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IN THE SUPREME COURT OF ILLINOIS

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FRANK C. BEMIS, D.C., )  
Plaintiff-Appellee, )  
v. )  
STATE FARM FIRE & CASUALTY )  
COMPANY, )  
Defendant-Appellant. )  
No. 1-08-0284 )  
There Heard on Appeal From the )  
Circuit Court of Cook County, )  
County Department, Chancery )  
Division, )  
KEVIN SNEAD et al., )  
Plaintiffs, )  
v. )  
STATE FARM MUTUAL AUTOMOBILE )  
INSURANCE COMPANY, )  
Defendant. )  
No. 07 CH 21066 )  
*Consolidated with* )  
MARK J. EAVENSON, D.C., )  
Plaintiff, )  
v. )  
STATE FARM MUTUAL AUTOMOBILE )  
INSURANCE COMPANY and STATE )  
FARM LIFE INSURANCE COMPANY, )  
Defendants. )  
No. 99 CH 12047 )  
*and* No. 05 CH 10191 )  
Hon. Martin S. Agran, Judge, )  
Presiding )

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**BRIEF OF DEFENDANT-APPELLANT  
STATE FARM FIRE & CASUALTY COMPANY**

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August 3, 2009

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## INTRODUCTION AND NATURE OF THE CASE

This case does not raise any questions on the pleadings or involve a jury verdict. Rather, as explained below, it concerns whether an order granting plaintiff's motion for substitution of judge pursuant to 735 ILCS 5/2-1001 undermines a series of consolidation orders issued by this Court under Supreme Court Rule 384, and therefore violates the separation of powers doctrine.

In 1999, State Farm was sued in a putative MedPay class action in Cook County styled *Snead v. State Farm Mut. Auto. Ins.*<sup>1</sup> Over the ensuing decade, the plaintiff's lawyers in this case—*Bemis v. State Farm Fire & Cas.*—filed a series of four MedPay class actions similar to *Snead* against various State Farm entities. The plaintiff's lawyers filed each of these new cases (*Siler, Eavenson, Jones, and Bemis*) in Madison County. In most of the cases—including this one—the plaintiff is a chiropractor seeking to represent a class of healthcare providers who treat persons covered under a State Farm policy. C1, 3, 25 (*Bemis*); C163, 167 (*Eavenson*); C394, 397 (*Jones*).<sup>2</sup>

Each time plaintiff's lawyers filed one of their MedPay cases in Madison County, this Court ordered it transferred to Cook County and consolidated with *Snead* pursuant to Rule 384, which authorizes this Court to transfer cases from one circuit court to another when there are common questions and consolidation “*would promote the just and*

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<sup>1</sup> MedPay is short for medical payments. In the MedPay cases, plaintiffs allege that State Farm systematically underpays insurance claims seeking to recover medical expenses. State Farm categorically denies the plaintiffs' MedPay allegations.

<sup>2</sup> Record materials cited as “App.” are contained in the Appendix attached to this brief. Documents cited as “C” appear in the three-volume Supporting Record that State Farm filed in the Appellate Court with its Rule 308 petition. Other record materials are found in the Supplemental Supporting Record (“Suppl. R.”) that the plaintiff filed in the Appellate Court and the Second Supplemental Supporting Record (“2d Suppl. R.”) that State Farm submitted to the Appellate Court. Finally, plaintiffs' answer to State Farm's petition for leave to appeal to this Court is cited as “PLA Answer.”

*efficient conduct of such actions.*” S. Ct. R. 384(a) (emphasis added). See *Siler v. State Farm Mut. Auto. Ins.*, No. 89785 (Ill. Aug. 25, 2000) (App. A19) (transferring *Siler* and ordering consolidation with *Snead*); *Eavenson v. State Farm Mut. Auto. Ins.*, No. 100122 (Ill. Apr. 6, 2005) (App. A17) (transferring *Eavenson* and *Jones*, and ordering consolidation with *Snead*); *Bemis v. State Farm Fire & Cas.*, No. 104727 (Ill. June 26, 2007) (App. A15) (transferring *Bemis* and ordering consolidation with *Eavenson* and *Snead*).

Once the Madison County cases were transferred and consolidated in Cook County, however, plaintiffs moved for substitution of judge pursuant to 735 ILCS 5/2-1001 in order to remove judges who had issued rulings adverse to the plaintiffs (first Judge Maki in *Eavenson* and *Jones*, and now Judge Agran in *Bemis*). See *Bemis v. State Farm Fire & Cas.*, 388 Ill. App. 3d 687, 905 N.E.2d 285, 288 (1st Dist. 2009).

In this case, Judge Agran granted plaintiff’s substitution of judge motion as to all of the consolidated cases. App. A1, 6-7. Judge Agran expressly recognized, however, that “it is a close question” whether plaintiff’s motion for substitution of judge conflicts with this Court’s Rule 384 consolidation order and therefore violates the Illinois Constitution’s separation of powers doctrine, so he certified his substitution of judge order for interlocutory appeal. After the Appellate Court affirmed, this Court granted State Farm’s petition for leave to appeal. The issue before this Court is whether plaintiff’s use of the substitution of judge statute violates Illinois separation of powers principles by effectively nullifying this Court’s Rule 384 order in *Bemis*, which ordered *Bemis* “consolidated with *Eavenson*...and *Snead*” (App. A15)—then pending before Judge Agran—to “promote the just and efficient conduct of such actions.” Rule 384(a).

As we show in this brief, the decisions below permit plaintiff to misuse the

substitution of judge statute, section 2-1001 of the Code of Civil Procedure, to undermine the apparent purpose of this Court's Rule 384 order. In ordering that this case be consolidated with *Eavenson* and *Snead*, this Court necessarily ordered consolidation before Judge Agran, who has been handling *Eavenson* and *Snead* since 2005. It is evident that the Court's aim was to "promote the just and efficient conduct" (Rule 384(a)) of all of the MedPay cases by transferring *Bemis* to Cook County and consolidating it before the same judge who already presided over *Jones*, *Eavenson*, and *Snead*.

