DePaul Law Review

Volume 27
Issue 2 *Winter 1978*

Article 11

The Absolute Right to Refile: A Plain Meaning Interpretation of Section 24a of the Illinois Limitations Act - Francese v. Trinko

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THE ABSOLUTE RIGHT TO REFILE: A PLAIN MEANING INTERPRETATION OF SECTION 24a OF THE ILLINOIS LIMITATIONS ACT—*FRANZESE V. TRINKO*

Section 24a of the Illinois Limitations Act[1] provides a plaintiff with an opportunity to refile a complaint after dismissal, even if the original limitations period has expired. This right to refile is available to the plaintiff in four instances: (1) after a dismissal for want of prosecution (DWP); (2) after a voluntary dismissal; (3) when the plaintiff's judgment has been reversed on appeal; and (4) when, upon matter alleged in arrest of judgment, judgment is entered against the plaintiff.[2] Relief under this section is conditioned upon the plaintiff refiling within one year of the date of dismissal or within the time remaining in the statute of limitations, whichever is greater.[3]

This section traditionally has been read by the courts to enable only diligent plaintiffs to refile. Recently, however, section 24a was interpreted by the Illinois Supreme Court in *Franzese v. Trinko*[4] to allow all cases dismissed for want of prosecution to be refiled under the section, regardless of the plaintiff's diligence in prosecution of the suit.

In *Franzese*, the plaintiff filed suit for personal injuries sustained in an automobile accident. At a special call of the docket, one and one-half years after the plaintiff's initial filing, the suit was dismissed for

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1. Section 24a provides:

> In the actions specified in this Act or any other act or contract where the time for commencing an action is limited, if judgment is given for the plaintiff but reversed on appeal; or if there is a verdict for the plaintiff and, upon matter alleged in arrest of judgment, the judgment is given against the plaintiff; or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution then, whether or not the time limitation for bringing such action expires during the pendency of such suit, the plaintiff, his heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or given against the plaintiff, or after the action is voluntarily dismissed by the plaintiff or the action is dismissed for want of prosecution.

ILL. REV. STAT. ch. 83, § 24a (Supp. 1976).

2. Of the four categories in section 24a, two rarely are utilized by plaintiffs. The first is the situation in which "judgment is given for the plaintiff but reversed on appeal." The second category is the situation when a verdict is given for the plaintiff, "and, upon matter alleged in arrest of judgment, the judgment is given against the plaintiff." For an analysis of the case law background to these categories, *see* Comment, *The Illinois Savings Statute: An Analysis of Section 24a of Chapter 83*, 9 J. MAR. J. PRAC. & PROC. 465, 465 n.2 (1976).

3. *See* note 1 *supra*.

4. 66 Ill.2d 136, 361 N.E.2d 585 (1977).

want of prosecution.[5] The plaintiff refiled under the DWP provision of section 24a. The defendant opposed the refiling, alleging extreme lack of diligence on the part of the plaintiff in prosecution of his suit and citing the judicially-created diligence requirement of section 24a.[6] The trial court ruled against the plaintiff and the appellate court affirmed,[7] citing not only the failure to comply with a local

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5. The appellate court noted that "the case appeared on the docket pursuant to a local court rule." Franzese v. Trinko, 38 Ill. App.3d 152, 153, 347 N.E.2d 844, 846 (2d Dist. 1976). The specific rule was mentioned by the appellate court in a footnote:

> The 19th Judicial Circuit Rule 4.2 "Automatic Call of Dockets" which provides generally that cases shall be set for trial within nine months after filing and in the event this is not done the clerk shall notify the parties that the case will be called on a day certain "on which day it will be dismissed on motion of the court, except for good cause shown. Failure to appear shall constitute acknowledgement of the dismissal." The instruction sheet accompanying the special progress call specifically provided that if no action were taken on or before November 21, 1973, the cases would be dismissed on motion of the court.

Id. at 153-54 n.1, 347 N.E.2d at 846 n.1.

