Understanding the "Scheme to Defraud" Exception to Promissory Fraud in Illinois (Copyright ISBA. Reprinted by permission.)

By Roger L. Price and Mark L. Johnson*

When it comes to the tort of promissory fraud – knowingly making a false promise of future conduct upon which another party relies – Illinois takes a minority position prohibiting such claims, with the exception of "schemes to defraud." The exception has generated a confusing body of case law, but the authors propose a way to reconcile the decisions.

Like other states, Illinois recognizes a cause of action for intentional fraud – knowingly making a false statement of material fact upon which another party justifiably relies to its detriment. Unlike most other states, however, Illinois does not provide a remedy for promissory fraud – knowingly making a false promise of future conduct upon which another party relies. 2

Yet, having developed this minority promissory fraud rule, Illinois has also created an exception to it, namely when false promises of future conduct occur as part of a "scheme to defraud." Unfortunately, courts interpreting Illinois law have analyzed purported schemes inconsistently and less than rigorously, making determinations about them unpredictable. This article provides a functional framework for such analysis.

I. Promissory Fraud in Illinois

Illinois' rejection of promissory fraud extends back well over a century.³ While prohibiting such claims is certainly a minority position among the various states,⁴ Illinois' position is at least consistent with the fundamental elements of fraud itself and, further, serves a valuable practical purpose.

Central to sustaining a fraud claim is a misrepresentation of a present or pre-existing fact. When a party makes a promise as to of future conduct, it is a statement of intention or opinion that by its very nature is uncertain and, at the time made, not subject to verification by either party. Whatever else it may be, a promise to perform an act in the future is not a statement of present or preexisting fact and is therefore not an element of conventional fraud.

The practical consequences of allowing claims for promissory fraud are clearly on the minds of the judges presented with these cases. After all, every breach of contract claim is rooted in an allegedly unfulfilled promise. If all a claimant needed to allege to state a promissory fraud claim were that the promisor never intended to perform the broken promise, courts would be inundated with these cases given their potential for treble

damages and attorney fees. And given the stakes involved and the stigma attached to a fraud claim, they would be much more difficult to resolve.

More fundamentally, allowing a breach of contract claim to be so easily transformed into a fraud claim would blur the lines between traditional contract law and tort law, which protect different rights and address different conduct. For example, "[w]hile the law does not condone breach of contract, it does not consider it wrongful or tortious." Fault, in the sense of wrongful intent, "is irrelevant to breach of contract." Whether one intentionally, carelessly, or innocently breaches a contract, the breach exists and the nonbreaching party is entitled to be placed where it would have been absent the breach.

A nonbreaching party is not, however, entitled to punitive damages for the mere breach of contract. Rather, the law recognizes that there are often valid reasons for a party to decide not to perform fully its contractual obligations. A change in economic climate or in the resources of the party may actually place it in a worse position if it completed its contractual obligations as opposed to breaching them and compensating the other party for that breach. So long as a party provides the benefit of the bargain to the nonbreaching party, it is free to change its mind and not perform and still not be punished by the imposition of tort damages.

"Tort law, on the other hand, is primarily concerned with fault." In addition to compensating the injured party, tort law allows the imposition of punitive and other damages "as punishment for wrongful conduct." To allow a broken promise, without more, to sustain a claim for fraud would sanction punishment of a party for breaching its contract in derogation of well-established Illinois law.

II. An Exception to Illinois' Rule Barring Claims for Promissory Fraud

In practice, courts applying Illinois law have struggled with the promissory fraud rule. It is not difficult, after all, to imagine situations where promises of future conduct are made in a context in which, in some sense of rough justice, the promisee ought to receive a remedy that extends beyond traditional contract damages. To accommodate such situations, Illinois courts, not long after prohibiting promissory fraud claims, created an exception to the rule. This exception arises when false promises are part of a "scheme to defraud." 15

A. The Elusive Scheme-to-Defraud Exception

While the theoretical availability of the exception is understandable, determining the existence of an actual scheme has proven quite difficult. As one judge observed, "[t]he distinction between a mere promissory fraud and a scheme of promissory fraud is elusive, and has caused, to say the least, considerable uncertainty, as even the Illinois cases acknowledge."

