2014 CASE REPORT

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To the Honorable Members of the General Assembly:

This is the Legislative Reference Bureau's annual review of decisions of the Federal Courts, the Illinois Supreme Court, and the Illinois Appellate Court, as required by Section 5.05 of the Legislative Reference Bureau Act, 25 ILCS 135/5.05.

The Bureau's attorneys screened all court decisions and prepared the individual case summaries. Beginning in January 2015, a cumulative report of statutes held unconstitutional, prepared by the Bureau's staff attorneys and externs under the guidance of the Editorial Board and formerly included as an appendix to this publication, will be available on the Bureau's website.

Respectfully submitted,

James W. Dodge
Executive Director

INTRODUCTION

This 2014 Case Report contains summaries of recent court decisions and is based on a review, in the summer and fall, of federal court, Illinois Supreme Court, and Illinois Appellate Court decisions published from the summer of 2013 to the summer of 2014.

Beginning in January 2015, the information which previously appeared in this publication as Parts 2 and 3 of the Case Report will be located online and available through the Legislative Reference Bureau website, http://ilga.gov/commission/lrb_home.html.

QUICK GUIDE TO RECENT COURT DECISIONS

* Effective January 1, 2013, the Criminal Code of 1961 was renamed the Criminal Code of 2012 by P.A. 97-1108. This Case Report uses "Criminal Code of 2012" in all instances. A conversion table for the Criminal Code re-write can be found online at http://ilga.gov/commission/lrb/Criminal-Code-Rewrite-Conversion-Tables.pdf

SUMMARIES OF RECENT COURT DECISIONS

FREEDOM OF INFORMATION ACT – STATE'S ATTORNEYS

The office of the State's Attorney is an executive body of the State and is therefore a "public body" subject to the provisions of the Act.

In *Nelson v. Kendall County*, 2014 IL 116303, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the office of the State's Attorney was outside the definition of "public body" as defined in Section 2 of the Freedom of Information Act (5 ILCS 140/2 (West 2010)) and therefore not required to disclose public records under the Act. Section 2 defines "public body" as "all legislative, executive, administrative, or advisory bodies of the State . . . ." The defendant argued that it was exempt from the disclosure requirements of the Act because judicial bodies are excluded from the definition of "public body," and State's Attorneys are judicial bodies because they are discussed in Section 19 of the Judicial Article of the Illinois Constitution (ILL. CONST. art. VI, § 19), rather than the Executive Article (ILL. CONST. art. V). The plaintiff, however, argued that under Illinois law, the State's Attorney is an executive rather than a judicial officer. The Illinois Supreme Court agreed with the plaintiff, overturning the decision of the appellate court and holding that the General Assembly intended for State's Attorney offices to fall within the Act's definition of "public body." The court reasoned that the placement in the Judicial Article rather than the Executive Article of the Illinois Constitution of provisions concerning State's Attorney selection, qualifications, and compensation did not mean that State's Attorneys are in any way part of the judiciary, but rather that they are not subject to the particular Executive Article provisions governing changes in compensation. The court referenced a "substantial and well-established body of case law" holding that State's Attorneys exercise executive powers as part of the executive branch of State government, and questioned whether the General Assembly has the authority to expand the definition of the judiciary without contravening the provisions of the Judicial Article or violating principles of separation of powers. The court concluded by noting that "[n]othing in the text of the Act suggests that when the legislature imposed a duty of disclosure on executive bodies of State government, it meant anything other than the established and generally-recognized meaning of that term, which included the office of State's Attorney."

ILLINOIS PUBLIC LABOR RELATIONS ACT – PUBLIC EMPLOYEE

A provision expanding the definition of "public employee" to include peace officers employed by a school district in its own police department in existence on July 23, 2010 is unconstitutional as special legislation.

In *Board of Education of Peoria School District No. 150 v. Peoria Federation Support Staff, Security/Policeman's Benevolent and Protective Association Unit No. 114*, 2013 IL 114853, the Illinois Supreme Court was asked to determine whether Public Act 96-1257, effective July 23, 2010, constituted special legislation when it redefined "public employee" under Section 3 of the Illinois Public Labor Relations Act (5 ILCS 315/3 (West 2010)) to include peace officers employed by a school district "in its own police department in existence on the effective date of this amendatory Act." Under the special legislation clause of the Illinois Constitution (ILL. CONST. art. IV, § 13), "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable." The plaintiff argued that the statutory amendment under Public Act 96-1257 was unconstitutional as special legislation because it "only applies to a school district, [namely the plaintiff], which employs peace officers in its own police department in existence on the effective date of the amendment [and consequently will] never apply to any school district, which may, after the effective date of the amendment, decide to employ peace officers in its own police department." Such a classification, the plaintiff asserted, is "arbitrary and treats similarly situated individuals and districts differently without an adequate justification or connection to the purpose of the statute." The defendants countered that the language of the amendment "supported a prospective application" and that the classification does not constitute improper special legislation because "classes of one are permissible if there is a rational justification for the limited application, and the narrow classification is reasonably related to the justification." In finding the statutory amendment unconstitutional as special legislation, the Illinois Supreme Court conceded that "[n]othing in the constitution bars the legislature from enacting a law specifically addressing the conditions of an entity that is uniquely situated." However, when a law affects a generic class of persons or entities "with attributes that are in no sense unique or unlikely of repetition in the future," absent some rational basis for doing so, the General Assembly cannot limit the law's application "by a date restriction that closes that class as of the statute's effective date [thereby making the law inapplicable] to a person or entity who assumed those attributes or characteristics the day after the statute's effective date." In the instant case, the court found that the statutory amendment under Public Act 96-1257 affects a generic class of entities—school districts that employ peace officers in their own police department—and yet it only applies to those

school districts that employ peace officers in their own police department *in existence on the effective date of the amendment* and not to those school districts that might chose, *after* the amendment's effective date, to employ peace officers in their own police department. The court held that such limited application was unconstitutional because "a general law could have been enacted that would have affected what is, and henceforth would be, a generic class of individuals." The court also rejected the defendant's assertion that the amendment's language "applies prospectively to school districts that may, in the future, employ peace officers in their own police department," noting that, in previous cases, the court had interpreted similar language as "restrictive, closing the affected class as of the effective date of the statute." The court furthermore found no rational basis to distinguish between those school districts that employed peace officers in their own police department on the effective date of the amendment and those school districts that might employ peace officers in their own police department at some future date.

ILLINOIS PUBLIC LABOR RELATIONS ACT – SECURITY EMPLOYEES

Supervisors at a juvenile detention center do not have rights to interest arbitration as "security employees" because juvenile detention centers are not considered "correctional facilities."

In *Metropolitan Alliance of Police, River Valley Detention Center, Chapter 288 v. Illinois Labor Relations Board*, 2013 IL App (3d) 120308, the Illinois Appellate Court was asked to decide whether the defendant Illinois Labor Relations Board erred when it affirmed the administrative law judge's dismissal of the plaintiff's unfair labor practice charge against the defendant on the basis that the River Valley Juvenile Detention Center ("Center") was not a "correctional facility," and therefore supervisors employed at the Center were not "security employees" under the Illinois Public Labor Relations Act. Subsection (a) of Section 14 of the Act (5 ILCS 315/14(a) (West 2010)) provides that "security employees of a public employer" have the right to interest arbitration. The Act defines "security employee" as "an employee who is responsible for the supervision and control of inmates at correctional facilities." (5 ILCS 315/3(p) (West 2010)). The Act, however, does not define "correctional facility." The plaintiff, a labor union representing supervisors at the Center, argued that the Center's supervisors were security employees entitled to interest arbitration because a juvenile detention center is a "correctional facility." The plaintiff defined "correctional facility" as "a term that may be used to refer to a jail, prison, or other place of incarceration by government officials. They serve to confine and rehabilitate prisoners . . . ." The defendant argued that the Center is not a correctional facility and that its employees are probation officers, not security employees entitled to interest arbitration. The administrative law judge dismissed the plaintiff's claim by

distinguishing committed juveniles from detained juveniles for the purposes of determining what qualifies as a "correctional facility." The residents at a juvenile detention center are detained as they await adjudication of the charges against them, and they have not been found delinquent or sentenced to a term of incarceration. In contrast, the residents at a correctional facility are in the State's custody after a judicial determination based on delinquency or conviction has been made. The court agreed with the administrative law judge and held that the juvenile detention center is not a correctional facility for purposes of the Illinois Public Labor Relations Act. The court further reasoned that this decision followed the policy of the General Assembly separating the Department of Juvenile Justice from the Illinois Department of Corrections and requiring that security employees work at "correctional facilities" as opposed to "detention homes."

ILLINOIS PUBLIC LABOR RELATIONS ACT – FAIR SHARE FEES

Provision requiring "personal assistants" providing home care services to pay fair share fees to a State employees' union that they do not wish to join or support violates the First Amendment.

In *Harris v. Quinn*, 134 S.Ct. 2618, the Supreme Court of the United States decided whether the United States Court of Appeals erred when it held that the First Amendment of the United States Constitution (U.S. CONST. amend. I) permits a State to compel personal care providers, who are reimbursed with State Medicaid funds, to pay fair share fees to a State employees' union that they do not wish to join or support. Subsection (e) of Section 6 of the Illinois Public Labor Relations Act (5 ILCS 315/6(e) (West 2013)) contains a "fair share" provision which provides that "[w]hen a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the cost of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment . . . ." The plaintiff argued that Section 6 violates the First Amendment insofar as it requires personal assistants who provide homecare services to pay a fee to a union that they do not wish to support. Conversely, the defendant argued that the fair share fee provision was constitutional, relying on *Abood v. Detroit Board of Education*, 97 S.Ct. 1782, in which the Court upheld fair share fees based on the desirability of "labor peace" and the problem of "free ridership." The Court agreed with the plaintiff, refusing to extend *Abood* to the present situation, and held that the First Amendment does not permit a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support. The Court determined that Illinois personal assistants that provide homecare services are not full-fledged public employees for purposes of Section 6. The Court reasoned that personal assistants are almost always entirely answerable to the customers and not to the State, do not enjoy most of the rights and benefits available to State employees, are not indemnified by the State for claims against

them arising from actions taken during the course of their employment, and the scope of collective bargaining on their behalf is sharply limited. Because *Abood* was not applied, the Court stated that the fair share provision must serve a "compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms." The Court found that none of the interests offered by the defendants were sufficiently furthered by the fair share provision and thus, the provision was found to be an unconstitutional burden on the plaintiff's First Amendment rights.

STATE EMPLOYEES GROUP INSURANCE ACT OF 1971 – STATE CONTRIBUTIONS TO RETIREE HEALTH CARE BENEFITS

The pension protection clause of the Illinois Constitution applies to the State's contributions to the group health benefits of retirees of certain State-funded retirement systems.