6. The exception to section 24a's right to refile dates back to Lamson v. Hutchings, 118 F. 321 (7th Cir. 1902), in which the court noted that paragraph 25 of the act of July 1, 1873 (2 Starr. & C. Ann. St. p. 2642, c. 83, par. 25) (the forerunner to section 24a) was designed to aid the "*diligent* but mistaken claimant." *Id.* at 323 (emphasis added). Subsequent cases have reaffirmed the exception over the years. *See, e.g.*, Sandman v. Marshall Field & Co., 27 Ill. App.3d 427, 430, 326 N.E.2d 514, 516 (1st Dist. 1975) ("whether in a given instance . . . section 24a authorizes refiling of a suit depends on the history of the litigation and whether that history is compatible with the object and spirit of section 24a"); Brown v. Burdick, 16 Ill. App.3d 1071, 1074, 307 N.E.2d 409, 411 (2d Dist. 1974) (a plaintiff whose lack of diligence amounted to a "virtual abandonment of his cause of action" cannot avail himself of the provisions of section 24a); Quirino v. Chicago Tribune-New York News Syn., Inc., 10 Ill. App.3d 148, 150, 294 N.E.2d 29, 31 (1st Dist. 1973) ("Section 24a was not intended as a refuge for the negligent but only as an aid for the diligent."); Ray v. Bokorney, 133 Ill. App.2d 141, 145, 272 N.E.2d 836, 840 (1st Dist. 1971) ("The trial court and a court of review are not precluded from viewing the history of the litigation to determine if section 24a has been abused and relied upon contrary to its object, spirit and meaning.").

A liberal construction of section 24a can be traced back to its statutory origin, the English Limitations Act of 1623. The relevant portion of the act reads:

> If in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment reversed, or such given against the plaintiff, or outlawry reversed and not after.

21 Jac. 1, c. 16, § 4 (1623). The act was extended to cases not strictly within its letter by the English case of Swindell v. Bulkeley, 18 Q.B.D. 250 (1886). Thus a judicially innovative construction of section 24a is grounded in the distant past.

7. 38 Ill. App.3d 152, 347 N.E.2d 844 (2d Dist. 1976).

court rule, but also the serious lack of diligence evidenced in the record.[8]

The Illinois Supreme Court, in reversing the lower courts, held that no exception may be read into section 24a. The court used a canon of construction that required statutes to be interpreted according to their plain and ordinary meaning.[9] In specifically overruling the judicially-created exception to section 24a which once made the statute unavailable to plaintiffs lacking in diligence, *Franzese* created an absolute right to refile a case that has been dismissed for want of prosecution.[10]

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8. The seriousness of plaintiff's lack of diligence can best be illustrated by quoting the appellate court's examination of the record:

> In this case the court could thus properly conclude on the whole record of the litigation that the plaintiff was not within the objective and spirit of Section 24 of the Limitations Act and could not, therefore, claim a right to refile under its terms. He filed his first complaint only thirteen days prior to the expiration of the two year statute of limitations provided for personal injury actions. He did not respond to a discovery order until a second order was entered on June 11, 1973, approximately one year after the first order. He then did nothing until the day prior to the court call on November 21, 1973. Even accepting his own explanation which was contradicted by defendant's counsel, plaintiff's counsel did not offer any reasonable justification for either not appearing at the automatic call of the docket in accordance with local rules or for not having another attorney appear on his behalf. In fact, the common law record shows the general appearance of local counsel. No explanation for the non-appearance of co-counsel at the call of the docket has been offered. There is no record that plaintiff, at any time, sought to vacate the original order of dismissal or to appeal from it. After the cause was dismissed plaintiff did not refile his case until eleven months and one week later, approximately three weeks prior to the expiration of the limitations period provided for refiling under section 24. And he offered no reasonable excuse for either the delay in prosecuting his initial action or for the delay in refiling. Under these circumstances we will not interfere with the court's ruling.

38 Ill. App.3d at 155, 347 N.E.2d at 847.

9. *See* note 13 *infra*.