Surely, no bright line has been drawn to distinguish between mere broken promises and those promises that are part of a scheme to defraud. Indeed, "the precedents appear to

turn upon a case-by-case weighing of the equities, rather than clearly-defined principles." This seemingly subjective approach of the courts compounds the problem, for schemes are "very easy to allege and very difficult to prove or disprove." At the same time, the analysis is not nearly as vague or unpredictable as it is for parties in other types of cases who must await the ruling of a judge guided by little more than a subjective "I know it when I see it" standard. A close analysis of various scheme to defraud cases reveals a basis for a workable approach to these cases.

B. Historical Context of Scheme-to-Defraud Exception

To better understand the current state of the law, a review of the origin of the exception is in order. In 1922, in *Luttrell v Wyatt*, the Illinois Supreme Court first created an exception to the promissory fraud rule. The promisor in *Luttrell*, having signed certain promissory notes, "repeatedly" represented that he would repay the loans if the private lender would release him from liability on the existing notes. The promisor also misrepresented that the lender's family members were attempting to get the money for themselves and put the lender in jail. 1

The court held that by promising to repay the notes and turning the lender against his family, the promisor committed fraud at the outset of negotiations for relief from the notes. His misrepresentations "were aptly fitted to accomplish his fraudulent purposes." *Luttrell* thus stands for the proposition that where a preexisting intent was implemented by repeated false promises upon which the promisee reasonably relied, an action for promissory fraud can be maintained.

When the Illinois Supreme Court decided *Roda v Berko* in 1948, however, the requirement for a complex scheme marked by repeated false promises seemingly disappeared. *Roda* involved an elderly woman who sued to cancel a deed issued in reliance on the purchaser's promise that the deeded land would be used to build a factory, which would improve the value of other property in the area. This was the only promise made by the purchaser, who ultimately turned the deeded land into a junkyard, thereby creating a nuisance and decreasing the value of the surrounding land. ²⁴

While the Illinois Supreme Court acknowledged that a mere broken promise was not enough to sustain a claim for promissory fraud, it nevertheless permitted the elderly woman to recover under the scheme to defraud exception because the false promise was "intentional and deliberate." This approach, of course, simply eviscerated the original rule against promissory fraud. By definition, all fraud is deliberate and intentional, undertaken with the purpose of causing the promisee to rely to its detriment. Here, obviously motivated to punish the scam artist who preyed upon the elderly woman, the court created a broad exception to the promissory fraud rule, one that trivialized the requirement that a promisee must show the existence of a complex plan involving repeated false promises. ²⁶

C. Inconsistent Attempts to Constrain Roda

In the last 50 years since *Roda*, both state and federal courts have attempted to harmonize the promissory fraud rule and the scheme to defraud exception with limited success. In *Metropolitan Bank & Trust v Oliver*, a case involving a bank that claimed a course of fraudulent and deceptive conduct prevented it from recovering a debt, the Illinois Appellate Court both defined and characterized a scheme to defraud as a "carefully constructed plan of deceit." This "carefully constructed plan of deceit" echoes the narrow construction originally contemplated by the Illinois Supreme Court in *Luttrell*, in that it seemingly requires a complex scheme to defraud involving repeated false promises. Beyond that, though, the decision fails to offer much in the way of an objective test that can be applied uniformly.

More recently, in *Desnick v American Broadcasting Cos.*, the seventh circuit declared that an "elaborate artifice of fraud" is "central" to a scheme to defraud. While that description would appear to include both the requirements of a preexisting intent and repeated misrepresentations found in *Luttrell*, it is not very helpful in defining the nature of a scheme to defraud. It does suggest, however, that actionable promissory fraud should involve the use of crafty devices or ruses.

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• <u>A proposed standard for the scheme-to-defraud</u> exception

Even though the holdings in *Metropolitan Bank* and *Desnick* are less than precise in articulating what constitutes a scheme, they both clearly reject the notion that simple broken promises are sufficient to do so. They also support the notion that a successful claim for a scheme to defraud must allege more than "deliberate" fraud. It must also involve some elaborate design, which turns on clever, and preferably mean, tricks.

III. The Scheme-to-Defraud Exception Today – Towards a Workable Approach

Over three-quarters of a century after *Luttrell*, Illinois law remains without a definitive standard of what constitutes an actionable scheme to defraud. A review of more recent cases, however, reveals three key elements that seem to tip the scales towards finding a scheme to defraud as opposed to finding mere broken promises: (1) a preexisting intent to defraud; (2) repeated false promises; and (3) sufficiently egregious or essentially unconscionable conduct. These elements can help to form a workable and objective standard for courts to use as they grapple with the elusive scheme-to-defraud exception.