Plaintiff's gambit is the opposite of "just and efficient." To the contrary, it is inefficient and unfair to permit a plaintiff to file a new MedPay class action in Madison County, knowing that this Court will order it transferred to Cook County, and then move for substitution of judge—in order to (a) take *all* of the consolidated class action cases away from the judge who has handled them for years (and issued rulings that plaintiffs do not like), and (b) bring in a new judge who knows nothing about the case but whom plaintiff hopes will be more favorably disposed toward his claims.

Thus, the Appellate Court's decision allows plaintiff to use a statutory power to effectively undermine this Court's Rule 384 order, which transferred *Bemis* and consolidated it with *Snead* and *Eavenson* to promote the just and efficient resolution of the cases. The separation of powers principles in the Illinois Constitution, however, require that this Court's rules and orders be given precedence over statutes concerning judicial administration. The Appellate Court's ruling stands separation of powers on its head. It gives precedence to statutes over this Court's rules and orders. State Farm respectfully requests, therefore, that the rulings below allowing plaintiff's substitution of judge motion be reversed.

## STATEMENT OF THE ISSUE

Whether plaintiff's use of the substitution of judge statute, 735 ILCS 5/2-1001, in this case violates Illinois separation of powers principles by undermining this Court's Rule 384 order, which transferred *Bemis* and consolidated it with *Eavenson* and *Snead* pursuant to the Court's authority under Rule 384 to order consolidation when that would "promote the just and efficient conduct" of cases involving one or more common questions.

## STATEMENT OF JURISDICTION

The substitution of judge order being appealed was entered on January 14, 2008; the Circuit Court certified that order for interlocutory review under Rule 308 on that same day. C148. State Farm timely filed its application for leave to appeal pursuant to Rule 308 on January 28, 2008. The Appellate Court granted leave to appeal on March 19, 2008. *Bemis v. State Farm Fire & Cas.*, No. 1-08-0284 (1st Dist. Mar. 19, 2008). The Appellate Court issued its decision on the merits of the appeal on February 27, 2009. *Bemis v. State Farm Fire & Cas.*, 388 Ill. App. 3d 687, 905 N.E.2d 285 (1st Dist. 2009) (App. A10-14). State Farm filed a timely petition for leave to appeal on April 1, 2009, which this Court granted on May 28, 2009.

## CONSTITUTIONAL PROVISIONS, RULE, AND STATUTE INVOLVED

This appeal involves provisions of the Illinois Constitution, a Supreme Court Rule, and an Illinois statute.

Article VI, section 1 of the Illinois Constitution provides: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Article VI, section 16 of the Illinois Constitution provides in pertinent part: "General administrative and supervisory authority over all courts is vested in the Supreme Court." And Article II,

section 1 of the Illinois Constitution provides: “The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”

This appeal also involves Illinois Supreme Court Rule 384(a), which allows this Court to transfer civil actions for consolidation to “promote the just and efficient conduct of such actions.” The rule reads:

**(a) Motion to Consolidate—Transfer.** When civil actions involving one or more common questions of fact or law are pending in different judicial circuits, and the supreme court determines that consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions, the supreme court may, on its own motion or on the motion of any party filed with the supreme court, transfer all such actions to one judicial circuit for consolidated pretrial, trial, or post-trial proceedings.

The statute involved in this case is 735 ILCS 5/2-1001(a)(2), which allows litigants to obtain a new judge in certain circumstances. The statute provides:

(a) A substitution of judge in any civil action may be had in the following situations:

...

(2) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).

(i) Each party shall be entitled to one substitution of judge without cause as a matter of right.

(ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.

(iii) If any party has not entered an appearance in the case and has not been found in default, rulings in the case by the judge on any substantial issue before the party’s appearance shall not be grounds for denying an otherwise timely application for substitution of judge as of right by the party.

## STATEMENT OF FACTS

**A. The Underlying Series Of MedPay Class Actions.** *Snead*, a putative MedPay class action against State Farm, was filed in Cook County in 1999. C549. Later that year, a different set of lawyers—plaintiff’s counsel in this case—filed a similar MedPay class action against State Farm, *Siler*, in Madison County. C484. Due to the similarity between the suits, State Farm moved in this Court under Rule 384 to transfer *Siler* to Cook County for consolidation with *Snead* to promote the “just and efficient” conduct of the actions. C511. This Court agreed and granted the Rule 384 motion in *Siler*. App. A19. When *Siler* arrived in Cook County, State Farm moved to dismiss the complaint. C519, 524. In response, plaintiffs’ counsel first tried to voluntarily dismiss without prejudice, but when the presiding judge refused to allow that (because a dispositive motion was already pending), they voluntarily dismissed *Siler* with prejudice. C524, 540, 547-48.

In 2003, plaintiff’s counsel in this case filed two more putative MedPay class actions in Madison County against State Farm, *Jones* and *Eavenson*. C162, 389. Because of the similarities and overlap with *Snead*, State Farm again filed a Rule 384 motion in this Court, asking to have *Jones* and *Eavenson* transferred and “consolidate[d] in Cook County before a court that already is addressing the issues as a result of presiding over the *Snead* action.” C240, 262. State Farm explained that “[i]t would be flatly inconsistent” with Rule 384’s purpose to “‘promote the just and efficient conduct’ of the cases, to allow [plaintiffs’ counsel] to force State Farm and the Illinois courts to re-litigate issues already being addressed in *Snead*.” C263. This Court again granted the Rule 384 motion, and in April 2005 it ordered both *Jones* and *Eavenson* transferred to Cook County and consolidated with *Snead*. App. A17.

At the time, *Snead* was in front of Judge Maki, who had dismissed all but one of

the five counts of the *Snead* complaint. C608, 619-20. Once in Cook County, Jones moved for a substitution of judge under section 2-1001, seeking to move all three consolidated cases away from Judge Maki. C413. State Farm objected, but Judge Maki granted the motion, and the three consolidated cases were reassigned to Judge Agran in August 2005. C461-72.