In *Kanerva v. Weems*, 2014 IL 115811, the Illinois Supreme Court was asked to decide whether the circuit court erred when it held that State contributions to the group health benefits of retired members of certain State retirement systems are not a pension benefit for the purposes of the pension protection clause of the Illinois Constitution (ILL. CONST. art. XIII, § 5). The pension protection clause of the Illinois Constitution provides that "membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Prior to Public Act 97-695, Section 10 of the State Employees Group Insurance Act of 1971 (5 ILCS 375/10 (West 2012)) provided a formula for determining the State's contributions toward the basic program of group health benefits for retirees of the State Employees' Retirement System, the State Universities Retirement System, and the Teachers' Retirement System of the State of Illinois. Public Act 97-695 amended Section 10 by removing the formula and, instead, requiring the Director of Central Management Services to annually determine, subject to certain constraints, the amount of the State's contribution to the retiree's group health benefits. The changes made to Section 10 by Public Act 97-695 applied both to existing retirees and future retirees. The plaintiffs argued that the State's contribution toward the health benefits of those who are retired on the effective date of Public Act 97-695 cannot be diminished or impaired because the contributions are a benefit of participation in a pension system. The defendants argued that the pension protection clause does not apply to the contributions, and therefore may be diminished or impaired because the provisions authorizing the contributions are not codified in the Illinois Pension Code, are not paid from the assets of the fund, and are fundamentally different from pension annuities. The court agreed with the plaintiffs and held that the pension protection clause applies to the State's contributions to the group

health benefits of retirees. The court reasoned that the State's contributions to the group health benefits of retirees are "limited to, conditioned on, and [flow] directly from membership in one of the State's various public pension systems." The court further reasoned that the floor debate at the 1970 Constitutional Convention concerning the pension protection clause indicated that the intent of the clause is to protect "the right to receive the promised retirement benefits, not the adequacy of funding to pay for them." The court remanded the case for further proceedings. A dissenting opinion argued that the plain language of the term "pension" supports the argument that the pension protection clause protects only the annuities paid to members of the retirement system. The dissenting opinion also noted that there was no discussion of non-pension benefits for retirees during the constitutional floor debates concerning the pension protection clause.

USE TAX ACT – INTERNET

Changes made by Public Act 96-1544, making the Act applicable to retailers and servicemen who contract with certain internet affiliates, are preempted by federal law.

In *Performance Marketing Association v. Hamer*, 2013 IL 114496, the Illinois Supreme Court was asked to decide whether the circuit court erred when it determined that portions of Public Act 96-1544, amending Section 2 of the Use Tax Act (35 ILCS 105/2 (West 2010)) and Section 2 of the Service Use Tax Act (35 ILCS 110/2 (West 2010)), were preempted by the federal Internet Tax Freedom Act (ITFA) and violated the commerce clause of the United States Constitution (U.S. CONST. art. I, §8). Public Act 96-1544 provided that the terms "retailer maintaining a place of business in this State" and "serviceman maintaining a place of business in this State" include retailers and servicemen who contract with an internet affiliate that has a physical presence in Illinois to place links on the affiliate's website for the purpose of soliciting customers. ITFA prohibits a state from imposing "discriminatory taxes on electronic commerce." The plaintiff argued that Public Act 96-1544 creates such a discriminatory tax because it imposes a tax collection obligation on out-of-state internet retailers, but it does not impose a similar obligation on out-of-state retailers who enter into performance marketing contracts with "offline" entities such as print newspapers or radio broadcasters. The defendant argued that Public Act 96-1544 is not discriminatory because there are other statutory provisions that impose tax collection obligations on retailers and servicemen who engage in offline performance marketing. The Illinois Supreme Court agreed with the plaintiff and held that the provisions of the Public Act were preempted by ITFA. The court reasoned that the current statutory provisions governing offline advertising impose a tax collection requirement only if the advertising is "disseminated primarily to consumers located in this State." However, internet advertising has the potential to reach a national or international audience. Therefore, the court concluded that Public Act 96-1544 imposes a discriminatory tax on

electronic commerce within the meaning of ITFA. A dissenting opinion argued that ITFA did not "purport to assert any general federal authority over matters of state and local taxation." The dissent also commented on the majority's failure to undertake any commerce clause analysis, but noted that, in the dissent's view, the provisions of Public Act 96-1544 do not violate the commerce clause.

ILLINOIS PENSION CODE – CREDIT FOR PRIOR EMPLOYMENT

A participant of the Chicago Policemen's Annuity and Benefit Fund may not receive credit for prior employment performing safety or investigative work for the city.

In *Taiym v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 2014 IL App (1st) 123769, the Illinois Appellate Court was asked to decide whether the trial court erred when it affirmed an administrative determination by the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago ("Board") that the plaintiff did not qualify for pension credit for previous employment under subsection (c) Section 5-214 of the Illinois Pension Code (40 ILCS 5/5-214(c) (West 2010)). Subsection (c) provides credit for prior service as a temporary police officer in the city or for prior service "performing safety or investigative work for the county in which such city is principally located or for the State of Illinois or for the federal government, on leave of absence from the department of police, or while performing investigative work for the department as a civilian employee of the department." The plaintiff argued that because "safety" is not statutorily defined, the court should apply the dictionary definition of the word to determine that the plaintiff's prior employment as a watchman and a laborer for a municipal department of streets and sanitation constituted "safety work" which qualified him for credit for prior service credit. The Board countered that the plaintiff's prior employment duties did not constitute safety or investigative work within the meaning of Section 5-214. The Board further argued that the plaintiff did not qualify for credit because he was employed by the city and subsection (c) of Section 5-214 only affords pension credit to those who were employed by the county, State, or federal government. The court agreed with the Board, holding that the dispositive issue was whether the plaintiff performed work for the county, State, or federal government. The court reasoned that although the plaintiff was employed by the city prior to becoming a police officer, this did not constitute performing safety or investigative work for the units of government listed in the statute, specifically the county, State, or federal government. The court noted that the General Assembly could have included "the city" in Section 5-214, but chose not to. Consequently, the court concluded that "even with a broad construction of the statute, we cannot provide language which the legislature saw fit to omit."

ILLINOIS PENSION CODE – CALCULATION OF DUTY DEATH ANNUITY BENEFITS

The salary calculation of duty death annuity benefits awarded to widows of City of Chicago firemen does not include duty availability pay unless the firemen actually received duty availability pay as part of their salaries.

In *Hooker v. Retirement Board of the Fireman's Annuity and Benefit Fund of Chicago*, 2013 IL 114811, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the Retirement Board of the Firemen's Annuity and Retirement Benefit Fund of Chicago ("Board"), while calculating death annuity benefits for surviving spouses of deceased firefighters, must include "duty availability pay" in the calculation of the annuity, even if the fireman never received that compensation while working as a firefighter. Subsection (a) of Section 6-140 of the Illinois Pension Code (40 ILCS 5/ 6-140(a) (West 2008)) provides that the annuity is to be calculated based on "the current annual salary attached to the classified position to which the fireman was certified at the time of his death." Subsection (i) of Section 6-111 of the Code (40 ILCS 5/ 6-111(i) (West 2008)) provides that "the salary of a fireman . . . shall include any duty availability pay received by the fireman." The plaintiff argued, and the appellate court held, that the annuity must be calculated using duty availability pay for which the firefighter was eligible under subsection (i) of Section 6-111 because the firefighter would have received that compensation if alive. The Illinois Supreme Court disagreed, reversing the ruling of the appellate court and holding that pursuant to the plain language of subsection (i), only duty availability pay that was actually received by the fireman is included in the salary calculation under subsection (a) of Section 6-140. The court reasoned that there is no dispute that the husbands of the plaintiff widows did not receive duty availability pay. Accordingly, the court concluded that the calculation of duty death annuity benefits was not required to include duty availability pay. A dissenting opinion noted that in an earlier opinion, the court construed the words "current annual salary" to plainly mean that the annuity was based upon the current salary of a fireman and was flexible, increasing with the changes in their salaries as provided for under the applicable budget appropriations. The dissent further noted that by failing to read subsection (i) of Section 6-111 and Section 6-140 of the Illinois Pension Code as a whole, the majority erroneously concluded that the General Assembly intended that the widows' duty-related annuity calculation be based on whether their husbands actually received the compensation as part of their salary.

ILLINOIS PENSION CODE – EARLY RETIREMENT INCENTIVE

The Illinois Municipal Retirement Fund Board of Trustees does not have the authority to find that a corporation created by a pensioner was created as a guise to avoid the return-to-work prohibitions of the Code.

In *Prazen v. Shoop*, 2013 IL 115035, the Illinois Supreme Court was asked to decide whether the appellate court erred when it reversed a decision of the Illinois Municipal Retirement Fund ("IMRF") Board of Trustees ("Board") finding that the plaintiff violated return-to-work prohibitions of the early retirement incentive by returning to work for an IMRF employer in violation of subsection (g) of Section 7-141.1 of the Illinois Pension Code (40 ILCS 5/7-141.1(g) (West 1998)). Section 7-141.1 prohibits an annuitant who has received any age enhancement or creditable service under the early retirement incentive provision from later either accepting "employment with" or entering into a "personal services contract with" an IMRF employer. The Board argued that it had the authority to determine that the plaintiff forfeited a portion of his pension because he tried to circumvent the restrictions of subsection (g) of Section 7-141.1 when he retired, created a corporation, became employed with the corporation, contracted with his former IMRF employer through the corporation, and then went back to work at essentially the same job. The plaintiff contested that his employment with the corporation he formed did not constitute employment with an IMRF employer because the corporation was not an IMRF employer, but merely a party to the contract with his former IMRF employer. The Illinois Supreme Court agreed with the plaintiff, holding that the plaintiff's personal performance of the duties was not material to the contract between the municipality and the corporation created by the plaintiff. The court reasoned that the terms of the statute were clear and unambiguous, and that the contract was between the IMRF employer and the corporation, not between the IMRF employer and the plaintiff, and did not require that the plaintiff personally perform any of the services described in the contract. The court also noted that although the General Assembly, in Section 7-200 of the Code (40 ILCS 5/7-200 (West 2010)), granted the Board the power to "carry on generally any other reasonable activities" necessary to carry out the intent of the IMRF, the Code, when taken as a whole, does not support the conclusion that the General Assembly granted the Board the power to find that a corporation was a guise to circumvent the forfeiture provisions of the Code.

ILLINOIS PENSION CODE – FINALITY OF STATE EMPLOYEES' RETIREMENT SYSTEM BOARD DECISIONS

The Board of Trustees of the State Employees' Retirement System must correct errors in benefits calculations within 35 days of issuing a final decision.

In *Sharp v. Board of Trustees of State Employees' Retirement System*, 2014 IL App (4th) 130125, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that under Section 14-150 of the Illinois Pension Code (40 ILCS 5/14-150

(West 2010)), the Board of Trustees of the State Employees' Retirement System ("Board") lacked jurisdiction to reconsider its prior pension calculation. Section 14-150 provides that the Administrative Review Law (735 ILCS 5/Art. III) governs all proceedings for the judicial review of final administrative decisions of the Board. The Board argued that it had the power to do what is reasonably necessary to carry out its duty, including reconsidering its decision to approve the plaintiff's pension at any time in order to correct an alleged miscalculation resulting in overpayments to the plaintiff. The plaintiff argued that absent an express statutory provision granting the Board continued authority to review its final decision, the Board lacks jurisdiction to do so beyond the Administrative Review Law's 35-day time period under Section 3-103 of the Code of Civil Procedure (735 ILCS 5/3-103 (West 2010)). In support of the plaintiff's argument, the plaintiff pointed to the express authority granted to municipal police pension boards and the State Universities Retirement System to review and correct certain errors outside of the Administrative Review Law's 35-day limit (40 ILCS 5/15-186.1; 40 ILCS 5/3-144.2 (West 2010)). The court agreed with the plaintiff, holding that review of the Board's initial approval of the pension was limited to a 35-day period after the decision was issued. The court reasoned that the General Assembly could have granted the Board the authority to revisit its final decision outside of the 35-day period, but did not do so. The court noted that the Board is not estopped from fixing errors it makes in its calculation of pension benefits, but it must correct those mistakes within the 35-day period provided for by the Administrative Review Law.