A. Preexisting Intent to Defraud

Courts now seem to agree that a prerequisite to establishing a scheme to defraud is that the wrongful intent to defraud exist prior to the making of the promise. This requirement precludes or should preclude claims in numerous situations where, for example, economic conditions change or adversary relationships develop in the course of

a transaction, giving rise to new intents not to fulfill past promises. As one court aptly noted, "[a] change of mind can be...a breach of contract, but it is not fraud." ³⁰

In *Doherty v Kahn*, certain financial contributors approached the owner of a landscaping business about forming a new company to provide landscaping services for clients of a property management company that they operated. They allegedly promised the landscaper that in exchange for his existing employees, accounts, and equipment, he would be a 65 percent owner and president of the new company. Sometime after forming the new company, the financial contributors reduced the landscaper's ownership to 25 percent and stripped him of the presidency.

While the alleged promises were made during negotiations and later rescinded or not performed at all, the Illinois Appellate Court determined that there were insufficient facts alleged to demonstrate the existence of a preexisting scheme to defraud. The court found it significant that there were "no facts alleged that, at the time of the alleged representations, there was an intent not to perform them."

Two years later, the federal seventh circuit considered a sports agency that purportedly made fraudulent promises to obtain endorsements for a client to lure the client from his current agents. In *Speakers of Sport, Inc. v ProServ, Inc.*, the court characterized the promises as "aspirational rather than enforceable – an expression of hope rather than a commitment." The sports agency, in short, had no preexisting intent to defraud. Even if its promises were characterized as more than promises to try to obtain endorsements – i.e., guarantees – the court found that the allegedly fraudulent promises alone were not a sufficient basis for finding fraud. 36

In both rulings, the courts reinforced the importance of not only the existence of an intentional misrepresentation at the time of the dealing, but also the presence of a preexisting plan to carry out the fraud. Furthermore, the cases exemplify how courts afford a promisor a benefit of doubt as to whether an allegedly preexisting intent not to perform existed. Such a benefit of doubt is entirely consistent with the "deliberately high" burden of proof that is placed on a party alleging a scheme to defraud.³⁷

While some courts have inquired no further than determining whether such a preexisting intent existed under a scheme analysis, ³⁸ others have continually attempted to develop further requirements to sustain a claim of a scheme to defraud. ³⁹ Nonetheless, the preexisting intent to defraud requirement has been uniformly accepted by Illinois and federal courts, though not explicitly stated in every case. ⁴⁰

As a result, a preexisting intent to defraud should be the starting point for evaluating every alleged scheme. In effect, courts should proceed as if operating under the innocent construction rule found in the law of slander and libel. Under that rule, if an allegedly defamatory statement can be construed in context with its natural and obvious meaning with a reasonably innocent interpretation, then the statement should be so construed. Similarly, with alleged schemes, if the allegedly wrongful intent cannot reasonably be shown to have existed before the promise was made, or if the promisee cannot even

allege such in its complaint, then the requisite wrongful intent should be construed as missing and, consequently, no scheme to defraud should be found.

Implementing such a rule of construction would undoubtedly aid judges in the initial determination of whether an intent to defraud even existed at the outset and provide them with a litmus test for weeding out weak claims. Indeed, as one judge noted,

[i]n order to survive the pleading stage, a claimant must be able to point to specific, objective manifestations of fraudulent intent – a scheme or device. If he cannot, it is in effect presumed that he cannot prove facts at trial entitling him to relief. If the rule were otherwise, anyone with a breach of contract claim could open the door to tort damages by alleging that the promises broken were never intended to be performed. Presumably, it is this result that the Illinois rule seeks to avoid. 42

In short, if it can be shown, or at least alleged in good faith, that the breaching party in fact never intended to fulfill the contractual promises from the very start, then one arguably has the beginnings of what might be a scheme to defraud. Without this preexisting plan, however, all that exists is a garden-variety breach of contract claim. While the breaching party must compensate the other party for the breach, it cannot be punished through the imposition of punitive damages under a fraud analysis. This preexisting intent-to-defraud requirement, therefore, provides an objective and bright-line test for courts analyzing alleged schemes to defraud.

