2015 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. A cumulative report of statutes held unconstitutional, prepared by the Bureau's staff attorneys under the guidance of the Editorial Board and formerly included as an appendix to this publication, is available on the Bureau's website.

Respectfully submitted,

James W. Dodge
Executive Director

INTRODUCTION

This 2015 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 2014 to the summer of 2015.

The information which previously appeared in this publication as Parts 2 and 3 of the Case Report is 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

SPEECH AND DEBATE CLAUSE – ABSOLUTE LEGISLATIVE IMMUNITY

The speech and debate clause of the U.S. Constitution provides the General Assembly with absolute legislative immunity to restrict access to the House or Senate floor.

In *Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015), the United States Court of Appeals for the Seventh Circuit was asked to decide whether the district court erred when it found that officials of the General Assembly were entitled to absolute legislative immunity from suit after denying a reporter's request for press credentials to the House and Senate floors on session days because his employer was an entity required to register under the Lobbyist Registration Act (25 ILCS 170/1 *et seq.* (West 2012)). The concept of legislative immunity is found in the speech and debate clause of the United States Constitution, (U.S. CONST. art. I, § 6) which provides that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place." The Supreme Court has extended the protections of legislative activity, which has "long been held to extend beyond mere discussion or speechmaking on the legislative floor," to State, regional, and local officials and their employees for legislative activities. Subsection (d) of Senate Rule 4-3 (S.R. 4-3(d), 98th G.A.) and subsection (d) of House Rule 30 (H.R. 30(d), 98th G.A.) both prohibit any person "who is directly or indirectly interested in defeating or promoting any pending legislative measure, if required to be registered as a lobbyist" from obtaining access to the House or Senate floor at any time during legislative session. The plaintiff argued that, in addition to violating his First Amendment right to the freedom of the press, the denial of his press credentials was an administrative activity, not a legislative activity, and therefore not subject to the protections of legislative immunity. The defendant acknowledged that reporters are usually granted press credentials but argued that the plaintiff's request was properly denied because his employer was required to register as a lobbyist under the Lobbyist Registration Act. The court affirmed the trial court's grant of the defendant's motion to dismiss, holding that the General Assembly is entitled to absolute legislative immunity. The court reasoned that the General Assembly's prohibition of lobbyists and those associated with lobbying groups from having access to the floor of either chamber was enacted in order to preserve core legislative activities, including speeches and deliberations. The court concluded that it was entirely reasonable for the General Assembly to believe that the presence of lobbyists could interfere with those activities, and thus the House and Senate rules restricting floor access are protected under the speech and debate clause.

ILLINOIS PUBLIC LABOR RELATIONS ACT – UNFUNDED OBLIGATIONS

Contractual wage increases must be paid even if the General Assembly fails to appropriate funds to finance those obligations.

In *State v. American Federation of State, County, and Municipal Employees*, 2014 IL App (1st) 130262, the Illinois Appellate Court was asked to determine whether the trial court erred when it ruled that State agencies that lack sufficient appropriated funds to pay contractual wage increases are only required to pay the wages that they are able to pay. Section 21 of the Illinois Public Labor Relations Act (5 ILCS 315/21 (West 2008)) provides that "[s]ubject to the appropriation power of the employer, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act." The State argued that Section 21 means that the State's duties under its collective bargaining agreement are subject to the General Assembly's appropriation power and that the State should not be required to pay raises for which the General Assembly has not appropriated money. The plaintiff argued that the State is required to meet its contractual obligations for wage increases regardless of the General Assembly appropriates enough money for that purpose. The court held that the State must pay the wage increases because it has an obligation to do so under a State contract. The court reasoned that the State's interpretation of the General Assembly's appropriation power would allow the General Assembly to pass insufficient appropriation bills and intentionally impair its contractual obligations. This interpretation would be a violation of the constitutional policy forbidding the General Assembly from passing any laws that impair the obligation of contracts (ILL. CONST. art. I, §16). On March 25, 2015, the Illinois Supreme Court granted the State's Petition for Leave to Appeal.

ELECTION CODE – SIGNATURE REQUIREMENTS FOR NOMINATION PAPERS

The Code requires strict compliance with signature requirements for nominating petitions in municipal elections.

In *Jackson-Hicks v. East St. Louis Board of Election Commissioners*, 2015 IL 118929, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that substantial compliance is sufficient to meet the minimum signature requirements for nominating petitions under Section 10-3 of the Election Code (10 ILCS 5/10-3 (West 2012)). Section 10-3 provides, "Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political subdivision, equaling not less than 5%, nor more than 8% (or 50 more than the minimum, whichever is greater) of the number of persons, who voted at the next

preceding regular election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area." The plaintiff argued that because the defendant failed to submit the minimum number of valid signatures on the nominating petitions, the defendant's name should be removed from the ballot. The defendant argued that because Section 10-3 uses the word "may," the statutory signature requirement is directory, not mandatory, and substantial compliance with the signature requirements satisfies the legal standard. The court agreed with the plaintiff and reversed the appellate court, holding that the signature requirements established by Section 10-3 require strict compliance in order for a candidate to be placed on the election ballot. The court reasoned that the language of Section 10-3, when read as a whole, is clear and unambiguous in establishing precise signature requirements for nomination papers. The court further observed that following the defendant's "substantial compliance" theory would create a subjective, uncertain, and changeable guideline in conflict with the General Assembly's intent.