In May 2006, Judge Agran granted State Farm's motion to dismiss *Jones* because the claims were based on a worker's compensation policy, and the Worker's Compensation Commission is the exclusive forum for disputes concerning worker's compensation benefits. C408, 473, 477-78. (The *Jones* ruling is directly relevant to *Bemis*, which also arises out of a workers' compensation policy and is subject to a virtually identical motion to dismiss.) Judge Agran entered final judgment in *Jones* pursuant to Rule 304(a), but plaintiffs did not appeal the dismissal of the *Jones* claims. C483.

In *Eavenson*, State Farm moved to dismiss the claims. C214, 221. In December 2006, Judge Agran rejected plaintiff's request for arbitration—ruling that Eavenson had waived his right to seek arbitration—and ordered him to respond to State Farm's motion to dismiss. C324, 337-38. Plaintiff's counsel appealed that ruling, but the First District affirmed Judge Agran's order in September 2007 and denied rehearing in November 2007. C366-81, 383. When they returned to the trial court, the *Eavenson* parties finished briefing State Farm's motion to dismiss, and a hearing on that motion was scheduled for January 9, 2008. C382.

Meanwhile, in early 2007, plaintiff's counsel filed *Bemis*, their fourth putative MedPay class action against State Farm in Madison County. C1. As with the three earlier Madison County cases, State Farm filed a Rule 384 motion to transfer *Bemis* to Cook

County for consolidation with the State Farm MedPay cases pending before Judge Agran. C35-59. In its motion, State Farm told this Court that Rule 384 transfer and consolidation were warranted because Judge Agran “has had considerable experience in addressing the issues raised in *Snead*, *Jones*, and *Eavenson* and that experience will lead to the just and efficient handling of *Bemis*.” C53. In particular, State Farm explained that in *Jones* Judge Agran had already addressed—and dismissed—claims based on the same kind of workers’ compensation policy at issue in *Bemis*. C43. This Court again granted the Rule 384 motion, ordering in June 2007 that *Bemis* must be transferred to Cook County and consolidated with *Snead* and *Eavenson*. App. A15.

When the Cook County Circuit Court randomly assigned *Bemis* to Judge Rochford, the Presiding Judge of the Chancery Division in Cook County granted plaintiff’s request to “transfer[]” *Bemis* to Judge Agran “[i]n order to effectuate” this Court’s order. Suppl. R. 72. Plaintiff moved for a substitution of judge in all three consolidated cases. C65-68. The hearing on that motion occurred before—and ultimately preempted—the previously scheduled oral argument on State Farm’s motion to dismiss the claims in *Eavenson*. C106, 382.

**B. The Trial Court’s Order.** Judge Agran granted plaintiff’s motion for substitution of judge. He agreed with State Farm that the plaintiffs were “bouncing from judge to judge in order to try and find one that may or may not be sympathetic to their position.” App. A5. And Judge Agran noted that “[o]bviously, I have put a lot of work into the case. It doesn’t make a whole lot of sense to me to move this down the road.” App. A14; see also C156 (the court: “I’ve been on these particular cases for a couple of years”; “[t]he other cases there’s been substantial rulings on”).

But while recognizing that “it is a close question” (App. A7), he granted the

motion to substitute judges for all of the consolidated cases because “[t]he Supreme Court order here consolidated the cases but not specifically before me. Had the order said specifically before me, I would agree without any question [with] your Separation of Power argument.” App. A6. Judge Agran certified his order for appeal under Rule 308 and stayed it (App. A1), explaining that “this issue isn’t going to go away because this issue is going to resurrect itself. So I would like to hear what the Appellate Court and possibly the Supreme Court have to say about this issue.” C157.

**C. The Appellate Court’s Decision.** The First District granted leave to appeal and affirmed. Upholding an “absolute” right to substitute judges if section 2-1001’s prerequisites are met, the court reasoned that “the supreme court’s order does not name any particular Cook County judge that must preside over the consolidated cases” and that “Rule 384 allows for a transfer because of common issues of fact or law, not because of the expertise of any particular trial judge.” *Bemis*, 905 N.E.2d at 290-91. “In other words,” the court continued, “the supreme court, under Rule 384, merely transferred the case at bar from Madison County to Cook County. ... There is nothing in the record to support State Farm’s claim that the supreme court granted State Farm’s motion to transfer with the intention that only Judge Agran would preside over the consolidated cases.” *Id.* at 291. In addition, the Appellate Court found “no support in the record for State Farm’s second claim that plaintiff is engaging in a plan to evade the supreme court’s orders.” *Id.*

The Appellate Court also suggested that the separation of powers doctrine does not apply in cases involving private litigants. *Id.* at 291-92. Finally, the Appellate Court ruled that section 2-1001 was not being used to “infringe[] on [the supreme court’s] supervisory authority.” *Id.* at 292.

In its opinion, the Appellate Court did not mention Rule 384’s purpose: to

“promote the just and efficient conduct of such actions” (Rule 384(a)); did not dispute that this Court’s Rule 384 order consolidating *Bemis* with *Eavenson* and *Snead* was intended to serve that purpose; did not dispute Judge Agran’s statement that moving the cases to another judge would be inefficient and “doesn’t make a whole lot of sense” because “[o]bviously, I have put a lot of work into the case” (App. A4); and did not dispute that removing the three cases from Judge Agran would be inefficient.

### STANDARD OF REVIEW

This case involves a question of law, which this Court reviews *de novo*. *In re Adoption of K.L.P.*, 198 Ill. 2d 448, 453 (2002).

### ARGUMENT

#### **I. Permitting A Substitution Of Judge Here Would Be Contrary To The Separation Of Powers Doctrine.**

##### **A. Statutes Used To Override This Court’s Rules And Orders Are Unconstitutional As Applied And Violate Separation Of Powers.**

“[A]rticle VI, section 1, of the Illinois Constitution of 1970 vests the judicial power in the supreme court, an appellate court, and the circuit courts.” *People v. Joseph*, 113 Ill. 2d 36, 47 (1986). Under Article VI, “[t]he supervisory and administrative authority over all the courts is vested in the supreme court, to be exercised in accordance with rules.” *Id.* Thus, “procedural administration of the courts” and judicial “rulemaking” are a particular province of this Court, which has the “paramount authority to regulate judicial procedure by court rule.” *Kunkel v. Walton*, 179 Ill. 2d 519, 528, 530 (1997). See also *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423, 432 (1990) (“One aspect of the judiciary’s inherent ‘judicial power’ is the power to administer and supervise the court system”). Indeed, Article VI of the 1970 Constitution is designed to “emphasize and strengthen the concept of *central* supervision of the judicial system.” *Joseph*, 113 Ill. 2d

at 42-43.