COUNTIES CODE – STATE'S ATTORNEY FEES

Petitions for relief from judgment under Section 2-1401 of the Code of Civil Procedure are not collateral habeas corpus proceedings, and thus are not subject to any State's Attorney fees for habeas corpus proceedings.

In *People v. Johnson*, 2013 IL 114639, the Illinois Supreme Court was asked to decide whether the appellate court erred when it refused to vacate the imposition of a $50 State's Attorney fee for a habeas corpus proceeding imposed under subsection (a) of Section 4-2002.1 of the Counties Code (55 ILCS 5/4-2002.1(a) (West 2010)) after the defendant had filed a petition for relief from judgment under Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/4-1401). Subsection (a) of Section 4-2002.1 provides that "State's attorneys shall be entitled to [$50] . . . for each day actually employed in the hearing of a case of habeas corpus in which the people are interested." The defendant argued that the fee was not statutorily authorized because the statute did not explicitly include Section 2-1401 petitions for relief from judgment. The State countered by arguing that the fee applied to all collateral proceedings at which the State was employed. The appellate court affirmed the circuit court's decision to apply the $50 State's Attorney fee against the defendant, stating that the language applied to habeas corpus proceedings "generically," which necessarily included the defendant's Section 2-1401 petition. The Illinois Supreme Court reversed and remanded, ordering the circuit court to vacate the fee. Noting that the Counties Code did not define "habeas corpus," the court used its generally understood

definition of "a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." The court found that subsection (a) of Section 4-2002.1 applied only to specific types of habeas corpus proceedings, noting that the statute had remained unchanged even after the creation of other types of post-conviction proceedings (including Section 2-1401 petitions). The court concluded by stating that if the General Assembly intended to have collateral habeas corpus proceedings include petitions for relief from judgment, it would have explicitly stated so.

COUNTIES CODE; ILLINOIS MUNICIPAL CODE; REGIONAL TRANSPORTATION AUTHORITY ACT – RETAILERS' OCCUPATION TAX

For purposes of a retailers' occupation tax imposed at the local level, the situs of the sale is based on a "composite of the many activities" surrounding the transaction, not the actual location where a purchase order was accepted.

In *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, the Illinois Supreme Court was asked to determine whether the appellate court erroneously found that regulations promulgated by the Department of Revenue ("Department") imposing a local retailers' occupation tax ("tax"), were based on the actual location of receipt of a purchase order. Section 5-1006 of the Counties Code (55 ILCS 5/5-1006 (West 2012)), Section 8-11-1 of the Illinois Municipal Code (65 ILCS 5/8-11-1 (West 2012)), and subsection (e) of Section 4.03 of the Regional Transportation Authority Act (70 ILCS 3615/4.03(e) (West 2012)) allow home rule counties and municipalities and the Regional Transportation Authority to impose a tax "upon all persons engaged in the business of selling tangible personal property" at retail within that county, municipality, or metropolitan region. The plaintiff argued that the plain language of the regulations established a bright-line test in that the tax is determined by the county, municipality, or metropolitan region where a purchase order is accepted. The Department argued that such an interpretation was inconsistent with legislative intent and how Illinois courts have interpreted the phrase "business of selling." The appellate court and the circuit court both agreed with the plaintiff, but the Illinois Supreme Court reversed, finding that the appropriate test was based on the "composite of many activities" surrounding the transaction. The court found that the local tax statutes were enacted so that local jurisdictions could tax the activities taking place within those jurisdictions in relation to any benefits a retailer enjoyed from those activities. Noting that none of the tax statutes defined "situs of sale," the court concluded by stating that if the General Assembly wanted to adopt a bright-line test for determining the situs of a transaction for tax purposes, it would not have consistently used the phrase "business of selling" in the statutes.

ILLINOIS MUNICIPAL CODE – ANNEXATION OF TERRITORY

The statute of limitations barring the commencement of an action contesting the annexation of territory to a municipality applies to counterclaims, not pure affirmative defenses.

In *Stivers v. Bean*, 2014 IL App (4th) 130255, the Illinois Appellate Court was asked to determine whether the circuit court erred in granting the plaintiff's motion for summary judgment on the ground that the statute of limitations had expired, which barred the defendant from raising an affirmative defense that the plaintiff failed to follow certain statutory procedures in commencing a *mandamus* action to compel the county to annex certain territory to a municipality. Section 7-1-46 of the Illinois Municipal Code (65 ILCS 5/7-1-46 (West 2002)) bars a party from commencing "an action contesting either directly or indirectly the annexation of any territory to a municipality unless initiated within one year after the date of such annexation becomes final. . . ." The plaintiff argued that the defendant failed to timely respond to the *mandamus* action within the one-year statute of limitations, thus barring any further action. The defendant raised an affirmative defense that the plaintiff failed to follow all of the proper procedures for annexation. The circuit court agreed with the plaintiff, but the appellate court reversed and remanded. The court interpreted "commence an action" under Section 7-1-46 as barring actions or counterclaims filed outside the one-year statute of limitations. The court determined that the defendant asserted a pure affirmative defense, not a counterclaim. The court reasoned that the defense raised genuine issues of material fact and made the grant of summary judgment inappropriate. A dissenting opinion, however, agreed with the trial court's ruling. It pointed out that the General Assembly did not amend the statute after another appellate court had previously interpreted the statute as barring all actions after the one-year point. The dissent concluded that the affirmative defenses were counterclaims in disguise, as they were raised for the sole purpose of invalidating annexation, not merely to defeat the plaintiff's *mandamus* action.

SCHOOL CODE – TAXPAYERS' STANDING TO SUE SCHOOL DISTRICT OFFICIALS

Taxpayers do not have standing to bring an action on behalf of a school district against school district officials to recover money diverted without a separate resolution from a working cash fund.

In *Lutkauskas v. Ricker*, 2013 IL App (1st) 121112, the Illinois Appellate Court was asked to decide whether the trial court erred when it found that taxpayers do not have standing to bring a class action suit against school district officials under Sections 20-5 and 20-6 of the School Code (105 ILCS 5/20-5; 105 ILCS 5/20-6 (West 2010)). Section 20-5

provides that "[m]oneys in the working cash fund shall be transferred from the working cash fund to another fund of the district only upon the authority of the school board which shall from time to time by separate resolution direct the school treasurer to make transfers of such sums as may be required for the purposes herein authorized." Section 20-6 provides that any school official who wilfully violates Section 20-5 is guilty of a business offense and subject to fines and forfeiture of his or her office. Section 20-6 further provides that the person shall be liable for any sum unlawfully diverted from the working cash fund, "to be recovered by such school district or by any taxpayer in the name and for the benefit of such school district in an appropriate civil action . . . ." The plaintiffs argued that Section 20-6 gave them standing to allege that the defendants violated Section 20-5 when they repeatedly transferred, or allowed the transfer of, money from the school district's working cash fund without a board resolution, and to ask for the forfeiture of office by the school district officials. The plaintiffs argued that because Section 20-5 plainly forbids interfund transfers without a board resolution, any money transferred without a board resolution should be considered a "sum" unlawfully diverted from the working cash fund and recoverable by the plaintiffs on behalf of the school district. The defendants argued that the suit should be dismissed because the criminal penalties imposed by Section 20-6 meant that the plaintiffs were not the appropriate party to bring the suit. The Illinois Appellate Court agreed with the circuit court, holding that the plaintiffs did not have standing to seek forfeiture of the offices of the defendant school officials or to impose fines in a civil suit. In its analysis, the court stated that the plaintiff taxpayers did not cite any authority for why they, as private taxpayers acting on behalf of the school district, had the power to impose criminal penalties for a criminal violation, or for why statutory penalties for a business offense can be awarded as a remedy in a civil action. The court further reasoned that even though the moneys were transferred without a resolution, the plaintiffs did not allege that any money was spent on anything other than educational purposes.

A dissenting opinion argued that the case should be remanded for further discovery. The dissent observed that the School Code clearly sets up both criminal and civil actions in the same paragraph, and reasoned that there is no indication in the statute that the second type of action is dependent on the first. The dissent proposed that a fair reading of the statute is that the failure to consider and vote on the required resolution creates a civil liability for any sum diverted from the working cash fund without a separate resolution, which may be recovered under Section 20-6 by the taxpayers on behalf of the school district. The dissenting opinion noted that even though the funds from the working cash fund were spent solely on educational purposes, "that money was obtained by the sale of bonds and is expensive money." The court further observed that the working cash fund is intended to be used in situations when tax revenues do not come in before bills are due; it is not meant to be raided "to add extras that were not appropriated."

ILLINOIS PUBLIC ACCOUNTING ACT – ACCOUNTANT-CLIENT PRIVILEGE

The accountant-client privilege applies to information obtained by a certified public accountant for estate planning purposes, extends to information initially obtained by non-accountant agents, is subject to the testamentary exception in a will contest action, and can be waived by a decedent's personal representatives.

In *Brunton v. Kruger*, 2014 IL App (4th) 130421, the Illinois Appellate Court was asked to decide whether information given to a certified public accountant ("CPA") for estate planning purposes is protected by the accountant-client privilege, whether the privilege applies to agents of the CPA, whether it is subject to the testamentary exception in a will contest, and whether heirs have the authority to waive the privilege on behalf of the deceased. Section 27 of the Illinois Public Accounting Act (225 ILCS 450/27 (West 2012)) provides that "[a] licensed or registered certified public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a licensed or registered certified public accountant." The plaintiff argued that the defendant, an attorney representing the accounting firm utilized by the deceased in the underlying will contest action, was required to disclose requested estate planning documents because Section 27 covers only information obtained by a CPA when auditing a client's financial statements and not when providing nonfinancial consulting services. The plaintiff also argued that the privilege does not apply to information obtained by an agent of the CPA and that in this case, the estate planning information was initially obtained by an employee of the accounting firm who was not a licensed CPA. The plaintiff further argued that there is a testamentary exception to the privilege and, in the alternative, that the privilege may be waived by the decedent's personal representatives. The defendant argued that the privilege is not so narrowly limited and applies to a broader range of services performed by accountants. The defendant contended that the CPA is the holder of the accountant-client privilege, not the client and his or her successors, and that only the CPA can waive the privilege. The court held that information or evidence obtained by a CPA while assisting a client with estate planning is covered by the accountant-client privilege. The court reasoned that it is common for CPAs to perform a variety of services for clients, including estate planning, and that there is no evidence to suggest that the General Assembly intended for the accountant-client privilege to apply solely to the auditing of financial statements, which is only one service provided by CPAs. Furthermore, the court determined that the General Assembly was aware that CPAs commonly employ non-CPA agents and that it would be unreasonable to interpret Section 27 as not applying to information obtained indirectly by a CPA through such agents. The court went on to hold that the testamentary exception applies to the privilege, which provides that the confidential information is admissible in a will contest in certain circumstances. Finally, the court held that the client, and not the CPA, is the holder of the privilege and that the personal representatives of a deceased client may waive the privilege in the interest of the deceased's estate. Thus, the court held that the information related to the estate planning services was privileged, but discoverable nonetheless because of the testamentary exception and waiver by the personal representatives during the underlying will contest

proceedings. The court therefore affirmed the discovery order of the trial court, holding that the accounting firm must produce the documents requested by the petitioner in the will contest action.

MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE – FINAL ORDERS

The requirement that every final order entered by a court be accompanied by a statement on the record of the court's findings of fact is directory, not mandatory, and therefore noncompliance with the requirement is not a reversible error.

In *In re Rita P.*, 2014 IL 115798, the Illinois Supreme Court was asked to determine if the appellate court erred when it reversed the trial court's order for the involuntary treatment of the respondent with psychotropic medication on the grounds that subsection (a) of Section 3-816 of the Mental Health and Developmental Disabilities Code (405 ILCS 5/3-816(a) (West 2010)) is a mandatory provision and the appropriate remedy for noncompliance is reversal. Subsection (a) of Section 3-816 provides that "[e]very final order entered by the court . . . shall be in writing and shall be accompanied by a statement on the record of the court's findings of fact and conclusions of law." The respondent argued, and the Illinois Appellate Court held, that reversal of the trial court's order for treatment was required because the requirement under subsection (a) of Section 3-816 for the trial court to include with its order a statement on the record of the court's findings of fact was mandatory, not directory. The State argued that subsection (a) was merely directory, not mandatory, and thus noncompliance did not require reversal of the trial court's order. The Illinois Supreme Court ultimately agreed with the State, holding that the requirement that the court's order be in writing and contain findings of fact and conclusions of law was merely directory. In support of its holding, the court noted that statutes are presumed to be directory when they issue a procedural command to a government official. However, this presumption can be overcome and the statute will be read as mandatory if: (i) the statute contains language prohibiting further action, or indicating a specific consequence, in the case of noncompliance; or (ii) the statute protects a right or rights that "would generally be injured" as a result of noncompliance. The court found no language that indicated the General Assembly's intent to prohibit further governmental action if the court did not comply with the statutory command, and further noted that "although Section 3-816(a) states that final orders 'shall' be accompanied by findings of fact, the word 'shall' is not determinative when the mandatory/directory dichotomy is at issue." The court also dismissed the respondent's argument that a directory reading would generally injure her

right to appeal an order for involuntary treatment, her liberty interest in refusing treatment, or her right to notice of the trial court's reasoning.

ENVIRONMENTAL PROTECTION ACT – NOTICE OF INTENT TO SUE

The Illinois Environmental Protection Agency's failure to provide statutorily required notice of intent to pursue legal action does not divest the court of jurisdiction over that case.

In *Madigan v. J.T. Einoder, Inc.*, 2013 IL App (1st) 113498, the Illinois Appellate Court was asked to decide whether the Illinois Environmental Protection Agency's failure to satisfy the statutory requirement that the Agency give notice of its intent to pursue legal action against a person divests a court of jurisdiction of that case. Subsection (b) of Section 31 of the Environmental Protection Act (415 ILCS 5/31(b) (West 2010)) provides that "as a precondition to the Agency's referral or request to the Office of the Illinois Attorney General or the State's Attorney of the county in which the alleged violation occurred for legal representation regarding an alleged violation . . . the Agency shall issue and serve, by certified mail, upon the person complained against a written notice informing that person that the Agency intends to pursue legal action." The defendant argued that the Agency's failure to serve the notice of its intent to pursue legal action required by the statute deprived the court of subject matter jurisdiction in the case and that the purpose of the notice requirement is to give parties facing Agency action for alleged violations of the Act the opportunity to attempt to resolve those violations before the commencement of the suit. The State argued that the procedural requirements of Section 31 are directory, as opposed to mandatory, and that a statute is mandatory only if the General Assembly prescribes a consequence for the failure to comply with it. The court held that although the statute states that the Agency shall provide notice as a precondition to their referral for legal action, the General Assembly cannot statutorily impose conditions on the exercise of jurisdiction, as jurisdictional authority is derived from the Illinois Constitution. The court reasoned that Section 9 of Article VI of the Illinois Constitution (ILL. CONST. art. VI, §9) provides jurisdiction to circuit courts on all justiciable matters and that courts do not have to rely on jurisdictional authorization from statutes. The court reasoned that if the defendant was prejudiced by the Agency's failure to provide notice, then the failure to provide notice could be raised as an affirmative defense. In this case, however, there were extensive discussions before the Agency filed the lawsuit, and the defendant failed to raise the issue of a lack of notice before commencement of the trial. On March 26, 2014, the Illinois Supreme Court granted the defendant's Petition for Leave to Appeal.

ENVIRONMENTAL PROTECTION ACT – POLLUTION CONTROL BOARD APPEALS

The process for direct appeal to the appellate court provided by the Act does not confer jurisdiction to the appellate court when the appellant was not a party of record in the underlying proceedings before the Pollution Control Board.

In *Board of Education of Roxana Community School Dist. No. 1 v. Pollution Control Board*, 2013 IL 115473, the Illinois Supreme Court was asked to decide whether the appellate court erred when it concluded that it lacked jurisdiction to entertain an appeal by the Board of Education of Roxana Community School District No. 1 from decisions of the Pollution Control Board ("Board"), because the General Assembly had supplanted the direct appeal to the appellate court provided in subsection (a) of Section 41 of the Environmental Protection Act (415 ILCS 5/41 (West 2010)) with a more specific provision governing this kind of appeal under the Property Tax Code. Subsection (a) of Section 41 provides that "any party adversely affected by a final order or determination of the Board . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order or other final Board action complained of . . . [and] that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court." However, Section 11-60 of the Property Tax Code (35 ILCS 200/11-60 (West 2010)) provides that "[a]ny applicant or holder aggrieved by the issuance, refusal to issue, denial, revocation, modification or restriction of a pollution control certificate or a low sulfur dioxide emission coal fueled device certificate may appeal the finding and order of the Pollution Control Board, under the Administrative Review Law." Under the Administrative Review Law, these appeals are not brought directly to the appellate court, but rather initiated in the circuit court (735 ILCS 5/3-104 (West 2010)). The plaintiff argued that the appellate court's jurisdictional analysis was incorrect because the Environmental Protection Act provides a proper basis for challenging the Board's decision through direct appeal to the appellate court. The Illinois Supreme Court held that the appellate court properly denied the appeal for lack of jurisdiction. The court reasoned that to be a "party" within the meaning of the Act, one must have been an actual party of record in the underlying proceedings of the Board. Because the plaintiff was denied leave to intervene in the proceedings, it cannot be deemed to have ever been a party to the litigation and therefore cannot appeal under Section 41 of the Act.

ILLINOIS VEHICLE CODE – RESCINDING A LICENSE SUSPENSION

The recission of a summary suspension of a driver's license after the defendant was arrested for driving with a suspended license did not render the charge invalid.

In *People v. Elliott*, 2014 IL 115308, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that a statutory suspension that has been rescinded is void from the beginning as if it had never existed, and therefore the defendant's conviction for driving on a suspended license should be vacated. Subsection (a) of Section 6-303 of the Illinois Vehicle Code (625 ILCS 5/6-303(a) (West 2008)) provides that "any person who drives or is in actual physical control of a motor vehicle on any highway of this State at a time when such person's driver's license, permit or privilege to do so or the privilege to obtain a driver's license or permit is revoked or suspended as provided by this Code . . . shall be guilty of a Class A misdemeanor." Subsection (b) of Section 2-118.1 of the Illinois Vehicle Code (625 ILCS 5/2-118.1(b) (West 2008)) states that "[w]ithin 90 days after the notice of statutory summary suspension or revocation served under Section 11-501.1 [625 ILCS 5/11-501.1], the person may make a written request for a judicial hearing in the circuit court of venue. . . . This judicial hearing, request, or process shall not stay or delay the statutory summary suspension or revocation. . . . Upon the conclusion of the judicial hearing, the circuit court shall sustain or rescind the statutory summary suspension or revocation and immediately notify the Secretary of State." The defendant, who successfully had his suspension recinded, argued that a rescission has the effect of retroactive erasure of a suspension. The State argued that the provision that a pending hearing on a petition to rescind shall not stay the effect of a suspension implies a legislative intent that suspensions be given full effect until proven invalid, and that retroactive application of the rescission would condone disregard of the law. The Illinois Supreme Court agreed with the State and reversed the holding of the appellate court, holding that the General Assembly intended a recission of a suspension under Section 2-118.1 to apply prospectively only. The court noted that the General Assembly is inconsistent with the use of the term "rescind," sometimes intending a retroactive meaning while other times intending only a prospective meaning. To determine which of the two meanings the General Assembly intended in the context of Section 2-118.1, the court reasoned that a prospective-only meaning more ably accomplishes the purpose of the summary suspension, which the court stated is to quickly get impaired drivers off the road. The court further reasoned that the wording of Section 6-303 comports more with a prospective-only interpretation. The court concluded that to apply the recission of the suspension retroactively would have an absurd, unjust effect, "as the facts underlying [a charge of driving with a suspended license] remain in a perpetual state of flux and are nothing short of a judicial moving target[.]"

JUVENILE COURT ACT OF 1987 – JURISDICTION

The Act grants juvenile courts exclusive jurisdiction over crimes committed before a minor's 15th birthday; however, it does not permit prosecution of persons over the age of 21 for crimes they allegedly committed as a juvenile.

In *People v. Richardson*, 2014 IL App (1st) 122501, the Illinois Appellate Court was asked to determine if the adult criminal court erred when it dismissed an aggravated criminal sexual assault indictment on the grounds the court lacked jurisdiction because the alleged crime occurred when the defendant was a minor. Under subsection (j) of Section 3-6 of the Criminal Code of 2012 (720 ILCS 5/3-6(j) (West 2010)), a person may be charged for committing a sex crime against a minor "within 20 years after the child victim attains 18 years of age." In contrast, Section 5-120 of the Juvenile Court Act of 1987 (705 ILCS 405/5-120 (West 2002)) provides, with certain exceptions, that "[n]o minor who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State." In 2009, following the discovery of DNA evidence linking the defendant to an unsolved sex crime, the 26-year-old defendant was charged in juvenile court for allegedly committing aggravated criminal sexual assault on a 17-year-old girl when he was 14 years old. The State argued that after filing the indictment in juvenile court, the case could be transferred to adult court under subdivision (3)(a) of Section 5-4 of the Act (705 ILCS 405/5–4(3)(a) (West 1996)), which was in effect at the time the offense allegedly occurred and permitted the discretionary transfer to adult criminal court of minors charged with aggravated criminal sexual assault. However, the juvenile court dismissed the indictment on the grounds that it lacked jurisdiction because the defendant had aged out of the juvenile court system. In 2012, the State filed the same charges against the 29-year-old defendant in adult criminal court. That court also dismissed the indictment on the grounds the defendant could not be prosecuted in adult criminal court for a crime that allegedly occurred when he was a minor. In support of its holding, the court noted that the alleged offense "fell through the cracks between juvenile and adult jurisdiction, a gap which the legislature had unintentionally created when it extended the statute of limitations for sex offenses." The Illinois Appellate Court agreed with the lower court, observing, "This case presents a classic 'train crash' of statutes which address the same topic, but which seemingly create opposite results—a result stemming from a legislative failure to draft amendatory laws in such a way to maintain internal and parallel consistency." The court reasoned that the adult criminal court lacked jurisdiction because the Juvenile Court Act of 1987 grants jurisdiction over crimes committed before a minor's 15th birthday exclusively to the juvenile court, noting that interpreting Section 5-120 to allow prosecution of the defendant as an adult in this case would have the result of permitting the State to delay

prosecution of a juvenile until he or she ages out of the juvenile court system in order to "elevate the scope of possible punishments to the more severe levels applicable in the adult [court] system." Conversely, the court also found that the juvenile court lacked jurisdiction because the 29-year-old defendant was no longer a minor.