ELECTION CODE – SERVING PETITIONS ON ELECTORAL BOARDS

The Code's requirement to serve a copy of a petition for judicial review to the electoral board does not require service of the board itself if all members of the board are served individually.

In *Bettis v. Marsaglia*, 2014 IL 117050, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that subsection (a) of Section 10-10.1 of the Election Code (10 ILCS 5/10-10.1(a) (West 2012)) requires an individual to serve a copy of a petition to the electoral board as a separate legal entity when the person has already served all members of the board individually. Subsection (a) of Section 10-10.1 provides that "[t]he party seeking judicial review must file a petition with the clerk of the court and must serve a copy of the petition upon the electoral board and other parties to the proceeding . . . ." The plaintiff argued that the requirement was satisfied when she served every member of the board and that duplicate service on the legal entity is not necessary. The defendant argued that strict compliance with subsection (a) of Section 10-10.1 requires service on the board itself. The court agreed with the plaintiff, holding that a requirement to serve the board when the petitioner has already served every member of the board would be entirely duplicative. The court reasoned that the General Assembly's intent behind subsection (a) of Section 10-10.1 was to ensure that all necessary parties receive notice of the petition and, while both interpretations of the statute are entirely reasonable, the defendant's interpretation would require service of process to the same person twice. The court concluded that neither the statute nor public policy requires this redundant service.

ALCOHOLISM AND OTHER DRUG ABUSE AND DEPENDENCY ACT – RECOVERY HOMES

The Department of Human Services' regulatory scheme for recovery homes preempts local zoning and building ordinances imposed by local governmental units.

In *Affordable Recovery Housing v. City of Blue Island*, 74 F. Supp. 3d 875 (N.D. Ill. 2014), the District Court for the Northern District of Illinois was asked to decide whether the regulatory scheme of the Department of Human Services for residential alcohol treatment centers ("recovery homes") preempts the sprinkler system requirement under the 2012 National Fire Protection Association's Life Safety Code ("2012 Life Safety Code") adopted by the defendant for all residential buildings housing 17 or more persons. The plaintiff, a Department-licensed operator of a recovery home located in Blue Island, argued that Department rules preempt the 2012 Life Safety Code because under the Illinois Administrative Code (77 Ill. Adm. Code 2060.509), the Department specifically requires recovery homes to comply with the "Life Safety Code of 2000 (no later amendments or editions included)." The defendant argued that because both the Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 301/1-1 *et seq.* (West 2012)) and the rules adopted under that Act recognize local regulatory power, indicating the General Assembly's intent to allow "concurrent regulation of recovery homes by local and state authorities," a unit of local government is not preempted from requiring recovery homes to comply with the 2012 Life Safety Code in addition to the minimum requirements set forth in the Department rules. The court disagreed with the defendant and held that the Department rules preempt the 2012 Life Safety Code. The court characterized the rules as "comprehensive" and reasoned that by enacting a comprehensive system of regulation and licensure, the General Assembly implied that there is no room for regulation by local governmental units. Consequently, "municipalities may not enact more restrictive regulations, absent specific authority to do so." The court further reasoned that one of the rules—while acknowledging that local zoning and building ordinances should be followed—does not call for joint regulation or licensing of recovery homes. The court underscored this finding by interpreting other Sections of the Alcoholism and Other Drug Abuse and Dependency Act as giving the Department exclusive jurisdiction to promulgate licensure requirements and other appropriate regulations for recovery homes because "nothing [in those Sections] states or implies that local government was meant to share the task."

CHILD DEATH REVIEW TEAM ACT – SELF-CRITICAL ANALYSIS PRIVILEGE

The self-critical analysis privilege does not apply to information or records that are subject to disclosure under the Act.