Of course, “[w]here matters of judicial procedure are at issue, the constitutional authority to promulgate procedural rules can be concurrent between the court and the legislature.” *Kunkel*, 179 Ill. 2d at 528. But the legislature’s role is limited: “The legislature may enact laws that *complement* the authority of the judiciary or that have only a *peripheral* effect on court administration”—“this court retains *primary* constitutional authority over court procedure.” *Id.* (emphasis added).

Consequently, “[w]here legislation infringes upon the judiciary’s administrative authority, either by directly conflicting with a supreme court rule or by causing more than a ‘peripheral effect on judicial administration,’ the legislation violates the separation of powers doctrine.” *Baricevic*, 136 Ill. 2d at 432-33. See *Kunkel*, 179 Ill. 2d at 528 (“the separation of powers principle is violated when a legislative enactment unduly encroaches upon the inherent powers of the judiciary”). Accordingly, “if a statute conflicts with a rule of this court adopted pursuant to constitutional authority, the rule will prevail.” *Joseph*, 113 Ill. 2d at 45. Accord *People v. Felella*, 131 Ill. 2d 525, 538 (1989). “The principle that court rules will supersede inconsistent statutory provisions is connected to ‘the undisputed duty of the court to protect its judicial powers from encroachment by legislative enactments, and thus preserve an independent judicial department.’” *Kunkel*, 179 Ill. 2d at 529.

Moreover, “even where a statute, standing alone, does not violate the separation of powers clause, ‘the legislature is without authority to interfere with a product of this court’s supervisory and administrative responsibility.’” *Id.* at 528-29. Thus, where a statute is *used* to circumvent this Court’s rules and orders, the Court will “declar[e] the statute causing the encroachment unconstitutional” as applied to the order, “interpret[]

ambiguous statutory language in a manner which avoids constitutional problems,” or prevent the statute from being used in violation of this Court’s constitutional prerogatives. *Baricevic*, 136 Ill. 2d at 435, 438. See also *Kunkel*, 179 Ill. 2d at 529 (“this court has not hesitated to strike down legislative enactments governing judicial procedure” when a statute cannot be reconciled with a judicial rule).

This Court has applied the separation of powers doctrine to address abusive substitution of judge motions. In *Baricevic*, the petitioner, a State’s Attorney, sought a supervisory order to compel a trial judge to grant a series of substitution of judge motions in criminal cases. This Court acknowledged that the statute “unambiguous[ly]” provided “an absolute right to one substitution of judge” upon the timely filing of a motion alleging prejudice, which ordinarily “is not subject to judicial scrutiny.” 136 Ill. 2d at 435-36. Moreover, the Court noted, the statute “is constitutional” on its face. *Id.* at 435. Nevertheless, the Court rejected petitioner’s request, because he was “using the [substitution of judge] statute to interfere with the judiciary’s assignment authority.” *Id.* at 434. The Court stressed that it “is not powerless to act” when a substitution of judge provision is used “for unconstitutional purposes.” *Id.* at 436-37.

The Court concluded that the petitioner’s “blanket use of substitution motions in all felony proceedings before Judge Wharton, when viewed in conjunction with his earlier attempts at having Judge Wharton reassigned, poses a substantial threat to the dignity and independence of the judiciary.” *Id.* at 435. The Court refused to allow an automatic substitution of judge, instead imposing a procedure for that case to ensure that the statute was not being used “to thwart the chief judge of the circuit court’s independence in assigning cases” or otherwise to “violate[] the separation of powers doctrine.” *Id.* at 438; see also *id.* at 439-41.

*Baricevic* is just one of many cases that have applied the separation of powers doctrine to strike down or limit the application of a wide variety of statutes attempting to regulate the judicial process. Statutes directing the assignment of judges for post-conviction proceedings, *Joseph*, 113 Ill. 2d at 47, requiring personal injury plaintiffs to disclose certain medical information, *Kunkel*, 179 Ill. 2d at 531-37, allowing attorneys to conduct voir dire, *People v. Menken*, 54 Ill. App. 3d 199, 200-01 (4th Dist. 1977), authorizing appeals from certain interlocutory orders, *Smith v. Goldstick*, 110 Ill. App. 3d 431, 436 (1st Dist. 1982), and permitting voluntary dismissal without prejudice any time before trial, *O'Connell v. St. Francis Hosp.*, 112 Ill. 2d 273, 281-83 (1986); *Gibellina v. Handley*, 127 Ill. 2d 122, 136-38 (1989), have all been subject to successful separation of powers challenges. These cases—which hold either that statutes or particular applications of statutes are unconstitutional—reject the notion that litigants have an “absolute right” to litigate in ways authorized by statute when doing so would conflict with judicial prerogatives embodied in this Court’s rules or orders.

*O'Connell* and *Gibellina* are illustrative. They limited the statutory right to a voluntary dismissal without prejudice where plaintiffs had abused that right in an effort to avoid an involuntary dismissal for failure to comply with a Supreme Court rule or avoid another adverse ruling. In *O'Connell*, 112 Ill. 2d at 280-83, the Court held that before a circuit court could rule on a motion for voluntary dismissal, it first had to decide a pending Rule 103(b) motion to dismiss for lack of diligence in serving process—even though the voluntary dismissal statute provided broadly that a plaintiff may voluntarily dismiss “at any time before trial or hearing.” Likewise, in *Gibellina*, 127 Ill. 2d at 136-38, this Court held prospectively that, because of the “abusive use of the voluntary dismissal statute,” a circuit court may rule on any pending dispositive motions before

ruling on a motion for voluntary dismissal. The Court reached this result even though the voluntary dismissal statute “does not...directly conflict[] with a specific rule of this court.” *Id.* at 133. See also *Arnett v. Young*, 269 Ill. App. 3d 858, 860-62 (1st Dist. 1995) (under S. Ct. R. 91, a party absent from court-mandated arbitration cannot voluntarily dismiss litigation; Rule 91 “must...prevail over section 2-1009”).

