Relief from the Waiver/Forfeiture Rule: *Hux v. Raben* and its Progeny

by Bruce R. Pfaff

When is an Issue Waived or Forfeited?

A careful lawyer might answer "when the party fails to properly raise the issue in the trial court." That would be wrong. Due to the expansionistic views that some courts have shown in civil litigation, the correct answer can be "only when the reviewing court does not want to decide the underlying question." Some lawyers perceive that reviewing courts arbitrarily choose to call an issue waived or not. Relieving a party from waiver or forfeiture in a civil case is unfortunate. A correct reading of the genesis of all these decisions in Illinois shows that the *Hux* doctrine has no substantive foundation in civil litigation and should be abolished.[1]

The Difference Between Waiver and Forfeiture in Criminal Cases

> "Waiver is different from forfeiture. Whereas 'forfeiture' is the failure to make the timely assertion of the right, waiver is the 'intentional relinquishment or abandonment of a known right."[2]

Illinois cases accept this definitional distinction.[3]

Federal Rule of Criminal Procedure 52(b) gives reviewing courts a limited power to correct errors that were forfeited—only in those cases where the error is "plain" and it "affects substantial rights." That rule does not authorize a reviewing court to review errors that have been waived because once there is a valid waiver there can be no "error" to correct concerning the issue.[4]

Illinois Supreme Court Rule 615(a) dealing with criminal cases states "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

In civil cases, some courts have cited Supreme Court Rule 366(a)(5) "…the reviewing court may … enter any judgment and make any order that ought to have been given or made, or make any other and further orders and grant any relief… that the case may require" but that rule does not specifically authorize relief from waiver/forfeiture.

Waiver/Forfeiture Doctrine in Civil Cases

"A party cannot complain of an error which he induced the [trial] court to make or to which he consented."[5] A party who fails to object to proffered evidence waives any argument that it should have been admitted.[6] A party that fails to tender a jury instruction correctly stating the law on a given subject waives any claim that the jury was improperly instructed on that issue.[7] A party who fails to object during closing argument to an improper comment waives the issue.[8] A party that fails to object to misconduct of opposing counsel waives the issue.[9] A party who fails to raise an issue in its post-trial motion waives that issue for appeal.[10] A party who fails to raise an issue in its petition for leave to appeal waives that issue for purposes of appeal.[11]

Underlying these cases is the rational idea that a party does not get a mulligan just because the case is moved to a different court. There must be finality for the court system to work and to have the public's confidence. The trip to a reviewing court is not a chance to re-litigate the entire case. Perhaps the author's primary job as a trial lawyer biases him, but isn't the purpose of an appeal to decide whether the trial court gave the losing party a fair trial?

The trial judge *responds* to the issues raised by the parties. The judges rule on objections made; they do not rule absent objections. They do not make objections for the party. The party may not want to object for tactical reasons, and it would be wrong for the judge to stand in the way of a party's lawful trial strategy. Or the party may be represented by a lawyer who is deficient in some ways—and it would be wrong for the trial court to excuse waiver or forfeiture for that reason also.

***Hux v. Raben* - The Expansive Language**

From *Hux,* Illinois jurisprudence gained the phrase "[waiver] states an admonition to the parties, not a limitation upon the jurisdiction of the reviewing court….the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system."[12] To many careful practitioners, those words are like nails on a blackboard. What did the court cite for this expansionistic view of appellate review? Two law review articles and one book review. *Rentways*[13] was cited as a limitation on the expansionistic view. The *Hux* court made a very long reach and one that causes unfairness to civil litigants who try their case fairly.

***Hux* - The Case**

The language that has spawned many decisions excusing waiver was not necessary to the *Hux* decision—it was *dicta*. A purchaser of land sued the seller for specific performance. The trial court directed the defendant to execute a deed in favor of plaintiff. The appellate court reversed finding "the contract itself was not sufficiently definite and certain to support a decree of specific performance."[14] The Illinois Supreme Court affirmed. It held:

> Our examination of the briefs in the appellate court satisfies us that the adequacy of the contract to support a decree of specific performance was challenged in that court. The purchasers do not now argue that the contract was sufficiently definite. The judgment of the appellate court must therefore be affirmed.[15]

If that is as far as the published decision went, no one would ever cite *Hux*. Unfortunately, the court did not end its decision there. The opinion went on:

> These provisions recognize that the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system.[16] There are limitations. '(A)n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.'[17]

Rentways, Inc.*, the only case relied on by *Hux

It would be hard for anyone to object to the decision in *Rentways*.[18] Parties to a contract brought their disagreement to court. The crux of the dispute was its construction—did the time period in the contract run from this date or that? The parties took differing views on that question. The court of appeal decided neither party was right -- it decided that the contract ran from a different date. In so holding, the court held that the appellate division was not limited to the opposing constructions of the written contract urged at trial by the parties.