In *Harris v. One Hope United, Inc.*, 2015 IL 117200, the Illinois Supreme Court was asked to decide whether the appellate court erred when it refused to recognize a self-critical analysis privilege under the Child Death Review Team Act (20 ILCS 515/1 *et seq*. (West 2012)), which would protect from disclosure certain records sought by the plaintiff in a wrongful death action involving an infant who was previously under the care and supervision of the Department of Children and Family Services ("Department"). The defendant argued that (i) "shielding self-critical documents would further the purposes of the Act," and (ii) the codification of the self-critical analysis privilege in the medical studies provisions of the Code of Civil Procedure (735 ILCS 5/8-2101 (West 2012)) "warrants judicial extension of an analogous privilege [under the Act]." The Illinois Supreme Court rejected both of the defendant's arguments, finding that (i) the Act's plain language indicates the General Assembly's intent to "encourage, rather than discourage" the disclosure of certain records relating to or pertaining to a deceased child who was under the care or receiving services from the Department; and (ii) that the codification of the self-critical analysis privilege in the medical studies provisions of the Code of Civil Procedure and not in the Child Death Review Team Act indicates the General Assembly's intent "to limit, rather than expand, the scope of the privilege." The court invoked case law holding that "the extension of an existing privilege or establishment of a new matter is best deferred to the legislature."

ILLINOIS PENSION CODE – BENEFIT REDUCTIONS

Changes made to the Code that diminish pension benefits violate the pension protection clause of the Illinois Constitution.

In *In re Pension Reform Litigation*, 2015 IL 118585, the Illinois Supreme Court was asked to decide whether the circuit court erred when it held that the changes made to Articles 2, 14, 15, and 16 of the Illinois Pension Code (40 ILCS 5/arts. 2, 14, 15, 16 (West 2012)) by Public Act 98-599 violated the pension protection clause of the Illinois Constitution (ILL. CONST. art. XIII, § 5). The pension protection clause provides that "[m]embership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Public Act 98-599 reduced and delayed certain automatic annual increases in retirement annuities for certain persons who became members of the affected retirement systems before January

1, 2011 ("Tier 1 members"), capped certain Tier 1 members' maximum salary for pension purposes, increased retirement ages for certain Tier 1 members, changed the base annuity amount for the money purchase formula, and made other changes. The plaintiffs argued that these changes were unconstitutional because they diminish pension benefits and, therefore, violate the pension protection clause. The defendants argued that (i) the State's inherent police powers allow the General Assembly to "override the rights and protections afforded by [the pension protection clause] in the interests of the greater public good" and (ii) because the pension protection clause establishes that membership in a State retirement system is a contractual relationship, pension benefits should be subject to the law governing modifications of contracts, which authorizes contracts to be modified by the State. The court agreed with the plaintiffs, holding that Public Act 98-599 was unconstitutional in its entirety because the reductions in pension benefits violated the pension protection clause and the unconstitutional provisions were inseverable from the provisions that were constitutional. The court analyzed the language of the pension protection clause and the history of the adoption of the pension protection clause at the 1970 Constitutional Convention and rejected the defendants' first argument, concluding that there is "no possible basis for interpreting the provision to mean that its protections can be overridden if the General Assembly deems it appropriate." In rejecting the defendants' second argument, the court observed that even if the pension protection clause did not prohibit the diminishment or impairment of pension benefits, the provisions of Public Act 98-599 would violate the contracts clause of the Illinois Constitution (ILL. CONST. art. I, § 16), which provides that "[n]o . . . law impairing the obligation of contracts . . . shall be passed." The court reasoned that funding problems and economic fluctuations were foreseeable and "the State did not select the least drastic means of addressing its financial difficulties." The court also found that the provisions of Public Act 98-599 were inseverable but noted that the General Assembly is "free to enact any provisions of Public Act 98-599 that do not violate the constitution."

ILLINOIS PENSION CODE – TRANSFER OF SERVICE CREDIT

A member of the Illinois Municipal Retirement Fund who has terminated service is not an active member for the purpose of transferring service credit from another fund.

In *Village of Oak Brook v. Sheahan*, 2015 IL App (2d) 140810, the Illinois Appellate Court was asked to decide whether the circuit court erred when it upheld an administrative decision of the Board of Trustees of the Illinois Municipal Retirement Fund ("IMRF") allowing the defendant, a police chief, to transfer service credit established under Article 3 of the Illinois Pension Code (40 ILCS 5/art. 3 (West 2012)) to IMRF after he terminated his service as a police chief. When the defendant transferred his Article 3 service credit, paragraph (9) of subsection (a) of Section 7-139 of the Code (40 ILCS 5/7-

139(a)(9) (West 2012)) provided that upon payment of a specified amount and upon transfer of those credits from an Article 3 fund, "[c]redits and creditable service shall be granted for service under Article 3 . . . to any active member of [IMRF] . . . ." The plaintiff argued that IMRF was not authorized to grant service credits to the defendant because he was not employed as a police chief, and was therefore not an active member, at the time he made the payment required to transfer the Article 3 service credit. The defendant argued that he was an active member at the time he made the payment because IMRF did not receive the form for termination of IMRF participation until after the payment was made. The court agreed with the plaintiff, holding that the defendant was not an active member when he made the payment because he was not employed by the participating municipality to perform police duties at the time. After noting that the term "active member" is not defined and that the Article uses the term "member" interchangeably with "employee," the court reasoned that under the Article's definition of "employee," a chief of police who elects to participate in IMRF is an employee for so long as he or she is employed by a participating municipality to perform police duties. Therefore, the court concluded that the "legislature intended the term 'active member' to refer to a person who is both employed by a participating municipality and making contributions to IMRF." Public Act 98-439, effective August 16, 2013, moved the relevant provisions to 40 ILCS 5/7-139(a)(11).