These cases confirm a central principle: courts limit the exercise of supposedly “unrestricted” statutory rights when litigants use them to circumvent the operation of Supreme Court rules or otherwise “infring[e] on the authority of the judiciary to discharge its duties fairly and expeditiously.” *Gibellina*, 127 Ill. 2d at 137. As this Court made clear in *Baricevic*, a litigant’s “abuse” of a seemingly absolute statutory right “should not go unremedied” when it “infringes upon” the Court’s constitutional authority “to administer and supervise the court system.” 136 Ill. 2d at 431-32. See also *Muskat v. Sternberg*, 122 Ill. 2d 41, 48 (1988) (the rationale of *O’Connell* and its progeny is that “this court may not be thwarted in its constitutional mandate to render justice fairly and promptly by the manipulation of the statutory provisions relating to dismissal and the refiling of suits”).

To be sure, some cases reject separation of powers challenges to statutes that regulate the judicial process. *E.g.*, *In re Daniel R.*, 291 Ill. App. 3d 1003, 1014-16 (1st Dist. 1997) (allowing one-time substitution of judge in one of six related child neglect petitions where no Rule 384 consolidation order was entered); *McDaniel v. St. Elizabeth’s Hosp.*, 213 Ill. App. 3d 103, 106-07 (5th Dist. 1991) (allowing voluntary dismissal in face of motion to dismiss where voluntary dismissal deemed not abusive). But even those cases, which are not factually analogous to this case, recognize that statutory regulation of the judicial process is permissible only where it has at most a

“peripheral effect on judicial administration.” *Daniel R.*, 291 Ill. App. 3d at 1015-16.

That threshold is crossed—as this Court’s decisions in *Baricevic*, *O’Connell*, and *Gibellina* show—when (as here) a litigant abuses a purported absolute statutory right to defeat this Court’s efforts to administer the litigation process under this Court’s rules. The Appellate Court’s decision to the contrary is inconsistent with those decisions and this Court’s other separation of powers precedent.

**B. Section 2-1001 Is Being Used To Violate The Separation Of Powers Doctrine By Interfering With This Court’s Rule 384 Order.**

Plaintiff and his attorneys are attempting to use section 2-1001 to “interfere with a product of this court’s supervisory and administrative responsibility,” *Kunkel*, 179 Ill. 2d at 529—namely, this Court’s Rule 384 order transferring *Bemis* to Cook County and consolidating it with the putative MedPay class actions pending before Judge Agran since 2005. Plaintiff’s motion undermines the Court’s Rule 384 order in fundamental ways.

**1. Removing Judge Agran from the cases would frustrate the apparent purpose of this Court’s Rule 384 order.**

Moving the consolidated MedPay cases away from Judge Agran would completely frustrate the evident reason for the Court’s Rule 384 order. The Appellate Court opined that “Rule 384 allows for a transfer because of common issues of fact or law, not because of the expertise of any particular trial judge.” 905 N.E.2d at 291. But that ignores the central purpose of Rule 384(a): this Court will transfer and consolidate multi-circuit actions *only* when that “would promote the just and efficient conduct of such actions.” S. Ct. R. 384(a).

In this case, the pre-existing MedPay cases had been pending before Judge Agran since 2005. State Farm’s Rule 384 motion argued that the Court should transfer *Bemis* and consolidate it with the State Farm MedPay cases already pending before Judge Agran

because Judge Agran “has had considerable experience in addressing the issues raised in *Snead*, *Jones*, and *Eavenson* and that experience will lead to the just and efficient handling of *Bemis*.” C53. In particular, we explained that in *Jones*, Judge Agran already addressed the same kind of workers compensation insurance policy at issue in *Bemis*: the judge had dismissed *Jones* with prejudice because “the benefits that a provider gets are to be determined by the [Workers’ Compensation] Commission,” not by a court. C43. In response to this showing, this Court granted the Rule 384 motion and ordered *Bemis* transferred and consolidated with the Cook County MedPay cases pending before Judge Agran. App. A15.

It is true that the Rule 384 order did not mention Judge Agran by name. But this Court ordered *Bemis* “consolidated with *Eavenson*...and *Snead*” (App. A15)—which were pending before Judge Agran. Thus, the Court’s order plainly did more than “merely transfer[] the case at bar from Madison County to Cook County,” as the Appellate Court thought. 905 N.E.2d at 291. Rather, when this Court consolidated *Bemis* with *Eavenson* and *Snead*, it necessarily assigned *Bemis* to Judge Agran. The Court did not need to say anything more specific to direct *Bemis* to Judge Agran. Even plaintiff recognized that transfer to Judge Agran was necessary “to effectuate” this Court’s Rule 384 order. Suppl. R. 72. (Indeed, plaintiff was so sure that the Rule 384 order assigned *Bemis* to Judge Agran that he filed his substitution of judge motion to strike Judge Agran well before Judge Kinnaird, the Presiding Judge of Cook County’s Chancery Division, actually transferred *Bemis* to Judge Agran. C62-63.) Allowing plaintiff and his counsel to use the substitution of judge statute to, instead, reassign *Bemis*, *Snead*, and *Eavenson* to another judge would countermand this Court’s transfer of *Bemis* to the judge already handling *Snead* and *Eavenson*.

More important, taking *Bemis* away from the judge who (a) has been presiding over the MedPay claims against State Farm entities since 2005, and (b) already has ruled on an issue in *Jones* that is virtually certain to be a dispositive issue in *Bemis*, would defeat the evident purpose of the Court’s order: to “promote the just and efficient conduct” of the MedPay cases. S. Ct. R. 384(a). Sending a transferred case to the judge who has been handling the related cases with which it will be consolidated maximizes fairness and judicial efficiency by eliminating duplicative proceedings and the possibility of conflicting rulings.