10. The automatic right to refile applies to any case that has been dismissed for want of prosecution. *See, e.g.*, Aranda v. Hobart Mfg. Corp., 66 Ill.2d 616, 621, 363 N.E.2d 796, 798 (1977) (Dooley, J., specially concurring). Often a DWP is entered at a special call of the docket. *See* 66 Ill.2d at 619, 363 N.E.2d at 798. Though the vehicle for such a dismissal may be a local court rule, the real basis is the inherent power to dismiss for lack of diligence. Illinois case law emphasizes that this inherent power exists without limitation by any statute or rule. Epley v. Epley, 328 Ill. 582, 160 N.E. 113 (1928); Sanitary Dist. of Chicago v. Chapin, 226 Ill. 499, 80 N.E. 1017 (1907); Hogan v. Braudon, 40 Ill. App.3d 352, 352 N.E.2d 303 (2d Dist. 1976); Crawford v. Crawford, 39 Ill. App.3d 457, 350 N.E.2d 103 (1st Dist. 1976); Ryan v. Dixon, 28 Ill. App.3d 463, 328 N.E.2d 672 (2d Dist. 1975).

Defendants may attempt to limit *Franzese* to its facts by contending that the absolute right to refile applies only to a DWP entered pursuant to 19th Judicial Circuit Rule 4.2. This position is untenable, however, for the language of the decision is far-reaching. Nowhere in its opinion does the supreme court even mention the local court rule. The only reference to the type of DWP in *Franzese* was the quotation of the circuit court order referring generally to the special call of the docket. 66 Ill.2d at 137, 361 N.E.2d at 586.

The purpose of this Note is to show: (1) the weakness of *Franzese*'s justification for the plain meaning approach; (2) the adverse consequences for defendants; (3) the limited alternatives available to defendants to prevent such consequences; and (4) the logic of restoring a remedial interpretation to section 24a.

THE COURT'S JUSTIFICATION FOR THE PLAIN MEANING RULE

The supreme court placed exclusive reliance on a single canon of construction, the plain meaning rule, as justification for its decision. However, in the absence of a policy analysis of the particular statute in question, a canon of construction is of little value because such canons are susceptible to manipulation. In fact, commentators have noted a pattern in case law in which justifications and criticisms of the plain meaning rule can be symmetrically counterpointed.[11]

Illinois case law discussing the plain meaning rule can be categorized into pairs of opposing theories. The court's selection of a particular theory appears to be more a matter of convenience than a recognition of one theory as superior to its opposite.[12] The equiva-

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The supreme court's lengthy discussion and overruling of Tidwell v. Smith, 57 Ill. App.2d 271, 205 N.E.2d 484 (1965), is further evidence that *Franzese* applies to all types of dismissals for want of prosecution. In examining the case law basis for the exception to section 24a, the supreme court found *Tidwell* to be the origin of all appellate court cases supporting the diligence requirement. 66 Ill.2d at 138, 361 N.E.2d at 586. *Tidwell* involved a general DWP independent of any court rule or statute. The supreme court's entire discussion of *Tidwell* would have been irrelevant if the supreme court meant to limit its decision to DWPs entered pursuant to the circuit court rule. The court framed its analysis around the entire DWP provision of section 24a, not just one type of DWP. The court referred generally to the "language of section 24 concerning a dismissal for want of prosecution," and made no mention of any limitation upon its holding. *Id.* at 139-40, 361 N.E.2d at 587.

11. Llewellyn first used this technique in analyzing New York appellate court decisions. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

12. Nichols, *Some Aspects of Statutory Interpretation*, Ill. Ann. Stat. ch. 127½-132, Introduction XXIII-XV (Smith-Hurd 1953). The following pairs of opposing canons were constructed from an examination of Illinois case law on statutory interpretation:

(1) The wording of a statute is mandatory. City of Darien v. Dublinski, 16 Ill. App.3d 140, 145, 304 N.E.2d 769, 773 (2d Dist. 1973). The wording of a statute is directory only. *Id.* The fact that both theories appeared in the same case demonstrates the relative ease with which courts choose a canon which they find convenient.

(2) Courts must give effect to plain meaning regardless of consequences. Beckmire v. Ristokrat Clay Products Co., 36 Ill. App.3d 411, 415, 343 N.E.2d 530, 534 (1st Dist. 1976). Courts should avoid absurd, mischievous, or unjust consequences. Board of Educ. of Williamsville Community Unit School Dist. No. 15 v. Brittin, 11 Ill.2d 411, 414, 143 N.E.2d 555, 557 (1957); Herrington v. County of Peoria, 11 Ill. App.3d 7, 10, 295 N.E.2d 729, 731 (3d Dist. 1973).