COUNTIES CODE – COURT-FINANCE FEE

Court-finance fees are actually fines and may be imposed only by the court, not the circuit clerk.

In *People v. Smith*, 2014 IL App (4th) 121118, the Illinois Appellate Court was asked to decide whether court-finance fees were properly imposed by the circuit clerk, rather than the court. Subsection (c) of Section 5-1101 of the Counties Code (55 ILCS 5/5-1101(c) (West 2014)) provides that a county board may enact by ordinance or resolution certain "fees" to be paid by defendants ranging from $10 to $50, depending on the class of offense. The State argued that the court-finance fee was properly imposed by the circuit clerk because the circuit clerk can impose fees to recoup expenses due to the cost of prosecuting a defendant. The defendant argued that despite the use of the word "fee," the court-finance fee was actually a fine, which only a court can impose, because it did not seek to compensate the State for the cost of prosecuting the defendant. The court agreed with the defendant, vacating the circuit clerk's assessment of the court-finance fees and directing the circuit court to impose the court-finance fees as fines. The court reasoned that since the flat fees are expressly for "financ[ing] the court system" and do not seek to compensate the State for any costs incurred as a result of prosecuting the defendant, they are fines. The court acknowledged that an argument could be made that the General Assembly intended the court-finance fee to be imposed by the circuit court clerk upon

defendants who use the services of the court system to assist in defraying those costs. However, the court deferred to recent precedent and held that the court-finance fee does not serve to compensate the State, and therefore is a de facto fine imposable only by the court.

NURSING HOME CARE ACT – NOTICE AND HEARING

A nursing home resident is entitled to a hearing before the Department of Public Health on an involuntary transfer or discharge, but not on a refusal of readmission following the resident's hospitalization at another facility.

In *Gruby v. Department of Public Health*, 2015 IL App (2d) 140790, the Illinois Appellate Court was asked to decide whether the trial court erred when it dismissed a complaint for administrative review against the Department of Public Health ("Department") for failing to complete the plaintiff's requested hearing on a withdrawn notice of involuntary transfer or discharge. Subsection (a-10) of Section 3-401.1 of the Nursing Home Care Act (210 ILCS 45/3-401.1(a-10) (West 2012)) provides, "For the purposes of this Section, a recipient or applicant shall be considered a resident in the facility during any hospital stay totaling 10 days or less following a hospital admission." Section 3-410 of the Act (210 ILCS 45/3-410 (West 2012)) provides that a resident subject to involuntary transfer or discharge from a facility is entitled to a hearing before the Department. The plaintiff argued that the Department retained authority to conduct the hearing even after the nursing home withdrew its notice of involuntary transfer or discharge, and that under subsection (a-10) of Section 3-401.1, the plaintiff remained a "resident" of the nursing home during his hospitalization at another facility and thus should have been provided a hearing under Section 3-410. The Department argued that because the nursing home withdrew its notice of involuntary discharge and was no longer seeking approval of an involuntary transfer or discharge, the Department had no authority to conduct a hearing. The court agreed with the Department, holding that a nursing home facility may eliminate a resident's statutorily protected right to an involuntary discharge hearing by simply withdrawing its notice of discharge and simultaneously refusing to allow the resident to return to the facility after hospitalization. The court reasoned that Section 3-401.1 was enacted to prevent nursing homes from denying services to recipients of Medicaid and that the language providing that a nursing home resident is considered a resident in the facility during any hospital stay totaling 10 or less days applies only for the purposes of that Section. The court further reasoned that a nursing home resident is statutorily entitled to notice of and a hearing on a transfer or discharge by a nursing home, but not on a refusal of readmission following a hospitalization. The court observed that here, the plaintiff voluntarily left the nursing home for hospitalization purposes, allowing the nursing home to withdraw its notice and the Department to not conduct a hearing without violating plaintiff's procedural due process rights. The court also noted that the plaintiff could have requested the Department to undertake an investigation of the nursing

home if he believed the nursing home had violated the Act. The court stated, "It is up to the legislature or the Department to determine if a . . . revision to the Act or to the Department's regulations is appropriate in Illinois."

PUBLIC UTILITIES ACT – COST RECOVERY

The Illinois Commerce Commission's interpretation of the Act, allowing a rate scheme that recovered facility costs from customers not directly served by those facilities, is reasonable.