Here, the gains from litigating before Judge Agran are considerable. He has handled the cases for years, and he has already ruled in *Jones* on an issue that is dispositive in *Bemis*. Conversely, allowing plaintiff to force the reassignment of the consolidated cases away from the judge who has been handling them for several years would be disruptive and inefficient. App. A4 (Judge Agran: “I have put a lot of work into the case. It doesn’t make a whole lot of sense to me to move this down the road”). Indeed, because the Appellate Court’s ruling would result in the reassignment of *Snead* and *Eavenson* as well, it would interfere with the efficient resolution of those cases, too. As Judge Agran recognized, “there’s been a lot of work done on this case before me,” and “[m]oving [the case] to another judge” would “delay the case even further.” C74.

**2. The substitution of judge motion is part of a plan to evade this Court’s Rule 384 orders in the MedPay cases and find a judge more favorably disposed to plaintiffs’ claims.**

Plaintiff’s current substitution of judge motion is part of a larger plan to evade and undermine this Court’s multiple Rule 384 orders transferring the State Farm MedPay cases out of Madison County. The Rule 384 orders in *Siler*, *Eavenson*, *Jones*, and now *Bemis* make clear that this Court will not countenance the filing in Madison County of

similar MedPay class actions to circumvent pending litigation in Cook County. But plaintiff's counsel have refused to accept those orders. Instead, they have continued to file State Farm MedPay cases in Madison County. (Plaintiff's counsel admitted that they "fought tooth and nail to keep [*Bemis*] in Madison County." C121.) And when this Court transferred and consolidated those additional cases in Cook County pursuant to Rule 384, plaintiff's counsel filed substitution of judge motions to remove the judges who had issued rulings against plaintiffs in the consolidated cases—first, Judge Maki, and now, Judge Agran. In *Bemis*, plaintiff moved to remove Judge Agran even before the case was officially transferred to him following this Court's Rule 384 order. C62-63.

Unless this Court puts a stop to these tactics, State Farm will be "trapped on an unending treadmill." *Gibellina*, 127 Ill. 2d at 135. It is now clear that plaintiff's counsel are effectuating a careful plan to undermine this Court's long-time management of the MedPay cases—a plan that plaintiff's counsel will continue to execute until this Court ends it. Plaintiff's counsel will continue to file State Farm MedPay cases in Madison County, hoping for either of two outcomes: (1) this Court allows them to litigate in Madison County, or (2) if the Court continues to apply Rule 384 to transfer and consolidate the MedPay cases in Cook County, then plaintiff's counsel will use their "new" cases to force a substitution of judge in *all* of the consolidated cases—including cases in which plaintiffs have lost substantive rulings—until they find a judge who is receptive to their claims. (Because the MedPay cases are putative class actions, plaintiff's counsel should have little difficulty finding new plaintiffs.) Indeed, Judge Agran recognized that "this issue isn't going to go away because this issue is going to resurrect itself" (C157) and that plaintiff's counsel had a "game plan...to get before a judge who [they] feel is...sympathetic" (App. A3).

In short, plaintiff's counsel are exploiting the overlap between Rule 384 and section 2-1001 to override this Court's orders and effectively choose the judge presiding over the MedPay litigation. It certainly is not "just" (Rule 384(a)) to permit the plaintiff to use this overlap to remove a judge who has issued unfavorable rulings and attempt to find a judge more favorably inclined to plaintiff's claims.

Plaintiff's scheme also conflicts with the well-established principle that "a motion for substitution of judge may be denied if the movant had an opportunity to 'test the waters' and form an opinion as to the judge's reaction to her claim." *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (3d Dist. 2004). "A party is not free to 'judge shop' until he finds a jurist who is favorably disposed to his cause of action." *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 399 (1st Dist. 2002). In addition, when a judge has made rulings in a prior case, one cannot file a related case and then demand a substitution of judge. See *id.*; *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 247-48 (1st Dist. 2006). And because plaintiff's motion will result in the reassignment of *Snead* and *Eavenson*, too, plaintiff's counsel effectively have appropriated in those cases an additional "of right" substitution of judge that is not available under the statute. See 735 ILCS 5/2-1001(a)(2)(i), (ii).

Plaintiff's substitution of judge gambit further undermines this Court's Rule 384 orders by putting State Farm between the proverbial rock and a hard place. If State Farm insists on vindicating its right to have the cases transferred and consolidated under Rule 384, it will face the inevitable prospect that plaintiff's counsel will remove the judge who has been presiding over the consolidated MedPay cases, thereby forcing the parties to start over with a new judge. The only way State Farm could avoid that result would be to allow plaintiff's counsel to proceed with MedPay cases in both Madison County and Cook County, which would force State Farm (and the courts) to incur the unwarranted

costs and potential conflict of duplicative litigation. Either way, “the just and efficient conduct” (Rule 384(a)) of the cases that this Court apparently intended would be lost.

None of this is to say that section 2-1001 is unconstitutional on its face or that every substitution of judge after a Rule 384 transfer should be forbidden. A “for cause” substitution of judge obviously would not raise the same separation of powers issues. See 735 ILCS 5/2-1001(a)(3). Similarly, an “of right” motion that is filed before the judge who is presiding over the consolidated cases has spent substantial time managing the litigation, or before the judge has ruled on a substantial issue, would not undermine the “just and efficient” litigation purpose of the Rule 384 order. But here, plaintiff’s motion is part of a pattern of filings plainly calculated to undermine the series of Rule 384 orders that this Court has issued in the MedPay cases going back nearly a decade. Indeed, the violation of the separation of powers doctrine here is even greater than in *Baricevic*. There, plaintiff’s motions interfered with the chief circuit court judge’s judicial assignments. Here, plaintiff’s substitution of judge motion in *Bemis* is part of a plan to undermine a series of orders by *this Court*—including, specifically, the Court’s order consolidating *Bemis* with the MedPay cases already pending before Judge Agran.