What is the Standard for Waiver/ Forfeiture?

Under *Hux,* a litigant who waived or forfeited an issue in the trial court has these arguments to excuse himself (or his trial counsel) from waiver/ forfeiture:

- "the responsibility for a just result" or
- "the maintenance of a sound and uniform body of precedent"

One should ask, "what is a just result?" Isn't that the result compelled by the application of legal precedent to the facts of the case? If we were to say that the *Hux dicta* are precedent, how does it square with the hundreds of cases describing waiver and forfeiture? If a party forfeits a point, why should the reviewing court take that party's side and relieve him from forfeiture?

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Why does deciding an issue that had been waived below assist in maintaining "a sound and uniform body of precedent?" By ignoring the law on waiver and forfeiture, the court creates an unsound and disparate body of precedent on waiver and forfeiture. Cases after *Hux* do not identify meaningful criteria for deciding whether the *Hux dicta* or the waiver/forfeiture rules should apply.

Hux Mischief

A perfect example of the mischief the *Hux* doctrine can cause is found in *Dillon*.[19] Most tort lawyers know the case because it established that a plaintiff may be entitled to damages for the increased risk of a future injury that has a less than 50 percent likelihood to occur. The defendants at trial challenged plaintiff's right to such damages, but the trial court rejected that argument. Plaintiff tendered a jury instruction allowing for her to obtain damages for increased risk. The defendants did not object to the form of the instruction. The defendants did not tender their own form of instruction on that issue.[20] The jury found for the plaintiff. The supreme court held that the plaintiff was entitled to increased risk damages but found the instruction incomplete and reversed the case solely for retrial on that specific damages issue.[21] Justice Fitzgerald dissented, calling the majority to task for relieving defendants of their waiver:

> If the defendants in this case believed that the wording in the instruction on damages was incorrect, incomplete, or otherwise inadequate, it was their duty to object to that instruction and to offer their own remedial versions.[22] They did not do so. In the trial court, defendants' objection was that the issue of increased risk of future injuries should not be presented to the jury at all. Defendants did not take issue with the way that issue was set forth in the instruction tendered by plaintiff, and defense counsel declined an express invitation by the trial judge to propose alternative language. Under these circumstances, any claim of error with respect to the wording of the instruction has been waived.[23]

There are very strong practical reasons why courts should follow Justice Fitzgerald's view rather than the majority's view. If defendants made a specific objection to the form of plaintiff's instruction, plaintiff may have cured the claimed defect. If defendants disagreed with plaintiff's instruction, they should have tendered their own instruction, giving the trial judge a choice. In that setting, the plaintiff may have withdrawn his and accepted defendants' instruction in the hopes of having one less issue for appeal. Or the trial judge might well have chosen defendants' version if given the chance. By sitting mute in the face of plaintiff's instruction, defendants acquiesced to the error and should not have been heard to complain on appeal.[24]

Hux Hilarity

A decision in late 2012 shows what can happen when a court tries to apply a doctrine that is intellectually bankrupt:

> One of the basic principles in our forfeiture jurisprudence is that a party can forfeit the argument of forfeiture by failing to argue it in its brief: that is, forfeiture as a point of argument may, itself, be forfeited. That is what happened here. Jackson did not argue in her brief that Earls failed to include the request for a "post-April 5" special election in her petition for leave to appeal. As such, Jackson has forfeited the opportunity to claim forfeiture.[25] Nor did Jackson argue in her brief that Earls' brief had violated Rule 341(h)(7) or otherwise seek sanctions for the violation. The court overlooks Jackson's own forfeiture of forfeiture, and instead raises the issue on its own. I address each of the court's points in turn.[26]

Conclusion

Where the reader stands on the topic of this article might be best shown by answering these four questions:

- Is the purpose of appellate review to examine whether the trial court made prejudicial errors?
- Is the purpose of appellate review to decide whether the trial court treated the losing party fairly?
- Is the purpose of appellate review to allow the losing party to re-litigate the case and make new objections in the hopes of persuading the reviewing court that it should not have lost the trial?
- Is the purpose of appellate review to allow the justices to decide how the case should have come out at trial?