B. Repeated False Promises

If a court finds that an intent to defraud, i.e., an intent not to perform as promised, existed at the outset, the court must next determine if there were repeated false promises and other misrepresentations that materially misled the plaintiff.⁴³

For instance, in *HPI Health Care Servs., Inc. v Mt. Vernon Hospital*, the Illinois Supreme Court held that HPI, a provider of pharmaceutical goods and services, properly stated a cause of action against two defendants, National Medical and Centerre, because those two defendants made "repeated and numerous knowingly false promises and representations" of future payments in order to induce HPI to continue to provide its goods and services. ⁴⁴ The court seized on the fact that there were 11 separate and elaborate false promises alleged in the complaint.

Significantly, the court found no scheme to defraud as it related to a third defendant. The court noted that even though this defendant also requested goods and services without any ability to pay for them, he made the request only once and before the alleged scheme of the other defendants began. In other words, it was precisely the lack of repeated and numerous false promises that saved the third defendant from the scheme to defraud exception.

Some courts have characterized the required repeated promises as a "pattern," an often discussed element of wrongful conduct under federal racketeering law ("RICO"). Of course, federal courts have had considerable difficulty defining a pattern for purposes of RICO. And, as difficult as it may be to define a "scheme," looking for a "pattern" does not appear to make the exercise any easier.

Labels aside, a critical element of a scheme to defraud is the repeated making of false promises and representations. ⁴⁹ As the seventh circuit has said, "[b]y requiring that the plaintiff show a pattern [of false promises], by thus not letting him rest on proving a single promise, the law reduces the likelihood of a spurious suit; for a series of unfulfilled promises is better (though of course not conclusive) evidence of fraud than a single unfulfilled promise."⁵⁰

At the same time, while repeated false promises are essential to a finding of a scheme to defraud, they alone cannot constitute the scheme. In other words, one cannot merely add up the number of false promises, reach some magical, and arbitrary, number, and establish a scheme. Recall that false promises, by themselves, are not actionable fraud. They only become actionable if they are part of a larger scheme to defraud.

Thus, there must be something more to the scheme than the mere making of the false promises. That something is a matrix or framework of a larger scheme, into which the false promises are placed. Only then are they actionable. Absent this matrix of a larger scheme, however, false promises remain nothing more than just that – and the promissory fraud rule bars them from forming a basis of recovery.

C. Particularly Egregious Conduct

In many circumstances, though, even the existence of a preexisting plan coupled with repeated false promises is still not sufficient to sustain the scheme claim. In *Desnick*, discussed above, the operator of a medical facility was enticed to participate in a television show segment that allegedly promised to provide a "fair and balanced" look at large cataract practices. The show's producer also supposedly promised that the segment would not involve ambush interviews or undercover surveillance. Despite the producer's alleged promises, persons with concealed cameras were dispatched to Desnick Eye Centers in several midwest states and an investigative reporter with cameras rolling accosted Dr. Desnick at O'Hare International Airport for an ambush interview.

In evaluating Desnick's claim, the seventh circuit found that "particularly egregious" conduct was necessary for an actionable promissory fraud claim. Having set that standard, though, determining how to define it and what exactly constituted particularly egregious conduct was more difficult for the court. While noting that repeated deceptions may (or may not) be per se egregious, the requirement that the alleged misrepresentations be particularly egregious also seemed to stand for the proposition that the scheme to defraud exception should only protect those who cannot, due to an imbalance of power, fend for themselves. 66

While this last hurdle will be open to interpretation, it is consistent with the distinction between contract and fraud law, and further limits the situations in which a scheme may be found to a very narrow set of circumstances. According to the seventh circuit, Dr. Desnick, a successful professional and entrepreneur, should have reasonably foreseen the trouble coming from known ruthless investigative journalists and taken appropriate steps to protect himself. The court noted that "[n]o legal remedies to protect him from what happened are required, or by Illinois provided." 58

In this light, *HPI* appears to be an aberrant decision. Although HPI, as a provider of goods and services, may "not have [possessed] the same ability to discover the truth as the person making the representations," it clearly should have been aware of the risk of continually providing such goods and services on credit when the company receiving the goods was not paying. As in *Desnick*, no legal remedies to protect HPI from this situation, besides traditional breach of contract damages, were required or should have been provided under Illinois law.