\* \* \*

Plaintiff is attempting to interfere with this Court’s “power to administer and supervise the court system” (*Baricevic*, 136 Ill. 2d at 432) and its authority to “promote the just and efficient conduct” (Rule 384(a)) of the MedPay litigation. Because plaintiff’s substitution of judge motion is being “used...for unconstitutional purposes” (*Baricevic*, 136 Ill. 2d at 437) in defiance of this Court’s Rule 384 orders, the order granting plaintiff’s substitution of judge motion should be reversed.

## **II. The Appellate Court's Rationale And Plaintiff's Arguments Conflict With This Court's Precedent.**

The arguments advanced by the Appellate Court and the plaintiff as to why the substitution of judge motion should be granted do not withstand scrutiny.

1. Plaintiff and the Appellate Court seem to think that *Baricevic*'s principles apply only when a member of the executive branch (the State's Attorney in *Baricevic*) uses a statute to intrude upon judicial prerogatives. See PLA Answer at 5-6; 905 N.E.2d at 291-92. Not so. That happened to be the case in *Baricevic*, but this Court's precedent does not limit the separation of powers doctrine to that situation. Any time a statute is used to interfere with this Court's administrative authority, there is a separation of powers violation, regardless of the litigant's identity.

This Court's decisions make it clear that when a private litigant uses a statute to interfere with this Court's rules or orders, the separation of powers doctrine is violated because a legislative act is being used to undermine judicial prerogatives. For instance, in *O'Connell*, a private medical malpractice suit, this Court held that "sections 2-1009 [the voluntary dismissal statute] and 13-217 [permitting refiling within a year of voluntary dismissal], as invoked by plaintiff, unduly infringe upon this court's constitutional authority to regulate the judicial system of Illinois." 112 Ill. 2d at 281. The Court ruled that in the circumstances present there, those statutes unduly infringed "upon the judiciary as it seeks to discharge its duties fairly and expeditiously," and that a Rule 103 motion to dismiss for lack of diligence in serving the defendants had to be decided before a decision on a motion to voluntarily dismiss. *Id.* at 283. Likewise, in *Kunkel*, another private malpractice suit, the Court held that a statute requiring personal injury plaintiffs to disclose their medical records violated separation of powers and "encroach[ed] on this

court's paramount authority to regulate judicial procedure by court rule." 179 Ill. 2d at 530. And in *Gibellina*, the Court held, in suits involving private litigants, that because of plaintiffs' "abusive use of the voluntary dismissal statute," which "infring[ed] on the authority of the judiciary to discharge its duties fairly and expeditiously," dispositive motions may be ruled on before ruling on a subsequently filed voluntary dismissal motion. 127 Ill. 2d at 137-38. In short, this Court has never limited the separation of powers doctrine to cases involving the executive branch—the Court has repeatedly applied that doctrine in cases involving only private litigants.<sup>3</sup>

*In re Dominique F.*, 145 Ill. 2d 311 (1991), which plaintiff has relied on (PLA Answer at 5, 8), is not contrary to this line of cases. *Dominique F.* nowhere says or indicates that the separation of powers doctrine does not apply in cases involving private litigants. In that case, the Cook County public guardian sought a change of venue based on the trial judge's prejudice. The Court held that the separation of powers doctrine did not apply there because "the public guardian is both appointed and removed by the chief judge of the circuit court" and thus is "considered to be an arm of the judicial branch"—the judiciary cannot interfere with itself. 145 Ill. 2d at 323. Moreover, because the public guardian was appointed by the court and is a judicial officer, any abuse of the change-of-venue provision "can be dealt with swiftly and effectively by other means." *Id.* at 321. That is not true here: plaintiff's counsel are not judicial officers; the only way to deal with their misuse of section 2-1001 is to apply the separation of powers doctrine and bar them from using the statute to undermine this Court's Rule 384 order.

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<sup>3</sup> A simple example confirms the point. If a statute permitted petitions for leave to appeal to this Court to be filed within one year after an appellate court decision, it would violate the separation of powers doctrine because it would be contrary to Rule 315(b). The identity of the petitioner attempting to use the statute would not matter.

2. The Appellate Court declined to apply this Court’s decision in *O’Connell* because that case involved two provisions not at issue here (Rule 103(b) and section 13-217) and “*O’Connell* is to be ‘read and applied narrowly,’ because a ‘general sense of unease with the particular results under the dismissal statute is not necessarily the same as an infringement on [the supreme court’s] supervisory authority.’” 905 N.E.2d at 292 (quoting *Gibellina*, 127 Ill. 2d at 133) (brackets added by the Appellate Court). But this case *does* involve “‘an infringement on [the supreme court’s] supervisory authority’”—plaintiff has used section 2-1001 in a way that undermines this Court’s Rule 384 transfer order.

Moreover, cases finding separation of powers violations are not made irrelevant simply because they did not involve the same facts as this case. This Court has never limited constitutional principles to the exact circumstances present in existing precedent. The truth of the matter is that there are only two possible legal rules: either a private litigant can use section 2-1001 to force a reassignment that conflicts with a Rule 384 order, or he cannot. The assertion accepted by the Appellate Court that plaintiff has an “absolute” right (905 N.E.2d at 290) to use section 2-1001 in that fashion is plainly wrong, for it would undermine this Court’s power to administer and supervise the court system, contrary to the principle that “‘the legislature is without authority to interfere with a product of this court’s supervisory and administrative responsibility.’” *Kunkel*, 179 Ill. 2d at 529. See also *Baricevic*, 136 Ill. 2d at 432-41 (creating an exception to an otherwise absolute right to substitution of judge). Conversely, if, as we contend, the separation of powers doctrine prohibits such abuse of the substitution of judge statute, then plaintiff’s attempt to remove Judge Agran conflicts with this Court’s direction that *Bemis* be consolidated with cases pending before Judge Agran, evidently to facilitate the

“just and efficient conduct” (Rule 384(a)) of the MedPay litigation.

