, interest, and damages for delay, federal courts also have the inherent power to accept a lesser bond or even alternate security. While the federal rules do not expressly address the subject of partial bonds, the federal courts have addressed the issue and have consistently held that under appropriate circumstances, partial bonds are acceptable.

For example, in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986), the Seventh Circuit stayed the enforcement of a \$36 million judgment pending appeal on the condition that a \$10 million cash bond was posted along with \$10 million in accounts receivable and a security interest worth approximately \$70 million.

The circuit court’s analysis determined that Fed.R.Civ.P. 62(d) does not make posting a supersedeas bond mandatory. The court went on to conclude that a steadfast requirement of a bond would not be appropriate in two distinct cases: “where the defendant’s ability to pay the judgment is so plain that the cost of the bond would be a waste of money; and — the opposite case, one of increasing importance in an age of titanic damage judgments — where the requirement would put the defendant’s other creditors in undue jeopardy.” 786 F.2d at 796. *See also Trans World Airlines, Inc. v. Hughes*, 314 F.Supp. 94 (S.D.N.Y. 1970) (\$75 million bond to secure judgment of \$145,448,140), *aff’d in relevant part*, 515 F.2d 173 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1147 (1976); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501 (E.D.Pa. 1973) (\$100,000 bond, stock placed in escrow, and restrictions imposed on financial commitments to secure judgment of \$1.2 million). *Cf. International Telemeter Corp. v. Hamlin International Corp.*, 754 F.2d 1492 (9th Cir. 1985) (appellant can be required to secure judgment in ways other than by supersedeas bond); *United States ex rel. Small Business Administration v. Kurtz*, 528 F.Supp. 1113, 1115 (E.D.Pa. 1981) (full bond not required if it would be “impossible or impractical” provided appellant proposes “plan that [would] provide adequate . . . security for the appellee”).

(3) [12.56] Waiver of bond requirement

Federal courts have consistently allowed an appellant to request that the district court waive the bond requirement for a stay. *See Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986) (bond requirement waived when appellant was solvent public utility whose net worth far exceeded judgment). In order to waive the bond requirement, the district court should consider the following factors: (a) the complexity of the collection process; (b) the amount of time required to obtain a judgment after it is affirmed on appeal; (c) the degree of confidence that the district court has in the availability of funds to pay the judgment; (d) the fact of whether the defendant's ability to pay the judgment "is so plain that the cost of a bond would be a waste of money"; and (e) the fact of whether the defendant's finances are so precarious that requiring a bond would place other creditors of the defendant in an insecure position. *Dillon v. City of Chicago*, 866 F.2d 902, 904 – 905 (7th Cir. 1988), quoting *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986).

Therefore, in addressing the bond issue with the court, an appellant can request complete waiver of the bond requirement or any other reasonable alternative in light of the factors set forth above.

c. [12.57] Courts May Not Refuse To Set Bond

The court may not refuse to set a bond under the provisions of the automatic stay in S.Ct. Rule 305(a). In *People ex rel. Doty v. Dusher*, 24 Ill.2d 309, 181 N.E.2d 166 (1962), the petitioner sought a writ of mandamus from the Illinois Supreme Court directing a circuit court judge to set the amount and conditions of her appeal bond. The Supreme Court held, "Whether the terms and amount of the appeal bond were to be fixed or not fixed was not within the discretion of the judge." 181 N.E.2d at 167.

If a dispute arises regarding a court's refusal to set a bond, a party should petition the Illinois Supreme Court for an order of mandamus directing the circuit or appellate court to set a reasonable amount for the bond. In *Brown v. Scotillo*, 104 Ill.2d 54, 470 N.E.2d 504, 83 Ill.Dec. 378 (1984), the Illinois Supreme Court discussed situations in which the court should issue orders of mandamus. Pursuant to S.Ct. Rule 381, the Illinois Supreme Court may direct an appellate or circuit court to perform certain functions that do not involve the lower court's discretion. In other words, an order of mandamus can be issued when the duty is ministerial and does not encroach on the lower court's exercise of judgment or discretion. Howard A. London, *Stays Pending Appeal*, 3 App.L.Rev., No. 2, 1, 4 (Summer 1990). An order of mandamus would therefore be appropriate when the court refuses to approve an otherwise reasonable appeal bond presented pursuant to Rule 305(a) "since the approval of [a] manifestly reasonable bond is a ministerial act." *Id.*

d. [12.58] Failure To Obtain Stay

If an appellant fails to obtain a stay within the time limits of S.Ct. Rule 305, the provisions of S.Ct. Rule 305(k) apply. Rule 305(k) provides, in pertinent part, as follows:

If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, the reversal or

modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed.