In *The Coalition to Request Equitable Allocation of Costs Together (REACT) v. Commonwealth Edison Co.*, 2015 IL App (2d) 140202, the Illinois Appellate Court was asked to decide whether the Illinois Commerce Commission ("Commission") interpreted the Public Utilities Act in a reasonable manner in approving a rate design that charged certain high-usage and high-voltage industrial customers several million dollars for the recovery of costs for delivery systems they did not directly utilize. Subsection (c) of Section 16-108 of the Act (220 ILCS 5/16-108(c) (West 2012)) provides that charges "for delivery services shall be cost based, and shall allow the electric utility to recover the costs of providing delivery services through its charges to its delivery service customers that use the facilities and services associated with such costs." The plaintiff argued that its own interpretation, that a class of customers who never use a particular facility should not bear any costs that can be traced back to that facility, is the only permissible reading of subsection (c). The defendant argued that the plaintiff's reading is but one of several reasonable interpretations, and that the court should defer to the Commission's interpretation, which allowed a rate design that recovered delivery costs from customers even if they did not use the particular delivery system. The court agreed with the defendant and deferred to the Commission's interpretation of subsection (c). The court reasoned that while subsection (c) allows utilities to recover the costs of a facility from only the customers that use the facility, subsection (c) does not mandate such an arrangement. Therefore, the court observed, a utility may base its rate design partially on the recovery of costs from users of a particular facility, but it need not base its rate design solely on whether a particular customer uses that particular facility. The court further reasoned that the plaintiffs ignored the permissive wording of subsection (c). The court concluded that the Commission's interpretation agrees with the broad language of the Act because the Act establishes that the overall goal of rate design is fairness in allocating costs among customer classes, not granular precision in itemizing costs.

PUBLIC UTILITIES ACT – CALCULATING INTEREST ON ACCOUNTS

The Illinois Commerce Commission's interpretation of an ambiguous provision, allowing interest to be calculated on the net of under-collected revenues without deducting certain taxes first, is valid.

In *People ex rel. Madigan v. Illinois Commerce Commission*, 2015 IL App (1st) 140275, the Illinois Appellate Court was asked to decide whether the Illinois Commerce Commission ("Commission") erred when it determined that utilities may calculate interest on the full amount of under-collected revenues under subdivision (d)(1) of Section 16-108.5 of the Public Utilities Act (220 ILCS 5/16-108.5 (d)(1) (West 2012)). At the time of the rate proceedings at issue, subdivision (d)(1) provided, "Any over-collection or under-collection indicated by such reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, with interest, the charges for the applicable rate year. The plaintiffs argued that the Commission erred in not requiring the deduction of certain taxes before calculating the interest to be collected on under-collected revenues. The defendant argued that it would be improper to remove taxes from the reconciliation balance before computing interest. In support of its argument, the defendant noted that while some provisions of the Act specify that calculations are on a "net" basis, other provisions specify that calculations are "adjusted for taxes," and the relevant provision does not mention taxes at all. The court found the statutory language ambiguous and deferred to the Commission's interpretation. The court reasoned that the General Assembly could easily amend Section 16-108.5 to establish a mechanism for calculating interest, and the failure to act indicates that the General Assembly intended the "balance, with interest" to be the whole balance. Public Act 98-15, effective May 22, 2013, amended subdivision (d)(1) to provide that "[a]ny over-collection or under-collection indicated by such reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, with interest calculated at a rate equal to the utility's weighted average cost of capital approved by the Commission for the prior rate year, the charges for the applicable rate year."

ILLINOIS PUBLIC ACCOUNTING ACT – ACCOUNTANT-CLIENT PRIVILEGE

Accountants hold the accountant-client privilege under the Act and only they may prevent disclosure of confidential information in court proceedings.

In *Brunton v. Kruger*, 2015 IL 117663, the Illinois Supreme Court was asked to decide whether the appellate court erred in holding that the statutory accountant-client privilege granted under the Illinois Public Accounting Act was held by the client, and therefore could only be asserted or waived by the client. Section 27 of the Act (225 ILCS 450/27 (West 2012)) provides that "a licensed or registered CPA 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 CPA." Both parties argued that the statutory privilege granted under Section 27 was similar to the common law attorney-client privilege, which can only be waived with approval of the client. An accounting firm, responding to a discovery subpoena and refusing to release the documents it claimed were privileged, argued that the plain and unambiguous language of Section 27 granted the privilege to the accountant. The court agreed with the discovery respondent, holding that the accountant holds the accountant-client privilege. The court reasoned that the phrase "shall not be required by any court" is directed at the holder of the privilege, and that the holder of the privilege must be the accountant because Section 27 makes no reference to the client. Additionally, the court found that because the privilege is found in the Illinois Public Accounting Act, and not in the Code of Civil Procedure, the privilege acts as an attribute of the accounting profession, especially given that Section 27 does not track with Sections in other professional regulation acts that grant a similar privilege. The court found it significant that the General Assembly, in enacting the Act, had essentially deferred to the profession's own formulation of the policies that govern it. The court concluded by observing that the General Assembly could amend the Act to place the privilege with the client and bring it in line with other statutorily-granted privileges if it wished to do so.