CRIMINAL CODE OF 2012* – ATTEMPTED MURDER: SERIOUS PROVOCATION

The victim's act of brandishing a deadly weapon is not sufficient provocation to reduce the sentence for attempted first degree murder to that of a Class 1 felony.

In *People v. Harris*, 2013 IL App (1st) 110309, the Illinois Appellate Court was asked to decide whether the trial court erred when it ruled that a victim's act of brandishing a deadly weapon is not sufficient provocation to reduce the sentence for attempted first degree murder to that of a Class 1 felony under subdivision (c)(1)(E) of Section 8-4 of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)(E) (West 2012)). Subdivision (c)(1)(E) provides, "If the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony." The defendant argued that he proved by a preponderance of the evidence that the victim grabbed a handgun from a nearby car during the altercation, which caused the defendant to fear for his safety and led him to stab the victim. The defendant contended that this constitutes sudden and intense passion resulting from serious provocation and that he therefore should have received a Class 1 felony sentence under the statute. The State countered by arguing that the evidence did not establish that the victim brandished a weapon, and that even if it did, this would not constitute sudden and intense passion resulting from serious provocation because the defendant and victim had no interaction before the stabbing and the defendant was not injured by the victim. The court agreed with the State, holding that even if the defendant's factual contentions were accepted as true, serious provocation did not exist as a matter of law. The court reasoned that the term "serious provocation" is rooted in the provisions of the Code concerning second degree murder (720 ILCS 5/9-2(a)(1) (West 2010)), which have been interpreted by the Illinois Supreme Court to include only substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. The court presumed that the General Assembly intended for "serious provocation" to have the "well-settled" meaning it does in the context of second degree murder, and

* Effective January 1, 2013, the Criminal Code of 1961 was renamed the Criminal Code of 2012 by P.A. 97-1108. This Case Report uses "Criminal Code of 2012" in all instances. A conversion table for the Criminal Code re-write can be found online at http://ilga.gov/commission/lrb/Criminal-Code-Rewrite-Conversion-Tables.pdf

rejected the defendant's argument that the act of brandishing a deadly weapon is sufficient to constitute serious provocation. The court concluded that the defendant failed to show that the altercation fit into one of the four categories of serious provocation accepted in the context of second degree murder and affirmed the judgment of the trial court.

CRIMINAL CODE OF 2012 – POSSESSION OF CHILD PORNOGRAPHY

An individual in possession of files depicting child pornography may not be convicted of multiple counts solely for the possession of identical images saved on the same digital medium.

In *People v. Sedelsky*, 2013 IL App (2d) 111042, the Illinois Appellate Court was asked to vacate one of three convictions for possession of child pornography because two of the convictions were based on possession of an identical digital image stored on the same digital medium under different file names. Subdivision (a)(6) of Section 11-20.1 of the Criminal Code of 2012 (720 ILCS 5/11-20.1(a)(6) (West 2008)) provides that a person commits the offense of possessing child pornography if he or she "with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child . . . whom the person knows or reasonably should know to be under the age of 18 . . . engaged in any [specified] activity." The defendant argued that one of his convictions should be vacated because the same image cannot sustain two convictions if that image was stored in the same digital medium. The State argued that the convictions should stand to support the purpose of the child pornography statute, which is to prevent not only the production and dissemination of child pornography, but also its possession. The court agreed with the defendant and held that, under the specific facts of the instant case, only one conviction of possessing child pornography can be entered for the defendant's possession of the same digital image stored in the same medium. The court reasoned that in the statute, the term "any" does not indicate whether the simultaneous possession of a duplicate "depiction by computer" could constitute a separate offense, and because of the ambiguous language in the statute, the court had to construe the statute in favor of the defendant. On August 16, 2014, Public Act 98-437 was signed into law amending Section 11-20.1 to provide that "[t]he possession of each individual film, videotape, photograph, or other similar visual reproduction or depiction by computer in violation of this Section constitutes a single and separate violation. . . . [This provision] does not apply to multiple copies of the same film, videotape, photograph, or other similar visual reproduction or depiction by computer that are identical to each other."

CRIMINAL CODE OF 2012 – EAVESDROPPING

The eavesdropping statute is unconstitutional because it is overbroad.

In *People v. Clark*, 2014 IL 115776, the Illinois Supreme Court was asked to determine whether the circuit court erred when it dismissed the defendant's indictment for violating the eavesdropping statute and found the law unconstitutional on substantive due process and First Amendment grounds. Subdivision (a)(1)(A) of Section 14-2 of the Criminal Code of 2012 (720 ILCS 5/14-2(a)(1)(A) (West 2010)) provides that a person commits the offense of eavesdropping when he or she "knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he [or she] does so . . . with the consent of all of the parties to such conversation or electronic communication." The defendant argued that the statute, in addition to violating both the United States Constitution and the Illinois Constitution, did not require any criminal intent; the statute was overbroad to the extent that even wholly innocent conduct could be subject to a criminal penalty. The State argued that the law was not overbroad since it accomplished its primary purpose of protecting the conversations of Illinois citizens from being recorded without their consent. The Illinois Supreme Court affirmed the circuit court, holding that the statute was overly broad in that it criminalizes nearly all conversations. The court noted that when the statute was most recently amended in 1994, the General Assembly removed any reference to the expectation of privacy the parties may have had in their conversation. Because it had the effect of burdening more speech than necessary to carry out the purpose of the statute, the statute was unconstitutional.

CRIMINAL CODE OF 2012 – ENDORSEMENT OF COUNTERFEIT CHECK

A defendant cannot be convicted of forgery for endorsing a counterfeit check absent evidence that the defendant actually created the check.

In *People v. Brown*, 2013 IL 114196, the Illinois Supreme Court was asked to decide whether the appellate court erred when it upheld the defendant's conviction for forgery under subsection (a) of Section 17-3 of the Criminal Code of 2012 (720 ILCS 5/17-3(a) (West 2006)). That Section provides that a person commits forgery when he or she knowingly "makes or alters any document apparently capable of defrauding another in such manner that it purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority." The defendant argued that because the evidence established that she endorsed a false check, but not that she actually created the check, her conviction should be overturned. The State argued and the appellate court ruled that in endorsing the check, the defendant made the document apparently capable of defrauding another. The Illinois Supreme Court agreed with the defendant and overturned the conviction. The court, citing case law, observed that the crime of forgery by making a counterfeit check occurs at the check's creation with the

requisite intent to defraud. The court reasoned that in this case, the check, by being counterfeit, was already capable of defrauding regardless of whether the defendant endorsed it. Therefore, the court concluded that the defendant's endorsement of the check, by itself, did not render the check capable of defrauding.

Public Act 96-1551, effective July 1, 2011, deleted subsection (c) of Section 17-3, which defined "intent to defraud." Public Act 97-231, effective January 1, 2012, amended Section 17-3 to provide that a person commits forgery when he or she "knowingly makes a false document or alters any document to make it false and that document is apparently capable of defrauding another." Public Act 97-231 also provided that "'false document' or 'document that is false' includes, but is not limited to, a document whose contents are false in some material way, or that purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority."

CODE OF CRIMINAL PROCEDURE OF 1963 – MARITAL PRIVILEGE

Testimony by a defendant's wife about the defendant's threat to kill her and the victim is not protected by the marital testimonial privilege.

In *People v. Trzeciak*, 2013 IL 114491, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that Section 115-16 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-16 (West 2010)) barred testimony by the defendant's spouse that the defendant tied her up, beat her, threw her in his pickup truck, had a gun, drove her to the victim's trailer, pointed at the trailer and said he would kill her and the victim. Section 115-16 provides that neither spouse "may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in cases in which either is charged with an offense against the person or property of the other. . . ." The defendant argued and the appellate court held that the communications between the defendant and his wife were protected by the marital privilege because they were made during their marriage and were made privately. The Illinois Supreme Court reversed the appellate court, holding that not every communication between husband and wife made in private is confidential. The court, adopting interpretations of other states of what a confidential marital communication encompasses, reasoned that the privilege covers only those private exchanges which would not have been made but for the absolute confidence in, and induced by, the marital relationship and prompted by the affection, confidence, and loyalty engendered by such a relationship. The court further reasoned that whether a particular communication falls under the marital privilege depends on the nature and form of the communication and the circumstances immediately surrounding its making. The court noted that such a determination is a preliminary question of fact to be decided by the trial court, and concluded that the trial court was well within its discretion to allow the wife's testimony.

UNIFIED CODE OF CORRECTIONS – COURT FEES AND FINES

The court calls on the General Assembly to reduce the burden on judicial resources by reforming the assessment of criminal fines and court fees.

In *People v. Warren*, 2014 IL App (4th) 120721, the Illinois Appellate Court asked the General Assembly to address the statutory complexity surrounding the imposition of court fees and fines, which the court identified as a serious burden on the court system. This case involved the imposition of 33 separate assessments under several acts imposing court fees and fines, specifically the Counties Code (55 ILCS 5/4-2002, 55 ILCS 5/5-103, 55 ILCS 5/5-1101, 55 ILCS 5/5-1103 (West 2010)); the Clerks of Courts Act (705 ILCS 105/27.1a, 705 ILCS 105/27.3a, 705 ILCS 105/27.3c (West 2010)); the Illinois Controlled Substances Act (720 ILCS 570/411.2 (West 2010)); the Violent Crime Victims Assistance Act (725 ILCS 240/10 (West 2010)); the Unified Code of Corrections (730 ILCS 5/5-9-1, 730 ILCS 5/5-9-1.1, 730 ILCS 5/5–9–1.4, 730 ILCS 5/5-9-1.17 (West 2010)); and the County Jail Act (730 ILCS 125/17 (West 2010)). The court called upon the General Assembly to reduce the complexity of the court assessment system and ease the burden on judicial resources through "a comprehensive legislative revision in the assessment of fines, fees, costs and the $5-per-day credit for time spent in custody prior to sentencing."

SEX OFFENDER REGISTRATION ACT – FIXED RESIDENCE; IDENTIFICATION

A Veterans' Administration hospital may be considered a "fixed residence" and government-issued identification is not required to register under the Act.