In order to find an appeal moot under Rule 305(k), however, the record must unequivocally disclose that the third-party purchaser was not a party or nominee of a party to the action. *See, e.g., Cosmopolitan National Bank of Chicago v. Nunez*, 265 Ill.App.3d 1012, 639 N.E.2d 636, 203 Ill.Dec. 316 (1st Dist. 1994) (discussing then Rule 305(i)). In *Cosmopolitan*, a bank, as trustee, sued a purchaser of property for possession after the purchaser defaulted on the purchase agreement. Judgment was entered for the bank, and the purchaser appealed. The property was sold by the bank to a third party during the pendency of the appeal. In finding the appeal moot, the *Cosmopolitan* court evaluated various documents filed, including an affidavit by the beneficiary-seller, and rejected the appellant's argument that the third-party purchaser was a nominee of a party of the litigation based on the price paid for the property. *Cf. Pinnacle Corp. v. Village of Lake in the Hills*, 258 Ill.App.3d 205, 630 N.E.2d 502, 196 Ill.Dec. 567 (2d Dist. 1994) (discussing then Rule 305(i) and holding appeal was not moot when record contained no information about purchasers of subdivision lots).

A court will find an appeal moot under Rule 305(k), however, only when the relief sought is tied to the property itself, and no other relief is available. For example, in *Schaumburg State Bank v. Seyffert*, 71 Ill.App.3d 630, 390 N.E.2d 388, 28 Ill.Dec. 221 (1st Dist. 1979), the court discussed the effect of the rule (then Rule 305(i)) in an appeal of a mortgage foreclosure action in which, with no stay pending, the property at issue was sold to nonparties. The plaintiff argued that the appeal was rendered moot because it could not affect the rights of the nonparties. The court rejected this argument and held that a decision adverse to the appellees would require them to make restitution of the benefits of the sale. An appeal will also not be considered moot under Rule 305(k) when a fundamental right may be deprived. *Teachers Insurance & Annuity Association of America v. LaSalle National Bank*, 295 Ill.App.3d 61, 691 N.E.2d 881, 886, 229 Ill.Dec. 408 (2d Dist.), *appeal denied*, 179 Ill.2d 621 (1998), *cert. denied*, 119 S.Ct. 1043 (1999). In *Teachers Insurance & Annuity*, the court refused to treat the defendants' constitutional arguments as moot despite recognizing that the rule (then Rule 305(j)) arguably rendered the arguments moot, holding instead that under the circumstances of the case and in light of the possible deprivation of fundamental rights, it would not dismiss the appeal.

Similarly, in *Paquette v. Coble*, 271 Ill.App.3d 1110, 653 N.E.2d 1262, 208 Ill.Dec. 477 (1st Dist. 1995) (discussing then Rule 305(i)), adjacent landowners appealed a declaratory judgment finding that the plaintiff-property owners could subdivide their lot despite a restrictive covenant to the contrary. The plaintiff-property owners argued that the appellants' appeal had become moot by the sale of the property. The court rejected this argument, however, finding that although the judgment of the appellate court could not affect the new owner's title, the sale of the property would not affect the court's power to form a judgment that a home could not be built on the new subdivided lot or to award damages for breach of the covenant.

However, in *Jones v. Matthis*, 89 Ill.App.3d 929, 412 N.E.2d 649, 45 Ill.Dec. 298 (1st Dist. 1980), the court held that the appeal was moot because, pursuant to then Rule 305(i), the court

could not affect the rights of the nonparty who had bought the property from the defendant. In *Horvath v. Loesch*, 87 Ill.App.3d 615, 410 N.E.2d 154, 43 Ill.Dec. 154 (1st Dist. 1980) (discussing then Rule 305(i)), the court held that even if the trial court acted improperly in authorizing the sale of realty, notwithstanding a lis pendens, the plaintiffs' failure to obtain a stay of the sale order mooted their appeal since the property had been subsequently conveyed to non-litigant third parties.

The appellate court in *Horvath* even went so far as to hold that "even if the trial court abused that discretion [to grant the stay] plaintiffs' remedy was to renew immediately their motion in the appellate court rather than to attack belatedly the trial court's action in this appeal." 410 N.E.2d at 158. In this sense, the provisions of Rule 305(k) will become effective when the time period of Rule 305(c) expires and will remain in effect until the time a stay is perfected under Rule 305(b). *Meeker v. Payne*, 101 Ill.App.3d 723, 428 N.E.2d 614, 57 Ill.Dec. 64 (5th Dist. 1981) (discussing then Rule 305(i)).