LIQUOR CONTROL ACT OF 1934 – EXEMPTIONS

The State has the burden of providing that the Act's exemption for persons under the age of 21 who consume alcohol while under the direct supervision of their parents does not apply.

In *People v. Cannon*, 2015 IL App (3d) 130672, the Illinois Appellate Court was asked to decide whether the circuit court erred when it convicted the defendant of unlawful consumption of alcohol by a minor. Subsection (g) of Section 6-20 of the Liquor Control Act of 1934 (235 ILCS 5/6-20(g)(West 2012)) provides that the consumption of alcoholic liquor "by a person under 21 years of age under the direct supervision and approval of the parents or parent . . . in the privacy of a home . . . is not prohibited by this Act." The State argued that the defendant had the burden to prove the exemption applied. The defendant argued that the State had to prove beyond a reasonable doubt that the exemption did not apply and that the State had not met its burden. The court agreed with the defendant and held that it was the State's burden to establish: (i) that the exemption did not apply, and (ii) that defendant was not directly supervised by his mother while he was drinking alcohol. The court reasoned that when "a criminal statute contains an exemption and the legislature has not set forth a provision within the statue allocating the burden of persuasion as to the exemption, we presume that the burden is on the State, not the defendant." A dissenting opinion argued that the Illinois Supreme Court has held that exemptions have never been

an issue for the State to prove and that placing the burden on a defendant to prove he or she is exempt does not violate fundamental principles of justice or due process.

ILLINOIS PUBLIC AID CODE – NURSING HOME BED FEE

The nursing home bed fee imposed under the Code is constitutional as applied to nursing home facilities that operate as charitable institutions and do not participate in Medicaid.

In *Grand Chapter, Order of the Eastern Star of the State of the Illinois v. Topinka*, 2015 IL 117083, the Illinois Supreme Court was asked to decide whether the circuit court erred in declaring the nursing home license fee ("bed fee") required under Section 5E-10 of the Illinois Public Aid Code (305 ILCS 5/5E-10 (West 2012)) unconstitutional as applied to nursing home facilities that do not participate in the Medicaid program. Section 5E-10 requires "[e]very nursing home provider to pay to the Illinois Department . . . a fee in the amount of $1.50 for each licensed nursing bed day for the calendar quarter in which the payment is due . . ." for deposit into the Long-Term Care Provider Fund. The plaintiff, a fraternal organization that operates a nursing home licensed by the Department of Public Health, asserted that the bed fee is in fact a tax imposed for the sole purpose of funding Medicaid. The plaintiff argued that because it does not participate in Medicaid and is a not-for-profit organization that enjoys tax-exempt status, the bed fee, as applied to charitable institutions such as the plaintiff, is unconstitutional under the uniformity clause of the Illinois Constitution (ILL. CONST. art. IX, § 2). That clause provides, "In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly." The defendant countered that the purpose of the bed fee is not only to fund Medicaid reimbursements, but also to serve other purposes "which either benefit or are precipitated by the operation of nursing homes generally, including the [plaintiff's facility]." The Illinois Supreme Court reversed the circuit court's judgment and held that the bed fee does not violate the uniformity clause. The court reasoned that Section 5E-10 "expressly states" that the bed fees collected shall be deposited into the Long-Term Care Provider Fund and noted that Section 5B-8 of the Code (305 ILCS 5/5B-8 (West 2012)) "enumerates no less than seven distinct purposes for which disbursements from the Fund may be made . . . that are wholly unrelated to the Medicaid program," including funding for administrative expenses incurred by the Department, funding for the enforcement of Illinois' nursing home standards, and funding for the nursing home ombudsman program. Since the plaintiff's facility benefits from the Department's regulation of nursing homes, the court concluded by finding a reasonable relationship between collecting the bed fee from every nursing home, including the plaintiff's facility, and the State's need to fund the various obligations enumerated under Section 5B-8. However, the court urged the General Assembly to reconsider whether the

inclusion of charitable organizations such as the plaintiff among the nursing homes subject to the bed fee is warranted as a matter of public policy.

ILLINOIS VEHICLE CODE – LICENSE PLATE OBSTRUCTION

The Code is ambiguous as to whether a trailer hitch constitutes an unlawful obstruction of a license plate.