(3) Courts are not to read into a statute; the plain language controls. Belfield v. Coop, 8 Ill.2d 293, 307, 134 N.E.2d 249, 256 (1956); Hagen v. City of Rock Island, 18 Ill.2d 174, 179, 163 N.E.2d 495, 498 (1959). The object, spirit and intent of a statute control over the letter when a conflict arises. Inskip v. Board of Trustees of the Univ. of Ill., 26 Ill.2d 501, 510, 187

lency of such opposing theories is not openly acknowledged by the courts. This is because the accepted forms of legal argumentation involve a skill in being able to argue forcefully either side of any issue as if only one correct position could exist.[13] Even the cases cited by the Illinois Supreme Court in support of the plain meaning rule are internally inconsistent in applying that rule.[14]

Underlying the plain meaning canon is a static approach to separation of powers. According to *Franzese*, the purpose behind the plain meaning approach is to articulate and apply the intent of the legislature. Since the legislative body as rulemaker presents its final decision to the public in the form of laws, the legislative intent is allegedly contained only in the plain and ordinary meaning of a statute, and to ignore that plain meaning is supposedly to exceed the constitutional power granted to the judiciary.[15] Thus the separation of pow-

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N.E.2d 201, 206 (1962); Tidwell v. Smith, 57 Ill. App.2d 271, 274-75, 205 N.E.2d 484, 486 (2d Dist. 1965).

(4) Legislative intention is to be ascertained from the plain meaning of a statute. General Motors Corporation, Fisher Body Division v. Industrial Comm'n, 62 Ill.2d 106, 112, 338 N.E.2d 561, 564 (1975); Western Nat'l Bank v. Village of Kildeer, 19 Ill.2d 342, 350, 167 N.E.2d 169, 173 (1961). In determining legislative intention, the courts may consider not only language, but the evil to be remedied and the object to be attained. People v. Bratcher, 63 Ill.2d 534, 543, 349 N.E.2d 31, 35 (1976); People v. Dednam, 55 Ill.2d 565, 568, 304 N.E.2d 627, 629 (1973).

13. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

14. In Western Nat'l Bank of Cicero v. Village of Kildeer, 19 Ill.2d 342, 167 N.E.2d 169 (1973), the court declared that it must follow the plain language of the statute in question; later in the opinion, however, the court makes the distinction between "mandatory" and "directory" in identifying certain express statutory provisions as requiring strict compliance or condoning noncompliance. *Id.* at 348-49, 167 N.E.2d at 173. In Droste v. Kerner, 34 Ill.2d 495, 217 N.E.2d 73 (1966), the court embraces the plain meaning rule but then allows an exception to the statute's plain meaning when legislative intent is to the contrary. *Id.* at 504, 217 N.E.2d at 79.

15. The Illinois Supreme Court's rationale for eliminating the diligence requirement of section 24a is based on the separation of powers between the judicial and legislative branches:

> The language of a statute must be given its plain and ordinary meaning. "It is a primary rule in the interpretation and construction of statutes that the intention of the legislature should be ascertained and given effect. [Citations omitted.] This is to be done primarily from a consideration of the legislative language itself, which affords the best means of its exposition, and if the legislative intent can be ascertained therefrom it must prevail and will be given effect without resorting to other aids for construction. [Citations omitted.] There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statue imports." Western Nat'l Bank of Cicero v. Village of Kildeer, 19 Ill.2d 342, 350, 167 N.E.2d 169, 173 [1961].
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> The language of section 24 concerning a dismissal for want of prosecution is clear and unambiguous. "Courts have no legislative powers, and their sole function is to determine and, within the constitutional limits of the legislative power, give effect to the intention of the lawmaking body. We will not and cannot inject provisions not found in a statute, however desirable or beneficial they may be." (Droste v.

ers rationale views the reading of qualifications into a statute as a judicial usurpation of legislative authority.

Despite the logic of such an approach to statutory interpretation, this separation of powers rationale is not supported by precedent. The courts of Illinois have long recognized that the judiciary has the constitutional power to disregard the literal meaning of a statute.[16] Moreover, the separation of powers rationale for the plain meaning rule has been specifically rejected by the courts. Several landmark Illinois Supreme Court decisions emphasize that it is proper for a judge to exercise legislative powers as well as judicial powers to remedy gaps or defects in the law.[17] The separation of powers doctrine is to be understood in a limited and qualified sense; in reality, a "blending . . . and admixture of different powers" in the operation of the judicial branch is proper so long as "the whole power shall not be lodged in the same hands."[18] When a court fashions a remedy that is inconsistent with a statute's plain meaning, it is thus exercising the "admixture of powers" that is essential for effective judicial decision-making. This is by no means an unconstitutional disregard of legislative intent.

