

An Underused Tool

Using an Accounting Action to Litigate Complex Commercial Matters

In complicated commercial litigation, proving damages before a jury of twelve ordinary citizens can be overwhelming. As a practical matter, most jurors are unable to decipher even basic financial statements or accounting records. One under-used weapon in an attorney's arsenal is a lawsuit called an "accounting action." An accounting action can be brought in equity where a Chancery Judge will serve as fact-finder. As a result, an accounting action streamlines proof in complex litigation and avoids the problem of jury confusion.

An accounting action has two purposes: 1) the court will adjust the accounts of the parties; and 2) judgment for the remaining balance is entered against the debtor. Although courts will dismiss accounting actions if the parties have an adequate remedy at law, Illinois courts offer an exception if an accounting action is predicated upon "intricate and complicated accounts." Typically, the proof of financial damages must be "beyond the ken of average jurors." The mere fact that an accounting involves a large number of assets does not make it "intricate" or "complicated." In Illinois state courts, numerous entries, prorations, or

account transactions must be present to justify an accounting based on complexity alone.

Federal court judges are much less likely to make equitable determinations in accounting actions that are arguably too complex for a jury. As a result, plaintiffs in a federal court might consider seeking refuge using Federal Rule of Civil Procedure 53(b) which allows federal judges to appoint a "Master." While a jury trial is still necessary, a Master can assist the jurors in sorting the complicated legal issues and accounting records.

Defendants in accounting actions occasionally file for protection under Chapter 11 of the U.S. Bankruptcy Act. Under Chapter 11, the federal courts generally do not appoint a Trustee and the debtor continues to hold its assets until it submits a plan of reorganization. If the debtor appears to be squandering assets or "preferring" creditors, a motion can be filed appointing a trustee to oversee the Chapter 11 reorganization.

CC&M has found equitable accounting actions to be a useful tool in its commercial litigation arsenal.

by Gregory P. Adamo



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specializing in

general business and corporate law
commercial litigation
business and succession planning for family businesses, corporations and limited liability companies
banking and finance matters
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FIRM HIGHLIGHTS

Mary E. Callow won the 2008 Influential Women in Business award presented by *The Business Ledger* and the National Association of Women Business Owners, which will be conferred on November 6 at Venuti's in Addison, Illinois.

Timothy M. McLean and **Gregory P. Adamo** won judgments of \$475,000, \$425,000, and \$225,000 in favor of their clients in three separate lawsuits.

Steven A. Marderosian and **Eric J. Ryan** won dismissal of claims against a CC&M lender client for consumer fraud, conversion, and breach of contract while **Eric** also won a motion establishing priority for a lender client's lien ahead of a housing association, even though the association's lien had been recorded years earlier.

Steven A. Marderosian was selected as a team captain for this season of the DuPage County Bar Association's Chapter of the American Inns of Court. **Steve** also conducted a successful two-part mediation of homeowners' fraud and contract claims against the project lender client, which resulted in a settlement for a fraction of the lender's jury verdict exposure and far less than the homeowners' settlement demands.

National Financial Turmoil Directly Impacts Local Court Systems

The tremors from the seismic events in our national economy are rippling through our local court systems too. The aftershocks will continue to be felt for the foreseeable future.

All of the county court systems in the Chicago metropolitan area are reporting record numbers of foreclosure filings. For example, in DuPage County alone, foreclosure filings have more than doubled within the past year. In DuPage County, this record number of foreclosure filings has resulted in the creation of an entire new court call devoted exclusively to residential foreclosures and evictions.

The new court call in DuPage County has been assigned to Judge Paul Fullerton, a partner in Clingen Callow & McLean prior to his appointment as an associate judge in 2007 for the 18th Judicial Circuit Court in DuPage County. There have been over 1,000 foreclosure cases assigned to Judge Fullerton's call alone. By devoting one judge exclusively to the assignment of foreclosure cases, DuPage County is attempting to minimize the inevitable backlog that is occurring elsewhere as a result of the explosion of foreclosure filings.