In *People v. Gaytan*, 2015 IL 116223, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the circuit court improperly denied the defendant's motion to suppress evidence discovered during a traffic stop based on the police officers' belief that the vehicle's license plates was obstructed by a trailer hitch in violation of Section 3-413 of the Illinois Vehicle Code (625 ILCS 5/3-413 (West 2010)). Subsection (b) of Section 3-413 states that a license plate "shall be maintained in a condition to be clearly legible, free from any materials that would obstruct the visibility of the plate, including, but not limited to, glass covers and plastic covers." The defendant argued that nothing in subsection (b) mentions or prohibits the use of trailer hitches and that subsection (b) "refers to materials that are connected to the license plate itself, such as glass and plastic covers, decals, paint or other similar materials." In the alternative, the defendant argued that subsection (b) is "ambiguous as to whether it prohibits objects that are not physically attached to the license plate." The State argued that subsection (b) "prohibits any obstruction of a license plate . . . by any object attached to the vehicle, when viewed from any distance or angle." The Illinois Supreme Court reversed the appellate court's decision and affirmed the circuit court's denial of the defendant's motion to suppress on other grounds, but also agreed with the defendant that subsection (b) is ambiguous, and as such, the rule of lenity applies. Because of the ambiguity of Section 3-413, the court encouraged the General Assembly to "clarify to what extent . . . equipment and accessories which are attached to a vehicle near a license plate are prohibited." Public Act 97-743, effective January 1, 2013, made several changes to Section 3-413, including adding subsection (g), prohibiting the use of license plate covers. Public Act 99-68, effective January 1, 2016, amended Section 3-413 to provide that the registration plate is permitted to be obstructed by a rear loaded motorized forklift.

ILLINOIS VEHICLE CODE – SIGNALING BEFORE PARKING AT CURB

The Code is ambiguous as to whether a turn signal is required before pulling a car over to the curb.

In *United States v. Stanbridge*, 79 F. Supp. 3d 881 (C.D. Ill. 2015), the District Court for the Central District of Illinois was asked to grant a motion to suppress evidence on the grounds that a traffic stop was improper under Section 11-804 of the Illinois Vehicle Code (625 ILCS 5/11-804 (West 2012)). Subsection (a) states that "no person may . . . turn a vehicle from a direct course or move right or left upon a roadway . . . without giving an appropriate signal . . . ." Subsection (b) states that a "signal of intention to turn right or left when required must be given continuously during not less than the last 100 feet traveled by the vehicle before turning within a business or residence district," while subsection (d) provides that the electric turn signal device on a vehicle must be used to indicate an intention to turn, change lanes, or start from a parallel parked position. The defendant argued that under the plain language of Section 11-804, he had not committed any traffic violations when he pulled the car over to the curb while simultaneously signaling. The arresting police officer stated that he believed the defendant had violated Section 11-804 by failing to activate his turn signal for at least 100 feet before pulling over. The court denied the defendant's motion on other grounds, but noted that the language of subsections (a), (b), and (d) of Section 11-804 "does not indicate explicitly that pulling to a stop at the curb requires the use of a signal," or that the curb is a "lane" for purposes of changing lanes, which would also require use of a signal, nor does any Illinois case law indicate whether Section 11-804 applies to the curbing of a vehicle. The court further noted that in subsection (d), the General Assembly had clearly expressed its intent that the signal requirements of Section 11-804 apply to changing lanes, turning, and starting from a parallel parked position, but had not done the same for the curbing of a vehicle. On August 10, 2015, the defendant filed a Petition for Leave to Appeal with the United States Court of Appeals for the Seventh Circuit.

JUVENILE COURT ACT OF 1987 – AUTOMATIC TRANSFER TO ADULT COURT

The Illinois Supreme Court strongly urges the General Assembly to review the automatic transfer provisions of the Act in light of current scientific and sociological evidence.

In *People v. Patterson*, 2014 IL 115102, the Illinois Supreme Court was asked to decide whether the automatic transfer of certain minors from juvenile court to adult criminal court under Section 5-130 of the Juvenile Court Act of 1987 (705 ILCS 405/5-

130 (West 2008)) is constitutional under the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution (U.S. CONST. amend. VIII) and the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art. I, § 11). Section 5-130 of the Act provides that a minor who is at least 15 years of age at the time of the offense and charged with certain offenses shall be prosecuted in adult criminal court. Because the defendant was convicted of three counts of aggravated criminal sexual assault, he was sentenced to a total of 36 years in prison under Illinois' mandatory consecutive sentencing scheme in Section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4(a)(ii) (West 2008)). The defendant argued that Section 5-130 of the Act, either alone or in conjunction with Section 5-8-4 of the Code, is unconstitutional because it does not take into account the inherent differences between juveniles and adults, including juveniles' reduced culpability and greater ability to change. The court rejected this argument, holding that Section 5-130 is a procedural provision that does not impose a penalty. The court reasoned that access to juvenile courts is not a constitutional right because the Illinois juvenile justice system is a "creature of the legislature," and the "differences in treatment created by the statute in question [are] not in the penalty provided in different offenses," but rather in the procedural differences between juvenile and adult court. The court concluded that in the absence of an actual punishment imposed under Section 5-130, neither an Eighth Amendment nor a proportionate penalties clause challenge is sustainable. However, the court noted that Section 5-130 does not allow a trial court any discretion to take into account the unique qualities and characteristics of youth and its effect on juveniles' judgment, actions, or potential for rehabilitation. The court wrote, "[W]e strongly urge the General Assembly to review the automatic transfer provision based on the current scientific and sociological evidence indicating a need for the exercise of judicial discretion in determining the appropriate setting for the proceedings in these juvenile cases." Public Act 99-258, effective January 1, 2016, removed the mandatory transfer provisions and established factors for the court to consider in sentencing a minor.