ADVERSE CONSEQUENCES FOR DEFENDANTS

Recognition of the diligence exception is justified when one considers the sort of delays occasioned by plaintiffs. For example, the trial court in *Franzese* found that the plaintiff was guilty of "extreme and self-initiated delay" in prosecution of his suit because he continually waited until the last permissible moment to pursue his case and did not respond to several court orders.[19]

> Kerner, 34 Ill.2d 495, 504, 217 N.E.2d 73, 79 [1961].) We find no basis for engrafting upon section 24 an intent on the part of the General Assembly to exclude from its ambit all but the "diligent suitor."

66 Ill.2d at 139-40, 361 N.E.2d at 587.

16. The following cases demonstrate the use of judicial innovation to fashion a remedy not included in the literal meaning of a statute in order to meet the ends of justice: Spring v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972) (court implied a warranty of habitability in literal violation of the Forcible Entry and Detainer Statute even though the statute contained no wording which specifically allowed a defendant to sustain the defense of breach of warranty of habitability); Bradley v. Fox, 7 Ill.2d 106, 129 N.E.2d 699 (1955) (court fashioned remedy to avoid dictates of and thereby qualify survivorship statute when husband murders wife); Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1947) (court granted relief to allow husband to sue wife's lover for loss of her society and assistance even though this relief was in literal violation of Heart Balm Act).

17. *Id.*

18. Field v. McClernand, 3 Ill. (2 Scam.) 79, 83, 84 (1839). *See also* City of Waukegan v. Pollution Control Bd., 57 Ill.2d 170, 311 N.E.2d 146 (1974); People v. Reiner, 6 Ill.2d 337, 129 N.E.2d 159 (1955).

19. *See* note 9 *supra*.

Other cases reveal similar problems. In *Brown v. Burdick*,[20] the plaintiff filed his suit on the last permissible day before the expiration of the statute of limitations. He appeared only once thereafter to challenge the defendant's motion to dismiss. After that appearance he took no further action for four years and then appeared only to contest the dismissal of his suit for want of prosecution. Following this were two last-minute attempts at reinstatement and an eleventh-hour appeal. The plaintiff then waited almost a year before attempting to refile shortly before the expiration of section 24a's one year extension. The court found the plaintiff guilty of a lack of diligence, thus falling squarely within the exception to section 24a, and therefore prohibited him from refiling under the section.[21]

In *Sandman v. Marshall Field and Co.*,[22] the plaintiff's original suit was dismissed for want of prosecution. After the first dismissal, the suit was refused reinstatement and the plaintiff took no appeal. It was not until a few days prior to the expiration of section 24a's one-year period, over seven years after the cause of action arose, that the plaintiff filed his second suit under section 24a. The plaintiff was found guilty of an extreme lack of diligence and was denied a right to refile.[23]

Such avoidable delays in prosecuting lawsuits adversely affect defendants in several ways. First, delays by plaintiffs can increase defendants' legal expenses.[24] Increased costs result, for example, when a defendant's lawyer either appears unprepared or fails to appear altogether.[25] Second, litigation involves psychological costs. The need to retain counsel, prepare a defense, respond to discovery

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20. 16 Ill. App.3d 1071, 307 N.E.2d 409 (2d Dist. 1974).

21. The court concluded:

> These acts are not those of the diligent plaintiff whom the legislature intended to protect by section 24. Plaintiff's actions have not been compatible to the purpose and intent of the statute and his conduct falls within the exception of extreme and self-initiated delay.

Id. at 1074, 307 N.E.2d at 412.

22. 27 Ill. App.3d 427, 326 N.E.2d 514 (1st Dist. 1975).