The third and fourth options do a disservice to our system. Lawyers, jurors and judges who try cases deserve that their efforts have meaning and finality. Unwinding verdicts on appeal when proper objections have not been made gives the losing party two bites at the apple: he sat by silently expecting his failure to object to play well with the jury, and when that fails, he can try to persuade the reviewing court that the claimed error to which he acquiesced warrants reversal. A party should live with the consequences of the choices it makes at trial and should not be permitted a second bite at the apple.

Relief from waiver or forfeiture in civil cases does a disservice to trial lawyers, judges and jurors who present and decide cases based on what is before them. *Hux* allows the losing party to change the rules of the game on appeal. The only legitimate reason to relieve a party from waiver/forfeiture should be in the criminal arena to protect a defendant from plain error. That very narrow exception has

no place in civil litigation, and our courts should recognize that. *Hux* is mere *dicta*, and it should be disavowed by our supreme court.

Endnotes

[1] *Hux v. Raben*, 38 Ill. 2d 223, 224-225 (1967).

[2] *U.S. v. Olano*, 507 U.S. 725, 733 (1993) cited in *People v. Blair*, 215 Ill. 2d 465 n. 2.

[3] *People v. Blair*, *Id.*

[4] *U.S. v. Cooper*, 243 F. 3d 411, 415 (7th Cir. 2001).

[5] *Meyers v. Woods*, 374 Ill. App. 3d 440, 448 (3rd Dist. 2007), citing *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000).

[6] *Green v. Univ. of Chicago Hospitals & Clinics*, 258 Ill. App. 3d 536, 541-542 (1st Dist. 1994).

[7] *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 549-550 (1984).

[8] *Pharr v. Chicago Transit Auth.*, 220 Ill. App. 3d 509, 515 (1st Dist. 1991).

[9] *Webb. v. Angell*, 155 Ill. App. 3d 848, 852 (2nd Dist. 1987).

[10] *Pharr v. Chicago Transit Authority*, *supra* ("a party cannot sit on his hands and let perceived errors into the record and complain of those errors for the first time in a post-trial motion.").

[11] Supreme Court Rule 341(h)(7).

[12] *Hux v. Raben*, 38 Ill. 2d 223, 224-225 (1967).

[13] *Rentways v. O'Neill Milk & Cream Co.*, 308 N.Y. 342 (1955).

[14] *Hux*, *supra* at 224.

[15] *Hux*, *supra* at 224-225 (1967).

[16] Friendly, Review of Llewellyn, The Common Law Tradition, 109 U. of Pa. L. Review 1040; Vestal, *Sua Sponte* Consideration in Appellate Review, 27 Fordham L.R. 477; 64 Harv.L.R. 652.

[17] *Rentways, Inc.*, *supra. Hux*, *supra* at 225.

[18] *Rentways, supra.*

[19] *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002).

[20] *Dillon, supra* at 509-510.

[21] *Dillon, supra* at 508.

[22] *Deal v. Byford*, 127 Ill. 2d 192, 203 (1989).

[23] *Diaz v. Chicago Transit Authority*, 174 Ill. App. 3d 396, 401–02 (1988); *Dillon, supra* at 509- 510.

[24] "As officers of the court, counsel have a duty to cooperate with the trial judge to the end that the jury may be properly instructed. Enlightened trial practice does not permit counsel under the guise of trial strategy to sit idly by and permit instructions to be given the jury without specific objection and then be given the advantage of predicating error thereon by urging the error for the first time in a post-trial motion." *Onderisin v. Elgin, J. & E. Ry. Co.*, 20 Ill. App. 2d 73, 77-78 (2nd Dist. 1959) cited by *Saunders v. Schultz*, 20 Ill. 2d 301, 314 (1960).

[25] *People v. De La Paz*, 204 Ill. 2d 426, 433, (2003) (and cases cited therein).

[26] *Jackson v. Bd. of Election Com'rs of City of Chicago*, 2012 IL 111928 ¶ 63.

Bruce R. Pfaff *heads Pfaff, Gill & Ports, Ltd., a four-lawyer plaintiff's firm in Chicago. He is a trial lawyer who also does appeals in product liability, medical negligence, and general negligence claims.*

Bruce was named one of the Top 10 Illinois Personal Injury Lawyers for 2013 by Leading Lawyers and as one of the Top 10 Illinois Lawyers for 2011 by Superlawyers. He was also named Chicago's Product Liability Litigator of the Year for 2011.

Bruce has chaired ITLA's Amicus Curiae Committee since 1994.

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