In *People v. Wlecke,* 2014 IL App (1st) 112467, the Illinois Appellate Court was asked to determine whether the trial court erred when it convicted the defendant of failing to register as a sex offender under Sections 2 and 6 of the Sex Offender Registration Act (730 ILCS 150/2; 730 ILCS 150/6. (West 2010)). Section 6 of the Act requires a sex offender who lacks a fixed residence to report weekly to the law enforcement agency where he or she is located. Section 2 of the Act defines "fixed residence" as "any and all places that a sex offender resides for an aggregate period of time of 5 or more days in a calendar year." The defendant argued that the State introduced no evidence showing that he lacked a fixed residence or failed to report weekly, since the address listed on the defendant's Illinois Department of Corrections ("IDOC") identification card corresponded to a Veterans' Administration hospital. The State argued that the Veterans' Administration hospital is not a "fixed residence" under the Act and that the IDOC identification card was not sufficient identification for registering under the Act. The appellate court disagreed and reversed the trial court, holding that the language used by the General Assembly in the

definition of "fixed residence" is expansive. The court found that the inclusion of hospitals, nursing homes, and rehabilitation treatment centers in the definition of "fixed residence" is consistent with the Act's purpose of tracking the location of sex offenders and with the General Assembly's treatment of those facilities in other Acts. Furthermore, the court found that the information required by the Act is not limited to the types of identification listed by the State, and pointed out that Section 3 of the Act (730 ILCS 150/3 (West 2010)) does not include "government-issued identification" in the list of "accurate information" that sex offenders must provide.

MURDERER AND VIOLENT OFFENDER AGAINST YOUTH REGISTRATION ACT – JUVENILE REGISTRATION

The registration requirements of the Act are unconstitutional insofar as their application to juvenile offenders violates procedural due process and equal protection.

In *In re M.A.*, 2014 IL App (1st) 132540, the Illinois Appellate Court decided whether the trial court erred when it subjected a juvenile offender to the registration requirements of the Murderer and Violent Offender Against Youth Registration Act (730 ILCS 154/1 *et seq*. (West 2012)). Subsection (a) of Section 10 of the Act (730 ILCS 154/10(a). (West 2012)) states, "A violent offender against youth shall . . . register in person and provide accurate information as required by the Department of State Police. . . . A person who has been adjudicated a juvenile delinquent for an act which, if committed by an adult, would be a violent offense against youth shall register as an adult violent offender against youth within 10 days after attaining 17 years of age." Section 40 of the Act provides that the period of registration is 10 years (730 ILCS 154/40 (West 2012)). The petitioner argued that the automatic applications of the Act to juvenile offenders violated due process and equal protection requirements under the United States and Illinois Constitutions (U.S. CONST. amend. XIV; ILL. CONST. art. I, §§ 2, 6), because the Act fails to provide any meaningful sentencing hearing before imposing the requirement to register, and subjects juvenile violent offenders against youth to more stringent registration requirements than are currently in place for juvenile sex offenders. The State argued that the registration requirements should be upheld because there is a rational relationship between the registration requirements and the public's need to be protected from violent offenders against youth. The State also argued that the petitioner failed to show a violation of equal protection because juvenile violent offenders against youth are not "similarly situated" to juvenile sex offenders. The Illinois Appellate Court agreed with the petitioner, holding that the Act denies procedural due process and equal protection to juveniles. The court reasoned that because the registration requirements were mandatory, providing no exception, regardless of circumstance, without any individualized assessment of whether the offender posed any continuing risk to the public, the Act, in its application, afforded juveniles less procedural protection than their adult counterparts. The court reasoned that, for purposes of equal protection analysis, the appropriate class of persons was juvenile offenders who,

as a result of a juvenile adjudication, were required to register with law enforcement authorities. It was apparent, the court said, that juveniles required to register as sex offenders under the Sex Offender Registration Act (730 ILCS 150/1 *et seq. (*West 2012)) were treated differently – and much more leniently – than juveniles required to register as violent offenders against youth. The court concluded that the General Assembly's disparate treatment of juvenile offenders resulted in an unconstitutional denial of equal protection.

CODE OF CIVIL PROCEDURE – PERSONAL JURISDICTION

A defendant's waiver of objections to a court's personal jurisdiction is a prospective-only submission to the court's personal jurisdiction and does not retroactively validate an order made by a court lacking personal jurisdiction.

In *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, the Illinois Supreme Court was asked to decide whether the appellate court erred when it determined that the defendant both prospectively and retroactively waived her objections to the circuit court's personal jurisdiction by appearing in the proceeding and filing, as her initial motion, a post-judgment motion to vacate based on defects in the substituted service, instead of a motion to dismiss for lack of jurisdiction or a motion to quash service of process. Subsection (a-5) of Section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301(a-5) (West 2010)) provides that "[i]f the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." Subsection (a) of Section 2-301 provides, in relevant part, "Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person . . . by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process." The plaintiff argued that the term "waives all objections" in subsection (a-5) of Section 2-301 means that a waiver of objections to personal jurisdiction applies both prospectively and retroactively and therefore a waiver can retroactively validate a judgment entered by a court that lacked personal jurisdiction. The defendant argued that a waiver of objections to personal jurisdiction applies only prospectively. The Illinois Supreme Court agreed with the defendant and held that a waiver of objections to personal jurisdiction is a prospective-only waiver and does not validate a previously-entered order by a court without personal jurisdiction. The court noted that under the case law in existence when subsection (a-5) of Section 2-301 was added, a defendant's waiver operated as a prospective-only submission to the court's jurisdiction. After considering the legislative history, the court found that the changes made to subsection (a) of Section 2-301 and the addition of subsection (a-5) of Section 2-301 were intended to prevent an unknowing

waiver of a party's objections to a court's personal jurisdiction and were not intended to change existing law concerning the effect of a waiver. The court also reasoned that the General Assembly's purpose was to protect a defendant's right to object to a court's assertion of personal jurisdiction, and a ruling that a defendant's waiver retroactively validates an order entered by a court without personal jurisdiction would be inconsistent with that purpose.

CODE OF CIVIL PROCEDURE – DEFENSES FOR FAILURE TO PAY CONDOMINIUM ASSESSMENTS

A condominium association's alleged failure to repair or maintain common elements cannot be raised as a defense to a forcible entry and detainer action against a unit owner who failed to pay assessments.

In *Spanish Court Two Condominium Association v. Carlson*, 2014 IL 115342, the Illinois Supreme Court was asked to decide whether the appellate court erred when it reversed the circuit court's holding that a condominium association's failure to repair or maintain common elements is a defense to a forcible entry and detainer proceeding against a unit owner for unpaid assessments under subdivision (a)(7) of Section 9-102 of the Code of Civil Procedure (735 ILCS 5/9-102(a)(7) (West 2008)). That Section provides that a forcible entry and detainer action may be brought against a unit owner who "fails or refuses to pay when due his or her proportionate share of the common expenses of such property, or of any other expenses lawfully agreed upon." Section 9-106 of the Code (735 ILCS 5/9-106 (West 2008)) provides that "no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise." The defendant argued that the plaintiff's failure to properly maintain the roof and brickwork directly above her unit nullified her obligation to pay assessments and defeated the plaintiff's right to possession of the unit and recovery of the unpaid assessments. The plaintiff argued that the defendant's obligation to pay assessments is independent of the condominium association's obligation to maintain and repair common elements and that the defendant's claim that the association failed to fulfill its contractual obligation is therefore not germane to a forcible entry action based on unpaid assessments. The court agreed with the plaintiff, holding that the defendant's argument was not a viable defense in the forcible entry action as a matter of law and was therefore not germane to the proceedings. The court reasoned that the defendant's contractual obligation to pay assessments was not dependent on the plaintiff's obligation to repair and maintain the common elements, because such an interpretation is inconsistent with the assessment provisions of Section 9 of the Condominium Property Act (765 ILCS 605/9 (West 2008)). The court further reasoned that the defendant's interpretation of the law is inconsistent with the General Assembly's purpose of providing a "constitutionally permissible, quick method for collection of assessment arrearages." A dissenting opinion argued that the term "germane" is not defined by the Code and that any matter that goes to the validity and enforceability of the contract should be considered

germane to a determination of the right to possession. Thus, the issue of whether the defendant owed assessments is germane to the proceedings because the plaintiff's right to possession under the statute is based on the defendant's failure to pay assessments pursuant to the condominium declaration. The dissent further argued that because the provisions of the Condominium Property Act governing the payment of assessments do not address the situation where a unit owner stops paying assessments because of the association's failure to repair and maintain common elements, permitting the defendant to raise a nullification defense is not contrary to the provisions of the Act. The dissent noted that, while the statute allows for an action for possession to be brought against an owner for unpaid assessments, the General Assembly provided little guidance as to what defenses are germane to such an action. The dissent concluded that if the General Assembly had intended to bar a unit owner from raising a nullification defense in a forcible entry action, it could have expressly done so, and that "this is a matter best left to the legislature."

CODE OF CIVIL PROCEDURE – HOMESTEAD

A title holder's spouse may not claim the homestead exemption under the Code if her name is not on the title to the property, even though she used the property as her primary residence.

In *GMAC Mortgage, LLC v. Arrigo*, 2014 IL App (2d) 130938, the Illinois Appellate Court considered the following certified question as part of an interlocutory appeal: whether a person may claim a homestead exemption under Section 12-901 of the Code of Civil Procedure (735 ILCS 5/12-901 (West 2012)) when that person is the spouse of the title holder and maintains the property as her primary residence. Section 12-901 of the Code provides that "[e]very individual is entitled to an estate of homestead to the extent in value of $15,000 of his or her interest in . . . property that the individual uses as a residence." The plaintiff filed a mortgage foreclosure proceeding against the defendant spouses, alleging that the husband waived his homestead exemption. However, the wife argued that she was entitled to her own homestead exemption because: (i) the property had been her primary residence; and (ii) she did not sign the waiver of homestead rights and was not present at closing. The wife also argued that Section 12-901, when read in connection with certain other statutes, reflects the General Assembly's intent to create a homestead estate in marital property. The plaintiff argued that, under the terms of the statute and federal case law, a spouse may not claim the statutory homestead exemption when that spouse has no formalized interest in or formalized possession of the home. The plaintiff also argued that the trial court erred in relying on certain case law in which the husband and wife were joint tenants and in which the decision was based on antiquated law. The court agreed with the plaintiff and answered the certified question in the negative. Under the terms of the statute, to qualify for the exemption, the individual must: (i) occupy the property as a residence; and (ii) own the property or rightly possess the property by lease or otherwise. The court reasoned that since the wife neither owned the property nor occupied the property by lease, the question is whether she "otherwise" rightly possessed

the property. The court noted that the term "otherwise" is ambiguous and could encompass a broad range of possessory interests, but nevertheless found that the term "otherwise possessed" cannot be reconciled with the more narrow language found in the final sentence of the statute, providing that, where two or more individuals "own" the property, their exemptions may not exceed their proportionate shares of $30,000. The court then applied the reasoning in federal case law to conclude that the General Assembly's use of "own" and "ownership" establishes that "something more than mere possession is required to claim the homestead exemption."

CODE OF CIVIL PROCEDURE – PERSONAL REPRESENTATIVES

"Special administrators" or "special representatives" are not considered to be personal representatives of the estate of a deceased individual, and therefore cannot accept service of process under the Code.