3. [12.59] Stays of Nonmoney Judgments

Stays of nonmoney judgments and other appealable orders are governed by S.Ct. Rule 305(b), which provides that stays against these types of judgments are discretionary and may be allowed by the court if "notice and motion, and an opportunity for opposing parties to be heard," are provided. Since these judgments are not money judgments, a bond is not required. The court, however, has discretion to set a bond "with reference to the character of the judgment." S.Ct. Rule 305(g).

Procedurally, an appellant seeking a stay pursuant to Rule 305(b) ordinarily must seek a stay from the trial court before applying to the reviewing court; however, this is not mandatory. *Stacke v. Bates*, 138 Ill.2d 295, 562 N.E.2d 192, 149 Ill.Dec. 728 (1990); S.Ct. Rule 305(d). If the appellant can show that application to the trial court is not practicable or that the trial court has denied an application or not given requested relief, then a motion can be made to the reviewing court.

Stays pursuant to Rule 305(b) allow the court great discretion, particularly in regard to setting the amount for the appeal bond. There are no express provisions in the rule governing the requirements for an appeal bond, and there is no specific set of factors that the court must review when making its determination whether to grant a stay under Rule 305(b). *Stacke, supra*. As a result, Illinois courts have varied significantly in setting "just" conditions for appeal bonds pursuant to Rule 305(b).

For example, in *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972), the Illinois Supreme Court stayed enforcement of the circuit court's judgment, which avoided the plaintiff's possession of real estate. The court's stay was based on the condition that the defendants make all rent payments as they come due. By comparison, in *Hartman v. Hartman*, 2 Ill.App.3d 163, 276 N.E.2d 56 (1st Dist. 1971), the appellate court approved a \$25,000 bond and found that it was not excessive to stay enforcement of an award of real estate valued at only \$21,784.

C. [12.60] Staying a Self-Executing Judgment

A stay pending appeal operates only to prevent a judgment from being enforced. It does not operate against the judgment itself. *People ex rel. Barry v. Gregory*, 324 Ill.App. 614, 59 N.E.2d 106, 109 (1st Dist. 1944). In other words, a stay will operate only on the execution of a judgment without any effect on the validity or nature of the judgment itself. For example, since a stay pending appeal affects only the right to enforce a judgment, the entry of a stay in an appeal from a decree confirming a foreclosure does not stay or suspend the running of the statutory period for redeeming the mortgaged property.

In *Fairfield Savings & Loan Ass'n v. Central National Bank in Chicago*, 19 Ill.App.2d 465, 154 N.E.2d 333 (1st Dist. 1958), the petitioners sought to redeem real estate from a mortgage foreclosure sale. Their petition alleged that the time period that elapsed during the appeal should be excluded from the running of the period of redemption. “The principal question is, did the supersedeas bond and order . . . suspend or stay the running of the statutory period of redemption during the pendency of the appeal from the order approving the master’s sale.” 154 N.E.2d at 335. The court held “that the mere pendency of an appeal does not postpone the commencement date of the statute of limitations.” 154 N.E.2d at 336.

This issue was also addressed in *Mendelson v. Lillard*, 83 Ill.App.3d 1088, 404 N.E.2d 964, 970, 39 Ill.Dec. 373 (1st Dist. 1980), in which the court held that a stay order in a forcible entry and detainer case precluded the plaintiff from executing on that particular judgment, but “it did not prohibit plaintiff from filing an action against [the tenant] based upon nonpayment of rent for a different time period.”

However, there are judgments that do not require any enforcement (*i.e.*, self-executing judgments). For example, a judgment dismissing a complaint is self-executing because it has effect when ordered and remains in effect until reversed. In *A.R. Barnes & Co. v. Chicago Typographical Union No. 16*, 232 Ill. 402, 83 N.E. 932, 934 (1908), the court held that “[a] prohibitory decree which does not require anything to be done is self-executing.” In *Gregory, supra*, the court held that a judgment in a common law certiorari proceeding was self-executing and not stayed by a supersedeas. Previously, according to Illinois case law, a supersedeas was ineffective against a self-executing judgment. 59 N.E.2d at 109. The rationale was that the judgment was considered executed by the time the notice of appeal and motion for supersedeas were filed.