23. The court concluded:

> In our judgment . . . the dismissals, and plaintiff's failure to appeal the denial of reinstatement, are not indicative of the diligence required of a plaintiff who, in good faith, invokes the jurisdiction of our courts and seeks the trial of a cause on its merits.
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> . . . .
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> It is now clear that section 24 of the Limitations Act is not a statute that confers an absolute right to refile a suit after it has been dismissed for want of prosecution.

Id. at 431, 326 N.E.2d at 517.

24. Comment, *Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight*, 34 U. CHI. L. REV. 922, 932 (1967).

25. *Id. See also* Hanson v. Firebaugh, 87 Idaho 202, 392 P.2d 202 (1964).

orders and appear in court all involve great inconvenience. Moreover, the uncertainty of the eventual result produces anxiety which could be aggravated by delay.[26] Third, delay in prosecuting a lawsuit can weaken the presentation of defenses because of the difficulty of preserving evidence with the passage of time. Physical evidence may become lost or a valuable witness may die.[27] Often a plaintiff will deliberately perpetuate a specious cause of action to improve his bargaining position at settlement.[28]

Under *Franzese*, these problems will most likely go without a remedy. The elimination of judicial discretion to create restrictions on section 24a's right to refile allows a plaintiff to delay prosecution of his suit needlessly and still be entitled to refile. The consequences for defendants historically have been avoided by a remedial construction of the section. Because *Franzese* overruled the judicially-created exception, defendants will have to find alternative means of protection.

LIMITED ALTERNATIVES FOR DEFENDANTS

Defendants have two limited alternatives to preclude plaintiffs from refiling under section 24a. The first alternative is to have the plaintiff's suit dismissed for failure to comply with discovery orders pursuant to Illinois Supreme Court Rule 219[29] rather than dismissed for want of prosecution. In 1974, the supreme court in *Keilholz v. Chicago and North Western Railway Co.*[30] held that a dismissal

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26. "[T]he plaintiff should not be allowed to subject the defendant to the psychological costs of litigation for a needlessly long period of time." Comment, *supra* note 24, at 933.

27. Comment, *supra* note 24, at 934.

28. *Id.* at 935. *See also* Boling v. United States, 231 F.2d 926, 928 (9th Cir. 1956); Sortino v. Fisher, 20 App. Div.2d 25, 28, 245 N.Y.S.2d 186, 190 (1963).

29. A dismissal for failure to comply with discovery orders is authorized by ILL. SUP. CT. R. 219:

> Rule 219. Consequences of Refusal to Comply with Rules or Orders Relating to Discovery or Pre-trial Conferences.
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> . . . .
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> (c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provision of Rules 201 through 218, or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:
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> . . . .
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> (v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his suit be dismissed with or without prejudice; . . . .

ILL. REV. STAT. ch. 110A, § 219 (1968).

30. 59 Ill.2d 34, 319 N.E.2d 46 (1974).

under rule 219 for failure to comply with discovery orders was not the same as a dismissal for want of prosecution.[31]

The advantage to defendants is that rule 219 dismissals are unequivocally declared final according to Illinois Supreme Court Rule 273.[32] Rule 273 declares that an involuntary dismissal, other than for lack of jurisdiction, improper venue, or failure to join an indispensable party, operates as an adjudication upon the merits.[33] In contrast, a suit that has been dismissed for want of prosecution is exempted from the operation of rule 273 and may be refiled under section 24a.[34] Therefore, defendants should seek rule 219 dismissals instead of dismissals for want of prosecution to cut off plaintiff's attempt to refile.

This alternative route, however, has its problems. The dismissals under rule 219 by their very nature will not be available unless a plaintiff fails to comply with a discovery order.[35] Furthermore, a "reasonable relationship" must exist between the discovery sanction and the violation on the part of the plaintiff.[36] The drastic sanction of involuntary dismissal must be reasonably related to serious and unnecessary delay by the plaintiff. In the discovery process, therefore, defendants may be forced to settle for less drastic sanctions than involuntary dismissal of the case.