While *Desnick* suggests how difficult it is to establish egregious conduct sufficient to sustain a scheme in a purely commercial context, it is not impossible to do so. Four years after *Desnick*, a federal court refused to dismiss a complaint which alleged that Northern Telecom ("Nortel") promised Bensdorf & Johnson ("B&J") an exclusive distributorship in return for its use of substantial industry connections that Nortel, without such contacts, needed. Nortel allegedly utilized B&J's experience and connections and then left B&J with nothing, contrary to its promises. Taking the allegations as true, they went far beyond mere promises to pay or perform. They amounted to abusive and unconscionable behavior.

IV. Conclusion

Illinois' rule barring claims for promissory fraud is not only well established, it is also reasonable and worth preserving. So, too, is the exception where a scheme to defraud exists, but that exception should only be allowed in truly exceptional circumstances.

To bring some order out of the ambiguity that exists today, courts should require that a scheme allegation will survive only if plaintiff can allege sufficient facts to show: (1) a preexisting intent to defraud, (2) repeated false promises apart from but in furtherance of the scheme, and (3) particularly egregious conduct, unconscionable or onerous under the circumstances. Only by requiring that all of these standards be satisfied to sustain a scheme to defraud claim will courts be able to uphold the integrity of the general prohibition of promissory fraud claims.

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- 1. *Roda v Berko*, 401 Ill 335, 339, 81 NE2d 912, 914 (1948); *Doherty v Kahn*, 289 Ill App 3d 544, 562, 682 NE2d 163, 176 (1st D 1997).
- 2. Houben v Telular Corp., 231 F3d 1066, 1074 (7th Cir 2000); Doherty, 682 NE2d at 176.
- 3. *Gage v Lewis*, 68 Ill 604, 615 (1873).
- 4. Hollymatic Corp v Holly Systems, Inc, 620 F Supp 1366, 1369 (ND III 1985).
- 5. Roda, 81 NE2d at 915.
- 6. Id. Moreover, even if a party makes such a misrepresentation to induce the formation of a contract, usual contract damages will, normally, make the promisee whole and remedy the victim when the promise is broken.
- 7. Desnick v Am Broadcasting Cos, Inc, 44 F3d 1345, 1354 (7th Cir 1995).
- 8. *Wait v First Midwest Bank/Danville*, 142 III App 3d 703, 709-10, 491 NE2d 795, 802 (4th D 1986).
- 9. Id.
- 10. *Koehler v First Natl Bank of Louisville*, 232 Ill App 3d 679, 683, 597 NE2d 1261,1264 (5th D 1992).
- 11. Id.
- 12. Wait, 491 NE2d at 802.
- 13. Id.
- 14. Luttrell v Wyatt, 305 Ill 274, 280, 137 NE 95, 97 (1922).
- 15. Roda, 81 NE2d at 915.
- 16. *Desnick*, 44 F3d at 1354; see, e.g., *Stamatakis Indus, Inc v King*, 165 Ill App 3d 879, 882-83, 520 NE2d 770, 772-73 (1st D 1987); *Vance Pearson, Inc. v Alexander*, 86 Ill App 3d 1105, 1112, 408 NE2d 782, 787 (4th D 1980).
- 17. *Hollymatic*, 620 F Supp at 1369.
- 18. Id.
- 19. Jacobellis v Ohio, 378 US 184, 197 (1964).

- 20. Luttrell, 137 NE at 97.
- 21. Id, 137 NE at 96, 98.
- 22. Id, 137 NE at 98.
- 23. Roda, 81 NE2d at 914.
- 24. Id.
- 25. Id, 81 NE2d at 915-16.
- 26. Luttrell, 137 NE at 97.
- 27. 4 Ill App 3d 975, 978, 283 NE2d 62, 64 (1st D 1972).
- 28. 44 F3d at 1355.
- 29. *HPI Health Care Servs v Mt. Vernon Hosp, Inc*, , 131 III 2d 145, 169, 545 NE2d 672, 683 (1989); *Mitchell v Norman James Constr Co.*, 291 III App 3d 927, 940, 684 NE2d 872, 883 (1st D 1997); *Doherty*, 682 NE2d at 176; *Bower v Jones*, 978 F2d 1004, 1012 (7th Cir 1992).
- 30. Price v Highland Community Bank, 722 F Supp 454, 459-60 (ND III 1989).
- 31. Doherty, 682 NE2d at 166-67.
- 32. Id, 682 NE2d at 167.
- 33. Id, 682 NE2d at 176.
- 34. Id.
- 35. 178 F3d 862, 866 (7th Cir 1999).
- 36. Id, 178 F3d at 867.
- 37. *Bower*, 978 F2d at 1012. At least one court has also suggested that the fraud scheme be economically reasonable, i.e., logically calculated to effect its alleged end. See *Credit Ins Consultants, Inc v Gerling Global Reinsurance Corp.*, 2002 WL 205991, *3 (ND III).
- 38. *Doherty*, 682 NE2d at 176.
- 39. *Desnick*, 44 F3d at 1354.