For all of these reasons, the principles this Court established in prior separation of powers cases apply here—and those cases make clear that this Court can and should prohibit a misuse of a purported statutory right that interferes with this Court’s orders.

3. Plaintiff has asserted that the separation of powers doctrine applies only when a statute, on its face, conflicts directly with one of this Court’s rules. PLA Answer at 11. That is not correct. In *O’Connell*, this Court held that statutory provisions, “*as invoked by plaintiff,*” to dismiss and refile a suit in order to circumvent Rule 103 (requiring prompt service of process) infringed on the Court’s authority to regulate the judicial system. 112 Ill. 2d at 281-83 (emphasis added). In *Muskat*, the Court reaffirmed that “this court may not be thwarted in its constitutional mandate to render justice fairly and promptly by the *manipulation of the statutory provisions* relating to dismissal and the refiling of suits.” 122 Ill. 2d at 48 (emphasis added). And in *Gibellina*, the Court ruled that plaintiffs’ “*abusive use of the voluntary dismissal statute*” was “infringing on the authority of the judiciary.” 127 Ill. 2d at 137-38 (emphasis added). See also *Baricevic*, 136 Ill. 2d at 435, 437 (deciding that a substitution of judge statute that “is constitutional” may be “used...for unconstitutional purposes” in violation of separation of powers).

The statutes at issue in those cases, on their faces, did not violate separation of powers; in most circumstances, a plaintiff could exercise his or her statutory rights without constitutional objection. Instead, the separation of powers violations arose from the plaintiff’s *abuse* of the statutory right. So too here: we have never claimed that section 2-1001 is unconstitutional on its face; rather, there is a separation of powers violation on the facts here because plaintiff has used that statute to undermine and effectively evade this Court’s Rule 384 order in this case.

Even if a direct statutory conflict were needed to find a separation of powers violation, that conflict is present here. As we have shown, the Court’s Rule 384 order assigned *Bemis* to Judge Agran by consolidating the case with other cases already pending before him. Yet the Appellate Court permits the plaintiff to use the substitution of judge statute to take *Bemis* away from Judge Agran. That creates a direct and irreconcilable conflict between the Rule 384 order and the statute.

4. Plaintiff’s argument below that, unlike the *Baricevic* prosecutor, he has not tried to control the assignment of judges is belied by the facts. Plaintiff’s counsel’s campaign to secure a judge sympathetic to their MedPay claims interferes with judicial administration at least as much as the efforts of the *Baricevic* prosecutor to strike and otherwise remove Judge Wharton from the felony docket. On four occasions over eight years, plaintiff’s lawyers filed suit in Madison County even though similar litigation was already pending in Cook County. And after this Court transferred all of the cases for consolidation with the Cook County litigation, plaintiff’s lawyers have twice moved to strike the Cook County judges presiding over the consolidated litigation—after those judges had issued significant rulings against the plaintiffs. This “game plan” (App. A3) does even more harm to judicial prerogatives than the abuses of the *Baricevic* prosecutor, who struck only Judge Wharton. Plaintiff’s lawyers, by contrast, have shown that they will strike any judge not sympathetic to their cause and keep doing so until they get a judge they want.

5. Plaintiff has asserted that *Bemis* was in Judge Agran’s court because of Cook County’s case assignment procedures, not this Court’s Rule 384 order. PLA Answer at 4. Nonsense. This Court ordered *Bemis* consolidated with *Snead* and *Eavenson*, which were pending before Judge Agran. Given that order, Cook County was *required* to assign

*Bemis* to Judge Agran—circuit court assignment procedures are “[s]ubject to the authority of the Supreme Court.” Ill. Const. art. VI, § 7(c); see also *id.* art. VI, § 16 (“General administrative and supervisory authority over all courts is vested in the Supreme Court”); *Blair v. Mackoff*, 284 Ill. App. 3d 836, 842 (1st Dist. 1996) (the power of a Circuit Court’s Chief Judge to assign judges is “[s]ubject to the authority of the Supreme Court”). Plaintiff himself acknowledged this at the time: plaintiff asked Judge Kinnaird to send *Bemis* (and his substitution of judge motion) to Judge Agran “to effectuate” this Court’s Rule 384 order. Suppl. R. 72.

6. Finally, plaintiff has argued that *Bemis* involves claims that are different from those present in *Snead* and *Eavenson*. PLA Answer at 1. Plaintiff made the same argument at much greater length when opposing State Farm’s Rule 384 motion in *Bemis* (Supp. R. 56, 59-62), and this Court’s subsequent Rule 384 order conclusively (albeit implicitly) rejected plaintiff’s position. Plaintiffs lost this argument more than two years ago; since the Court’s June 2007 Rule 384 order, it has been the law of the case that *Bemis*, *Snead*, and *Eavenson* involve common legal and/or factual issues.

## **CONCLUSION**

Plaintiff’s counsel’s scheme—repeatedly filing MedPay class actions against State Farm in Madison County, intending to either secure a Madison County forum or use each “new” case transferred to Cook County as a means to remove any judge who has ruled against them in the consolidated litigation—violates the separation of powers doctrine. Plaintiff’s use of the substitution of judge statute directly undermines this Court’s Rule 384 order in this case and its evident goal of promoting “just and efficient” litigation. It is the opposite of efficient to allow plaintiff and his counsel to force reassignment of the MedPay cases after Judge Agran has presided over them for years

and made rulings directly applicable to plaintiff's case. And it is the opposite of just to allow plaintiff's counsel to carry out a plan to remove any judge who has made rulings against plaintiffs. State Farm therefore respectfully requests that this Court reverse the order granting plaintiff's motion for substitution of judge and order that the consolidated cases continue before Judge Agran.

August 3, 2009

Respectfully submitted,

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# **APPENDIX**

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**CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 27 pages.

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Nissa J. Imbrock

## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on August 3, 2009, she caused three copies of the foregoing Brief of Defendant-Appellant State Farm Fire & Casualty Company to be placed with the U.S. Postal Service, proper postage prepaid, for first-class mail delivery to the following, and also e-mailed a courtesy copy of the foregoing Brief to the following:

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