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31. The appellate court in *Keilholz* held that the penalties authorized under rule 219 were essentially penalties "for want of prosecution" within the meaning of section 24a. 10 Ill. App.3d 1087, 1092, 295 N.E.2d 561, 565 (1st Dist. 1973). The Illinois Supreme Court reversed:

> There is a sense in which every procedural rule and sanction, if it is to be viewed from a sufficiently remote perspective, may be said to be designed to expedite the prosecution of cases. But the focus of section 24 is narrow. It states with precision the four types of orders with which it is concerned, and a dismissal for failure to comply with an order of the court is not one of them. . . . [I]f all dismissal orders entered under Rule 219 for failure to comply with discovery and pretrial conference orders are to be considered as dismissals for want of prosecution under section 24, the result would be to eliminate the most effective sanction for the disregard of those orders.

59 Ill.2d at 37-38, 319 N.E.2d at 48.

32. ILL. SUP. CT. R. 273 provides, "Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." ILL. REV. STAT. ch. 110A, § 273 (1967).

33. *Id.*

34. The Illinois Supreme Court accomplished this by finding section 24a to be a statute which "otherwise specifies" within the meaning of the opening clause of rule 273. Kutnick v. Grant, 65 Ill.2d 177, 180, 357 N.E.2d 480, 482 (1976).

35. Savitch v. Allman, 25 Ill. App.2d 864, 867-68, 323 N.E.2d 435, 438 (3d Dist. 1975). *See generally* Kiely, *Re-Discovering Discovery: A Fresh Look at the Old Hound,* 10 J. MAR. J. PRAC. & PROC. 197, 218-219 (1977).

36. General Motors Corp. v. Bua, 37 Ill.2d 180, 197, 226 N.E.2d 6, 16 (1967); Department of Transp. v. Zabel, 29 Ill. App.3d 407, 410, 330 N.E.2d 878, 880 (3d Dist. 1975).

The second possible alternative method to avoid the consequences of *Franzese* is to have a plaintiff's complaint dismissed with prejudice pursuant to Illinois Supreme Court Rule 103(b).[37] Since a dismissal with prejudice is treated as an adjudication upon the merits, the right to refile may be denied because the original controversy is res judicata.[38]

Unfortunately, this alternative method is inadequate for two reasons. First, the rule 103(b) dismissal is available only in those cases involving delay in service of summons. Second, for the suit to be dismissed *with prejudice,* the plaintiff's delay in service upon the defendant must have occurred after the statute of limitations had expired and must be found by the court to be unreasonable.[39]

Thus, the rule 103(b) alternative, like that provided by rule 219, is limited in its scope. Most defendants will be unable to avoid the harassment, expense, and delay engendered by the elimination of section 24a's diligence requirement.

RECOMMENDATION

One possible approach to the problems created by *Franzese* is legislative amendment of section 24a to include a diligence requirement.[40] This would relieve defendants of the consequences fostered by dilatory plaintiffs. A better approach, however, is to restore the

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37. ILL. SUP. CT. R. 103(b) provides:

> Dismissal for Lack of Diligence. If the plaintiff fails to exercise reasonable diligence to obtain service prior to the expiration of the applicable statute of limitations, the action as a whole or as to any unserved defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice. In either case the dismissal may be made on the application of any defendant or on the court's own motion.

ILL. REV. STAT. ch. 110A, § 103(b) (West Cum. Supp. 1977-78).

38. The phrase "with prejudice" has a widely known legal significance. A dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the complainant. Gonzalez v. Gonzales, 6 Ill. App.2d 310, 314, 127 N.E.2d 673, 675 (1st Dist. 1955).

39. The Illinois Supreme Court recently pointed out that a dismissal with prejudice may be entered under rule 103(b) only when the failure to provide service occurred *after* the statute of limitations had run. Aranda v. Hobart Mfg. Corp., 66 Ill.2d 613, 619, 363 N.E.2d 796, 795 (1977). Moreover, Justice Dooley indicated that "Rule 103(B) should be employed with restraint. It should not be used as a vehicle to dispose of litigation." *Id.* at 621, 363 N.E.2d at 799 (Dooley, J., specially concurring). *See also* ILL. ANN. STAT. ch. 110A, § 103(b) (Smith-Hurd Supp. 1977) (committee commentary).

40. In H. HART & A. SACKS, THE LEGAL PROCESS (Tent. ed. 1958) the authors refer to the plain meaning doctrine as the "flaggellant theory of statutory interpretation." They question the effectiveness of a sanction that attempts to discipline the present lawmaking body for gaps of interpretation left by past legislatures. *Id.* at 99-100.

remedial construction that the section has received over the years.[41] Such a liberal interpretation is viewed by scholarly authority as essential to enlightened judicial decisionmaking.[42] Moreover, the legislature itself has decreed that the remedial approach is preferred in the interpretation of statutes.[43] This viewpoint provides more flexibility to the courts to fashion their own basis for the diligence requirement.