- 40. *HPI*, 545 NE2d at 683; *Mitchell*, 684 NE2d at 883; *Doherty*, 682 NE2d at 176; see also *AAR International, Inc v Vacances Heliades*, 202 F Supp 2d 788, 799 (ND III 2002) (allegation that breach followed soon after promise gave rise to inference of fraudulent intent sufficient to defeat motion to dismiss).
- 41. *Babb v Minder*, 806 F2d 749, 757 (7th Cir 1986); *Chapski v Copley Press*, 92 Ill 2d 344, 352, 442 NE2d 195, 199 (1982).
- 42. *Hollymatic*, 620 F Supp at 1369. *Bank of Lincolnwood v Comdisco*, *Inc.*, 111 III App 3d 822, 829, 444 NE2d 657, 662 (1st D 1982). ("To sustain unsupported allegations of a plan or scheme as sufficient . . . would only invite this type of pleading every time multiple parties, who are jointly obligated under a contract, elect not to perform.")
- 43. *Mitchell*, 684 NE2d at 883; *Desnick*, 44 F3d at 1354 ("[P]romissory fraud is actionable only if ... it is embedded in a larger pattern of deceptions or enticements that reasonably induces reliance and against which the law ought to provide a remedy.").
- 44. HPI, 545 NE2d at 683.
- 45. Id.
- 46. Id.
- 47. 18 USC § 1961(5) (2000).
- 48. *Speakers*, 178 F3d at 866.
- 49. HPI, 545 NE2d at 683; AAR, 202 F Supp 2d at 799.
- 50. Speakers, 178 F3d at 866.
- 51. Board of Trustees of Illinois Municipal Retirement Fund v First Natl Bank of Chicago, 263 Ill App 3d 108,115, 636 NE2d 840, 845 (1st D 1994) (plaintiff "did not show that any promises were part of a 'scheme employed to accomplish the fraud'").
- 52. *Desnick*, 44 F3d at 1347-48.
- 53. Id, 44 F3d at 1348.
- 54. Id, 44 F3d at 1348-49.
- 55. Id, 44 F3d at 1354.
- 56. Id.

- 57. Id; see also *Properties Unlimited, Inc Realtors v Cendant Mobility Services*, 2002 WL 1147460, * 2 (ND III).
- 58. *Desnick*, 44 F3d at 1354.
- 59. *HPI*, 545 NE2d at 683 (quoting *Gerill Corp v Jack L Hargrove Builders, Inc*, 128 III 2d 179, 195, 538 NE2d 530, 537 (1989)).
- 60. See Bensdorf & Johnson, Inc v Northern Telecom Ltd, 58 F Supp 2d 874, 876 (ND III 1999).

A proposed standard for the scheme-to-defraud exception

Illinois' rule barring claims for promissory fraud makes sense, as does the scheme-to-defraud exception, if limited to cases of

- a preexisting intent to defraud,
- repeated false promises apart from but in furtherance of the scheme, and
- egregious conduct, unconscionable or onerous under the circumstances.

ABOUT THE AUTHORS

Roger L. Price < reprice@dancona.com > is a member of D'Ancona & Pflaum, LLC, where his practice includes construction law, intellectual property, and civil litigation. A former law clerk to the late Abraham Lincoln Marovitz of the U.S. District Court (ND III), he earned a B.A. from the University of Michigan and a J.D. from the University of Chicago Law School, where he was an editor of the law review.

Mark L. Johnson < mjohnson@dancona.com > is a member of D'Ancona & Pflaum, LLC, where his practice includes construction law, intellectual property, and civil litigation. He earned a B.A. and a J.D. from the University of Illinois, where he was a member of the law review.