In *Relf v. Shatayeva*, 2013 IL 114925, the Illinois Supreme Court was asked to decide whether the appellate court erred when it determined that the plaintiff, who had timely filed her personal injury action directly against the tortfeasor within the two-year statute of limitations but was unaware of the tortfeasor's death prior to the expiration of the statute of limitations, was entitled to have the trial court appoint her lawyer's secretary as a "special representative" to defend the tortfeasor's estate against the plaintiff's claim under subsection (c) of Section 13-209 of the Code of Civil Procedure (735 ILCS 5/13-209(c) (West 2010)). Subsection (c) provides that "[i]f a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, and is not otherwise barred, [then] the action may be commenced against the deceased person's personal representative" if certain criteria are met, including proper service of process on the personal representative. The plaintiff argued that she fulfilled the requirements of subsection (c) within the limitations period, including appointing a "special representative" and serving her with process. The defendant argued that the plaintiff had not complied with the statutory requirements the General Assembly had intended under these circumstances, because the plaintiff did not bring the action against the tortfeasor's son, who had been appointed as personal representative by the probate court. The circuit court granted the defendant's motion to dismiss, but the appellate court reversed, determining that the plaintiff fulfilled the requirements of subsection (c). The Illinois Supreme Court reversed and remanded, holding that the question of whether the plaintiff met the requirements of subsection (c) hinged on the definition of "personal representative." Noting that the term is not defined in the Code, the court looked to its plain legal meaning and concluded that personal representatives referred to executors and administrators of a decedent's legal estate. The court reasoned that because the plaintiff was wrong to make "special

representative" synonymous with "personal representative," service of process to the special representative was invalid. The court concluded that the circuit court correctly dismissed the cause of action for being filed outside the statute of limitations period. The dissenting opinion, however, argued that the plaintiff had in fact appointed a valid substitute for the tortfeasor, and that misnaming the personal representative as a "special representative" or "special administrator" would not have prejudiced the estate.

CODE OF CIVIL PROCEDURE – STATUTE OF LIMITATIONS

An action arising from the installation of a temporary ventilation system is subject to the 4-year statute of limitations for cases arising from improvements to real property.

In *Fireman's Fund Insurance Co. v. Rockford Heating and Air Conditioning, Inc.*, 2014 IL App (2d) 130566, the Illinois Appellate Court was asked to decide whether the trial court properly dismissed a negligence action under the statute of limitations for cases arising from improvements to real property, when the action arose out of a subcontractor performing a temporary installation during a construction project. Subsection (a) of Section 13-214 of the Code of Civil Procedure (735 ILCS 5/13-214(a) (West 2010)) provides that "[a]ctions based upon tort, contract, or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission." The plaintiff argued that the complaint was timely because, since the defendant's installation of the ventilation system was temporary, it did not constitute an improvement to real property under the Code and therefore did not fall under the 4-year statute of limitations. The defendant argued that because the installation was part of a larger project to improve the property, the trial court was right to dismiss the case under the statute of limitations. The court agreed with the defendant and held that the case was properly dismissed under the 4-year statute of limitations. The court reasoned that the parties offered conflicting, yet reasonable, interpretations of the term "improvement to real property," meaning that the statute is ambiguous. After reviewing the legislative debates for Section 13-214, the court concluded that the legislative intent of subsection (a) was to apply the statute of limitations to anyone who is involved in the construction of an improvement to real property.

CODE OF CIVIL PROCEDURE – STATUTE OF REPOSE

The statute of repose for a cause of action arising out of an attorney's act or omission in the performance of professional services may apply to a cause of action that is not based on legal malpractice and brought by a party who is not a client.

In *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, the Illinois Supreme Court was asked to decide whether the appellate court erred when it determined that the statute of repose provided by Section 13-214.3 of the Code of Civil Procedure (735 ILCS 5/13-214.3 (West 2010)) is applicable only to a legal malpractice action brought by a client. Section 13-214.3 provides, in relevant part, that "[a]n action for damages based on tort, contract, or otherwise . . . against an attorney arising out of an act or omission in the performance of professional services . . . may not be commenced in any event more than 6 years after the date on which the act or omission occurred." The defendant argued that the plain language of Section 13-214.3 does not limit applicability of the statute of repose to legal malpractice actions brought by a client. The plaintiff argued that the language "performance of professional services" limits the applicability of Section 13-214.3 to legal malpractice causes of action based on services provided to a client. The Illinois Supreme Court agreed with the defendant and held that Section 13-214.3 is not limited to legal malpractice claims brought by a client. The court reasoned that the use of the terms "arising out of" and "or otherwise" makes Section 13-214.3 broadly applicable to causes of action other than legal malpractice, and therefore "it is the nature of the act or omission, rather than the identity of the plaintiff, that determines whether the statute of repose applies to a claim brought against an attorney." The court also observed that the General Assembly could have included language that limits Section 13-214.3 to legal malpractice actions or to actions brought by a client, but chose not to. The dissenting opinion argued that because an attorney owes a professional and fiduciary duty only to his or her client, Section 13-214.3 "contemplates a duty arising from an attorney-client relationship and that the alleged injury arose out of the attorney's representation of the person for whom the professional services were rendered." Further, the dissent argued that the legislative history suggests that the General Assembly did not intend for the statute of repose in Section 13-214.3 to apply to causes of action other than legal malpractice.

WRONGFUL DEATH ACT – ATTORNEY DUTY TO NON-CLIENT BENEFICIARIES

An attorney representing the personal representative in a wrongful death action has a duty to non-client beneficiaries at the distribution stage of litigation.

In *In re the Estate of Powell*, 2014 IL 115997, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the defendant attorneys held a duty to the plaintiff, a disabled adult, by virtue of the plaintiff's status as an intended

beneficiary under Sections 2 and 2.1 of the Wrongful Death Act (740 ILCS 180/2; 740 ILCS 180/2.1 (West 2012)). Section 2 provides that every wrongful death action shall be brought by and in the names of the personal representatives of the deceased, but the amount recovered in such an action shall be for the "exclusive benefit of the surviving spouse and next of kin" of the deceased. Section 2 also provides that the amount recovered in a wrongful death action shall be distributed "to each of the surviving spouse and next of kin of such deceased person" according to their degree of dependency as determined by the court. Section 2.1 specifies that "if proceeds in excess of $5,000 are distributable to a minor or person under legal disability, the court shall allow disbursements and fees to the special administrator and his or her attorney and the balance shall be administered and distributed under the supervision of the probate division of the court if the circuit court has a probate division." The defendants argued that because they did not have an attorney-client relationship with the plaintiff, the legal malpractice case was properly dismissed by the trial court. The defendants maintained that the Act does not create a duty to non-client beneficiaries in wrongful death actions; therefore, they were under no obligation to ensure that the settlement distributions to their client (the named personal representative in the action, who was also the plaintiff's mother and guardian of his person) were expended under the supervision of the probate court and could not be held liable for expressly advising their client not to comply with Section 2.1 with regard to the plaintiff's share of the settlement, or provide an account to the probate court for the expenditure of those funds. The defendants argued that it would be impossible for an attorney to exercise undivided loyalty to each beneficiary at the distribution stage, since the beneficiaries' interests are potentially adverse to one another. The plaintiff, however, contended that since the purpose of a wrongful death action is to benefit the spouse and next of kin of the deceased, the defendant had a duty to the plaintiff, as an intended third-party beneficiary of the relationship between the client and the attorney, to ensure that the settlement of $118,000 was distributed under the supervision of the probate court in accordance with Section 2.1 of the Act. The Illinois Supreme Court agreed with the plaintiff, holding that the defendants owed a duty to the plaintiff at the distribution phase of the wrongful death action. The court reasoned that the Act creates a cause of action for losses suffered by the deceased's spouse and next of kin, yet precludes the beneficiaries from pursuing individual actions, requiring instead that the action be brought by and in the name of the personal representative of the deceased. The court further observed that the Act provides for distribution among the beneficiaries pursuant to their degree of dependency rather than distributions subject to the provisions of the Probate Act of 1975 (755 ILCS 5/1-1 *et seq.* (West 2012)). The court opined that the argument that an attorney's duty only extends to the personal representative is at odds with the very purpose of the Act and ignores established case law. The court rejected the assertion that the "potential for conflicts" should negate the imposition of a duty, observing that no specific conflict was alleged in this case.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – PUNITIVE DAMAGES

The Act is ambiguous whether a defendant police officer is shielded from an award of punitive damages if the officer is serving in his official capacity at the time of the incident, but is being sued in his individual capacity.

In *Ohlrich v. Village of Wonder Lake*, 2014 WL 2094149 (N.D. Ill.), the District Court for the Northern District of Illinois declined to determine whether Section 2-105 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-105 (West 2012)) shielded a defendant police officer from an award of punitive damages if the officer was serving in his official capacity at the time of the incident, but was being sued in his individual capacity. Section 2-105 provides that a public official is not liable for punitive damages "in any action arising out of an act or omission made by the public official while serving in an official executive, legislative, quasi-legislative, or quasi-judicial capacity." The plaintiff filed a six-count complaint that alleged a state law battery claim against the defendant and included a request for punitive damages. The defendant filed a motion to strike the plaintiff's request for punitive damages, arguing that Section 2-105 of the Act prevents an award of punitive damages because the defendant was acting within the scope of his employment as a police officer at the time of the incident. The plaintiff argued that Section 2-105 did not apply because the officer was not a public official and because the plaintiff was suing the officer in his individual capacity. The court noted that several Illinois district appellate courts have differing opinions regarding the question of whether Section 2-105 shields a defendant police officer from an award of punitive damages if the officer is serving in his official capacity at the time of the incident, but is being sued in his individual capacity. The court also noted that the Illinois Supreme Court has not yet addressed the issue. As a result, the district court declined to make a determination regarding the applicability of Section 2-105 to the present case, but rather allowed the defendant to reassert his arguments at the summary judgment stage after the completion of discovery.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – EXECUTION AND ENFORCEMENT OF THE LAW

An on-duty police officer is not immune from liability for negligence if the officer cannot clearly establish that his or her conduct was performed to carry out or put into effect a law.

In *Betts v. City of Chicago*, 2013 IL App (1st) 123653, the Illinois Appellate Court was asked to decide whether the trial court erred when it dismissed a negligence complaint against a defendant city and police officer which had put forth an affirmative defense of immunity under Sections 2-202 and 2-109 of the Local Governmental and Governmental

Employees Tort Immunity Act (745 ILCS 10/2-202; 745 ILCS 10/2-109 (West 2010)). Section 2-202 provides, "A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." Section 2-109 provides, "A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." The plaintiff argued that because the defendant police officer was not executing or enforcing any law when he backed his vehicle into hers, but was merely leaving the parking spot where he had been waiting to take over for a surveillance team engaged in a narcotics investigation, his negligence was therefore not immune from liability under Section 2-202 of the Act. The defendants contended that the officer was executing the law when the accident occurred because he was on duty and actively assisting with surveillance for the investigation, and that, under Section 2-109 of the Act, because the officer is not liable, neither is the city as his employer. The court agreed with the plaintiff that the defendants did not provide sufficient evidence to clearly establish that the officer was executing or enforcing the law at the time he negligently struck the plaintiff's car. The court reasoned that Sections 2-202 and 2-109 of the Act provide an affirmative defense to a police officer and his or her employer when the evidence establishes that, at the time of the alleged negligence, the officer was engaged in conduct designed to carry out or put into effect a law. The court observed that law enforcement is rarely a single or discrete act, but reasoned that the General Assembly did not intend that the performance of any task by an on duty officer be considered enforcement or execution of the law for the purposes of Section 2-202. The court, in reversing the trial court's grant of the defendants' motion to dismiss and reinstating the plaintiff's complaint for further proceedings, concluded that there remained a genuine issue of material fact whether the officer was actually executing or enforcing a law at the time of the incident.