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41. *See, e.g.*, Aranda v. Hobart Mfg. Corp., in which Justice Dooley in a specially concurring opinion concluded that section 24a is remedial in nature and should be liberally construed. 66 Ill.2d at 622, 363 N.E.2d at 799. This is a possible attempt to ameliorate the impact of *Franzese*'s plain meaning approach.

42. The concept of innovative judicial interpretation is widely supported. As explained by Justice Holmes, the basic function of the judiciary is to fill the gaps of interpretation left by the legislature after passage of the statute. In Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), Holmes in dissent declared that judges must legislate, but they do so within limits: "I recognize . . . that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Id.* at 221.

The separation of powers rationale for the plain meaning rule is inconsistent with this concept of judicial legislation. The rule is based on the assumption that judges can exercise no legislative power. Cardozo, however, recognized that the exercise of legislative powers by a judge was a necessary adjunct of enlightened judicial interpretation. He explained that a judge is impelled to seek and define the proper interstitial limits of his decision-making power. He called this process an "interstitial" approach to decision-making, in which the function of judges is to fill the interstices (or gaps) in the law through a carefully reasoned process of judicial interpretation. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 15-18 (1921). The guiding force in this process is called a "stream of tendency," a concept which is shaped by inherited instincts, traditional beliefs, and acquired convictions about the proper boundaries to judicial legislation. *Id.* at 11-12.

The plain meaning rule, by requiring a rigid interpretation of any given set of words, is too inflexible to reconcile with Cardozo's approach. Cardozo wrote that the process of statutory interpretation is guided not by rules of construction but by judges' innate sense of what the law should be. This consideration by judges of larger factors than the plain and ordinary meaning is called the "Method of Sociology." Important social interests, rather than rigid rules of construction, shape the progress of the law: "logic, and history, and custom, and utility, and the accepted standards of right conduct are the forces which singly or in combination shape the progress of the law. Which of these factors shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired." *Id.* at 112. The Method of Sociology is "the arbiter between other methods [of statutory interpretation] determining in the last analysis the choice of each, weighing their competing claims, setting bounds to pretensions, balancing and moderating and harmonizing them all." *Id.* at 98.

Dean Pound expounded the philosophy of "judicial empiricism." As suggested by the title, this theory posits that courts should be given leeway to interpret the law as sufficiently elastic to meet changing conditions, even though that process is tantamount to lawmaking by judicial decision. E. POUND, SPIRIT OF THE COMMON LAW 181-83 (1921).

43. Scholarly authority is not alone in recognizing the necessity of judicial legislation. The legislature itself has declared for the courts a policy of liberal and remedial interpretation of statutes. As is stated in the interpretive provisions of the Illinois Revised Statutes: "All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out." ILL. REV. STAT. ch. 131, § 1.01 (1975).

Under a liberal rule of construction, the standards for refiling under section 24a can be carefully considered and articulated in case law. It should be the court's judgment as to what constitutes serious and aggravated delay by the plaintiff. Even if the legislature created its own diligence requirement in section 24a, the duty of differentiating between delay that was serious enough to fit within the exception to section 24a and delay that justified only the original DWP would still fall upon the courts.

CONCLUSION

Judicial recognition of the diligence requirement is justified when one considers the costs to defendants in terms of expense, harassment and weakened bargaining position at settlement.[44] These adverse consequences for defendants are caused by the *Franzese* court's reliance on the plain meaning rule as the sole basis of the decision. The plain meaning rule is too superficial in its rationale and too inflexible in its approach to survive for long as the rule of decision in section 24a cases.[45] Furthermore, this static view of a court's interpretive role is unsupported by case law[46] and scholarly authority.[47] A liberal and remedial construction must be restored to section 24a.

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44. *See* notes 19-28 and accompanying text *supra*.
45. *See* notes 11-14 and accompanying text *supra*.
46. *See* notes 16-18 and accompanying text *supra*.
47. *See* note 42 *supra*.