In Kane County, the enormous amount of foreclosure filings is causing a lengthening of the foreclosure process from the initial filing of the complaint to the foreclosure sale. For example, once a judgment of foreclosure is obtained, the judgment creditor now must wait at least six months before the foreclosure sale can be scheduled to accomplish the actual transfer of title to the foreclosed property.

There are several practical ramifications for both lenders and borrowers as a result of this explosion of local foreclosure cases. Borrowers having difficulty meeting their loan obligations should communicate openly with their lenders in proposing workable refinancing arrangements. Since lenders are reluctant to accumulate a glut of real estate in their portfolios at this time, many area lenders are increasingly open to reasonable arrangements for the refinancing of mortgage loans in order to avoid the time and expense of lengthy foreclosure proceedings in the present environment.

by Timothy M. McLean

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A Wolf in Sheep's Clothing

The Home Repair and Remodeling Act

As a sign of the times, we are seeing a wave of cases involving homeowners defaulting on home improvement contracts. Courts are filled with contractors seeking payment for their services.

Some of these cases implicate a little-known statute called the Home Repair and Remodeling Act (the "HRRRA"). The HRRRA, which the Illinois legislature passed to protect homeowners from unscrupulous contractors, requires contractors to provide a homeowner with:

1. a written contract for work more than \$1,000.00;
2. specific notice of contract clauses requiring arbitration or waiving jury trials, with separate signatures acknowledging that notice; and,
3. a brochure entitled "Home Repair: Know Your Consumer Rights."

The HRRRA makes failure to comply with the first two requirements unlawful, and any violation of the HRRRA a violation of the Consumer Fraud and Deceptive Business Practices Act. Violations of the HRRRA also can invalidate contracts and prove costly to contractors.

Recent Illinois cases require strict compliance with HRRRA requirements. Illinois appellate courts barred two contractors from recovering \$10,000 and \$14,000 for work they had performed because they failed to provide a written contract or the required brochure to homeowners.

Similarly, though no appellate cases have been decided on the issue, mortgage holders are extinguishing mechanics' lien claims against foreclosed properties using the HRRRA. Though the Mechanics' Lien Act allows a contractor to take priority over some mortgages, it requires that a lien be based on a valid contract. Trial courts are finding that violations of the HRRRA invalidate the contract and prevent contractors from taking any payments from the foreclosure sale of homes.

Considering the high cost of violations of the HRRRA, compliance with it is vital. CC&M can evaluate your contracts and business practices to ensure that you do not run afoul of the HRRRA. Conversely, we are prepared to assert the HRRRA as a valid defense for our clients where it is applicable.

by Eric J. Ryan

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MORE FIRM HIGHLIGHTS

Despite adverse market conditions, **Deven S. Kane** and corporate paralegal **Jean Erhardt** successfully coordinated a new lender to refinance a client's multi-million dollar business loan and line of credit as well as coordinating another CC&M client's purchase of a local mail advertising franchise.

For the second straight year, the DuPage County Bar Association's Basic Skills Training Program has invited **Ross I. Molho** to give an Employment Discrimination Litigation presentation on December 6, 2008. In early autumn **Ross** gave a presentation to the Association of Late Deafened Adults, Inc. on the practical and legal obligations associated with being a Director for a Not-For-Profit Illinois Corporation.

Colleen M. Healy recently gave an estate planning presentation to financial strategists at AXA Equitable on an individual's integration of estate planning, investments, and insurance.

On September 3 at 10:17 p.m., **Gregory P. Adamo** and his wife Kristen welcomed the birth of their first child, 7 lb. 11.6 oz. Audrey Lee.

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Gregory P. Adamo, an associate at CC&M, concentrates his practice in complex commercial litigation, corporate law and real estate law.

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Timothy M. McLean, a partner at CC&M, concentrates his practice in business counseling, commercial litigation and landlord-tenant law.



The Home Repair and Remodeling Act: A Wolf in Sheep's Clothing

Eric J. Ryan, an associate at CC&M, concentrates his practice in complex commercial litigation and corporate law.