However, S.Ct. Rule 305(b) is now broad enough to encompass the stay of a self-executing judgment. Rule 305(b) specifically provides that a court may stay pending appeal “the enforcement, force and effect of appealable interlocutory orders or any other appealable judicial or administrative order.” Accordingly, the court “is empowered to stay the force and effect of a self-executing judgment.” Committee Comments, Rule 305(i) (Jan. 5, 1981). (Note that former Rule 305(i) is now Rule 305(k).)

D. [12.61] Use of Insurance Policy as Bond

S.Ct. Rule 305(j) specifically provides that the “filing of an insurance policy pursuant to section 392.1 of the Illinois Insurance Code (215 ILCS 5/392.1) shall be considered the filing of a bond for purposes of this rule.” Section 392.1 of the Illinois Insurance Code, 215 ILCS 5/1, *et seq.*, provides as follows:

Whenever an appeal is taken from any judgment in any case wherein it appears to the court that all of the particular liability of the appellant thereunder is insured against in and by a liability insurance policy or surety bond issued by any insurance company authorized to do business in the State of Illinois, and the court is satisfied of the applicable coverage of such policy or bond, it shall not be required of the appellant to provide any appeal bond or bond to stay enforcement pending such appeal.

Courts have a great deal of flexibility in setting “just” amounts for bonds. This discretion carries over to situations in which insurance policies are used as bonds. In *Casey v. Baseden*, No. 83-L-1 (Union Cty.Cir. Jan. 5, 1984) (Oros, J.), the trial court ruled that since an insurance policy of \$100,000 did not cover the total judgment of \$140,000, the insurance policy could not be used at all. The court held that whenever there is an excess judgment, an insurance policy will be insufficient to stay the judgment even if an additional surety bond is provided for the excess amount.

In *Burkart v. Toraason*, 107 Ill.App.3d 92, 437 N.E.2d 388, 390, 62 Ill.Dec. 861 (3d Dist. 1982), the appellate court noted that the “underlying judgment exceeds the contractual obligation the insurer potentially owes. Thus, the policy is an unsatisfactory surety for an appeal bond.”

The issue of interest is another area of concern with using insurance policies as appeal bonds. Most policies provide that the insurance company will pay all interest accruing after the entry of a judgment in a suit it defends. This provision has been interpreted to require an insurance company to pay all postjudgment interest even if the judgment exceeds the policy limits and there may be additional coverage under an umbrella policy issued by another excess liability insurer.

In *Hartford Accident & Indemnity Co. v. Aetna Insurance Co.*, 132 Ill.2d 79, 547 N.E.2d 114, 138 Ill.Dec. 145 (1989), an excess liability insurer sought a declaration as to its liability for postjudgment interest. The action stemmed from a wrongful death case in which a \$1.5 million judgment exceeded the insurance coverage provided by the primary insurer. The excess liability insurer then filed a complaint for declaratory relief and damages seeking a determination that it was not liable for any postjudgment interest that accrued on the portion of the judgment for which the excess liability insurer provided excess coverage. The Supreme Court held that the excess liability insurer was not liable for any postjudgment interest on the portion of the judgment that exceeded the primary insurer’s coverage.

E. [12.62] Effect of Stay Following Amendment to Notice of Appeal

S.Ct. Rule 303(b) governs the form and contents of a notice of appeal. A notice of appeal may be amended without leave of court within 30 days after the entry of a final judgment. It may

also be amended without leave if a posttrial motion against a judgment is filed within 30 days after the entry of the order disposing of the last pending motion. After that, a notice of appeal can be amended only on motion in the reviewing court. Note that an amendment specifying a part of the judgment not specified in the original notice of appeal may not be made later than 30 days after the entry of the judgment.

Amendments to the notice of appeal do relate back to the original time of filing the notice of appeal. However, if a notice of appeal is amended to include part of the judgment not specified in the original notice of appeal, a stay entered based on the original notice of appeal does not extend to the portions of the judgment added by amendment. To obtain a stay of the added part to the amended notice of appeal, the appellant must satisfy the same conditions and follow the same procedures discussed in §§12.52 – 12.59 above as set out in S.Ct. Rules 305(a) and 305(b). See S.Ct. Rule 305(f), which requires an amendment to the stay order if an amendment to the notice of appeal is not covered by the original stay.

V. [12.63] CONCLUSION

Assessing issues for a posttrial motion and appeal, filing a timely posttrial motion, and protecting the client from the judgment being enforced while seeking posttrial or appellate relief are the three critical posttrial activities all lawyers in commercial cases must consider. The entry of the verdict does not end the case. The careful lawyer will ensure that these steps are taken so that a successful resolution of the case by settlement or appeal can be accomplished.