GOOD SAMARITAN ACT – DEFINITION OF "WITHOUT FEE"

A claim of immunity is barred when a physician receives compensation for services not directly billed to a patient.

In *Home Star Bank and Financial Services v. Emergency Care and Health Organization*, 2014 IL 115526, the Illinois Supreme Court was asked to decide whether the appellate court erred when it determined that under Section 25 of the Good Samaritan Act (745 ILCS 49/25 (West 2010)), the term "without fee" does not include a doctor's compensation for services provided during the normal course of employment. Section 25 provides that any licensed physician who "in good faith, provides emergency care without fee to a person, shall not, as a result of his or her acts or omissions . . . in providing the care, be liable for civil damages." The defendants, an emergency room physician and his employer, claimed immunity under Section 25 on the grounds that they never billed the plaintiff for the medical services at issue in the plaintiff's negligence suit. The plaintiff

countered that Section 25 was inapplicable because the defendant-physician "was simply doing his job when he treated" the plaintiff and was under contract to receive compensation for services he provided at the hospital. In support of its grant of summary judgment to the defendants, the trial court noted that previous Illinois courts had found no ambiguity in the use of the word "fee" under Section 25 and had consequently granted civil immunity to emergency room physicians who had not billed patients. The Illinois Appellate Court rejected this "narrow" interpretation of Section 25 and, in reversing the trial court, found that a broader interpretation of the term "fee" was needed to properly effectuate the Act's purpose. The Illinois Supreme Court affirmed the appellate court's ruling, holding that the term "fee" was ambiguous and "broad enough" to include two interpretations: (i) whether the patient was billed; and (ii) whether the physician received compensation. In support of its holding, the court reviewed the Act's legislative history and found that its stated purpose is to encourage physicians to "volunteer their time and talents to others," not to provide immunity to doctors who did not bill for services they dispensed in a hospital setting. The court also noted that given the modern billing practices of hospitals, physicians, and other medical providers, a narrow interpretation of "fee" would make the statute difficult to apply and might "result in a disparity of legal remedies between the affluent and the less privileged."

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – CHILD SUPPORT OBLIGATIONS.

A court may order a custodial parent to pay child support to a non-custodial parent.

In *In re Marriage of Turk*, 2014 IL 116730, the Illinois Supreme Court was asked to decide whether the appellate court erred when it determined that, under Section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/505 (West 2012)), a court may order a custodial parent to pay child support to a non-custodial parent. Subsection (a) of Section 505 contains provisions concerning the calculation of child support and provides, in relevant part, that "the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for the support of the child, without regard to marital misconduct." Paragraph (2.5) of subsection (a) of Section 505 lists certain expenses and provides that "[t]he court, in its discretion, in addition to setting child support pursuant to the guidelines and factors, may order either or both parents owing a duty of support to a child of the marriage to contribute . . . ." The appellant argued that custodial parents are exempt from having to pay child support because certain subsequent provisions of Section 505 are applicable only to non-custodial parents, such as the tracking of the non-custodial parent's location, certain factors for deviating from the support guidelines, discovery of assets and financial

information of the non-custodial parent, and liens on the non-custodial parent's property for the parent's failure to pay child support. The appellee argued that Section 505 authorizes a court to enter an order requiring a custodial parent to pay child support. The Illinois Supreme Court agreed with the appellee and held that a court may order a custodial parent to pay child support to a non-custodial parent. The court reasoned that the provision in subsection (a) of Section 505 that authorizes a court to order "either or both parents" to pay child support provides the trial court with the option to order a custodial parent to pay child support. The court further reasoned that the use of the term "either or both parents owing a duty of support to the child" in paragraph (2.5) of subsection (a) supports the conclusion that a custodial parent may be ordered to pay child support. The court also noted that the provisions of Section 505 that pertain exclusively to non-custodial parents are an acknowledgment that it is more difficult to ensure that a non-custodial parent fulfills his or her support obligations and do not "[evince] an intention by the General Assembly to exempt custodial parents from having to pay child support."

ILLINOIS UNIFORM PREMARITAL AGREEMENT ACT – ANTENUPTIAL AGREEMENTS – EQUITABLE FINANCIAL SETTLEMENT STANDARD

The validity and enforceability of an antenuptial agreement triggered by the death of one spouse rests on whether the agreement is fair and reasonable, rather than whether there is evidence of fraud or duress.

In *In re Estate of Laverne G. Chaney*, 2013 IL App (3d) 120565, the Illinois Appellate Court was asked to decide whether the trial court erred when it applied the equitable financial settlement standard to determine the validity of an antenuptial agreement executed prior to the 1990 enactment of the Illinois Uniform Premarital Agreement Act (750 ILCS 10/1 *et seq*. (West 2010)). The trial court noted that under the equitable financial settlement standard, the validity and enforceability of an antenuptial agreement turns on whether, among other things, the agreement is fair and reasonable. Applying this standard, the trial court held that the antenuptial agreement at issue was not fair and reasonable because the agreement did not provide an "equitable settlement for the surviving spouse in lieu of her inheritance rights." The executor of the estate argued that the equitable financial settlement standard was "antiquated" and that the trial court should have applied a less-stringent standard of fairness than that stated under the equitable financial settlement standard because that standard was appropriate only for antenuptial agreements triggered by the dissolution of a marriage, not by the death of one of the spouses. In affirming the trial court's holding, the Illinois Appellate Court noted that "Illinois courts have applied the [equitable financial settlement] standard of fairness regardless of whether the antenuptial agreement was triggered by a dissolution of marriage or by the death of one of the spouses." However, a dissenting opinion argued that in the

context of an antenuptial agreement triggered by the death of one spouse, "Illinois courts often focus on whether the party challenging the [antenuptial] agreement signed [it] under fraud or duress and whether [the challenging party] knew the extent of the other party's assets before signing the agreement." The dissenting opinion further asserted that though a court might treat "a disparity in assets awarded to the parties under" the antenuptial agreement as "evidence that the surviving spouse was defrauded or was otherwise unaware of the other spouse's assets," such a disparity in assets by itself "cannot establish unfairness or invalidate an otherwise valid antenuptial agreement."

PREVAILING WAGE ACT – PUBLIC UTILITY COMPANIES

A contractor that assists a village in maintaining a potable water facility and water delivery infrastructure is not exempt from the Act as a public utility company.

In *Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, the Illinois Supreme Court was asked to determine whether the appellate court erred when it found that the defendant, E.R.H. Enterprises ("E.R.H."), was exempt from the provisions of the Prevailing Wage Act because it qualified as a public utility company when it assisted the Village of Bement ("Village") in operating and maintaining a potable water facility and water delivery infrastructure. Section 2 of the Act (820 ILCS 130/2 (West 2008)) states that the Act applies to "the wages of laborers, mechanics and other workers employed in any public works . . . by any public body and to anyone under contracts for public works." Section 2 further states that "public works" does not include any work done directly by a public utility company. E.R.H. argued that, by operating and maintaining a potable water system for the Village, it was providing services as a public utility company exempt from the requirements of the Act. The Department of Labor ("Department") argued that E.R.H. did not qualify for the exemption because E.R.H. neither owned the system nor charged customers for providing water as a public utility company would. The Illinois Supreme Court reversed the appellate court and held that E.R.H. did not qualify as a public utility company exempt from the provisions of the Act. In addition to agreeing with the Department's arguments, the court reasoned that: (i) the Village had contracted some, not all, of its responsibilities out to E.R.H; and (ii) E.R.H. was not regulated by the Illinois Commerce Commission or any other State agency. The court noted that the General Assembly had not provided a working definition of the term "public utility company" in the Prevailing Wage Act, and noted the limitations in incorporating definitions from other statutes. Nevertheless, the court examined the definition of public utility found in the Public Utilities Act and saw no reason why that definition should not include the municipal exemption if it is to be incorporated into the Prevailing Wage Act. Comparing the Public Utilities Act definition with the dictionary definitions applied by the appellate court, the Illinois Supreme Court found that "government regulation of utilities – or lack thereof – is

a key component" in analyzing whether an entity is a public utility. The court concluded that holding "contractors who perform construction work for public utility companies, and those who perform similar work for municipal utilities" subject to the provisions of the Act was consistent with earlier precedent.

WORKERS' COMPENSATION ACT – JUDICIAL REVIEW; APPEAL BOND

The Act does not bar judicial review of a claim against the Illinois State Treasurer in his capacity as ex officio custodian of the Injured Workers' Benefit Fund, but does bar an appeal by the Treasurer if he or she did not file the required appeal bond.

In *Illinois State Treasurer v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 120549WC, the Illinois Appellate Court was asked to decide whether it had jurisdiction to hear the Illinois State Treasurer's appeal of the Illinois Workers' Compensation Commission's award of temporary total disability benefits from the Injured Workers' Benefit Fund ("Fund"). Subdivision (f)(1) of Section 19 of the Workers' Compensation Act (820 ILCS 305/19(f)(1) (West 2012)) provides that decisions of the Commission involving claims against the State are not subject to judicial review. Subdivision (f)(2) of Section 19 (820 ILCS 305/19(f)(2) (West 2012)) provides that a summons authorizing a circuit court to review the decision of the Commission shall not be issued unless the party whom the judgment for an award of money was rendered against files a bond with the clerk of the court. Certain local government entities are expressly exempt from this bond requirement. The claimant argued that the court lacked jurisdiction to decide the Treasurer's appeal because her claim was made against the Treasurer in his official capacity as *ex officio* custodian of the Fund, which is "a claim against the State" for the purposes of subdivision (f)(1). The claimant also argued that the court lacked jurisdiction because the Treasurer failed to file the appeal bond required by subdivision (f)(2). The Treasurer countered that the bond requirement of subdivision (f)(2) applies only to employers who have judgments for money awards rendered against them and that the legislature specifically exempts State officers from similar bond requirements in other statutes. The court held that judicial review of the case was not barred under subdivision (f)(1), but that it did lack jurisdiction under subdivision (f)(2). The court reasoned that subdivision (f)(1) was based on the doctrine of sovereign immunity, the application of which depends on whether the judgment rendered in the case "could operate to control the actions of the State or subject it to liability." The court reasoned that the judgment for an award from the Fund neither controlled the actions of the State nor subjected it to liability, but merely required the disbursement of money that was dedicated to paying the claims of claimants whose employer did not provide workers' compensation insurance. The court relied on the plain language of the statute in holding that subdivision (f)(2) does not exempt the Treasurer, acting as *ex officio* custodian, from the appeal bond requirement. The court reasoned that the Treasurer was not one of the government entities expressly exempted by the statute and declined to read an unexpressed exemption into the statute. Further, the

court found no evidence in the statute to support the Treasurer's interpretation that the bond requirement only applies to employers. The court held that because the Treasurer did not file the appeal bond required by subdivision (f)(2), the circuit court lacked jurisdiction to review the Commission's decision. Thus, the court vacated the decision of the circuit court, withdrew its previous order, and dismissed the appeal for lack of jurisdiction, therefore rendering the Commission's decision final. On May 28, 2014, the Illinois Supreme Court granted the Treasurer's Petition for Leave to Appeal the decision of the appellate court.

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