JUVENILE COURT ACT OF 1987 – AUTOMATIC TRANSFER TO ADULT COURT

Distinguishing recent Illinois Supreme Court precedent, the court held that the automatic transfer provisions of the Act, in conjunction with the sentencing provisions of the Unified Code of Corrections, violate the proportionate penalties clause of the Illinois Constitution.

In *People v. Gipson*, 2015 IL App (1st) 122451, the Illinois Appellate Court, First District – Third Division, was asked to decide whether the automatic transfer of a 15-year-old defendant from juvenile court to adult criminal court under Section 5-130 of the Juvenile Court Act of 1987 ("Act") (705 ILCS 405/5-130 (West 2006)) and subsequent 52-

year prison sentence for attempted murder under Section 8-4 of the Criminal Code of 2012 ("Criminal Code") (720 ILCS 5/8-4(c)(1)(C) (West 2006)) and Section 5-8-4 of the Unified Code of Corrections ("Code of Corrections") (730 ILCS 5/5-8-4(a)(i) (West 2006)) violated the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art. I, § 11). Section 5-130 of the Act provides that a minor who is at least 15 years of age at the time of the offense and charged with certain offenses shall be prosecuted in adult criminal court. Section 8-4 of the Criminal Code provides that 20 years per count must be added to a defendant's sentence if he or she was convicted of personally discharging a firearm while attempting to commit first degree murder. Section 5-8-4 of the Code of Corrections provides that the defendant must serve his two 26-year minimum sentences consecutively; therefore, the defendant will not be released from prison until he is approximately 60 years old. The defendant argued that Section 5-130 of the Act, either alone or in conjunction with Section 5-8-4 of the Code of Corrections, is unconstitutional as applied to him because it did not afford the trial court the opportunity to consider compelling mitigating factors in his case, such as traumatic events from the defendant's childhood, his youthfulness, his mental illnesses, his diminished mental capacity, the fact that he demonstrated progress in rehabilitation and improved mental health, or the fact that the actual harm done by the defendant was relatively minor. The State argued that it was improper to consider the defendant's personal characteristics in determining whether his sentence was proper. The State further argued that the court's analysis in determining whether a sentence violates the proportionate penalties clause should be "in lockstep" with its cruel and unusual punishment analysis under the Eighth Amendment of the United States Constitution (U.S. CONST. amend. VIII).

The court disagreed with the State, holding that the imposed sentence "shocks the moral sense of the community" and therefore violates the proportionate penalties clause of the Illinois Constitution. The court reasoned that although the defendant's facial challenges were invalid in light of *People v. Patterson*, 2014 IL 115102 (page [XXXX] of this Report), the circumstances of this case were distinguishable. The court acknowledged that the defendant could not demonstrate that the transfer and sentence scheme, as applied to him, violates the cruel and unusual punishment clause of the Eighth Amendment. Nevertheless, the court found that "the proportionate penalties clause demands consideration of the defendant's character by sentencing a defendant with the objective of restoring the defendant to useful citizenship." The court observed that the trial court indicated that it would have imposed a shorter sentence, had it possessed the statutory authority to do so, and found it "unsettling that in sentencing a juvenile, the trial court's discretion was frustrated by the legislature's decision to impose a mandatory firearm enhancement more than three times the length of [the] attempted murder sentence." The court reasoned that while the General Assembly may restrict the judiciary's discretion in imposing sentences, that power is limited by the constitution. The court concluded that under the specific circumstances of the case before it, the imposed sentence did not pass constitutional muster, stating, "We join our supreme court and colleagues in the appellate court in urging the

legislature to expeditiously address the inability of our present statutory scheme to provide allowances for the special considerations that youth warrants." Public Act 99-258, effective January 1, 2016, removed the mandatory transfer provisions and established factors for the court to consider in sentencing a minor.

JUVENILE COURT ACT OF 1987 – AUTOMATIC TRANSFER TO ADULT COURT

Following recent Illinois Supreme Court precedent, the court held that the automatic transfer provisions of the Act, in conjunction with the sentencing provisions of the Unified Code of Corrections, do not violate the proportionate penalties clause of the Illinois Constitution.

In *People v. Banks*, 2015 IL App (1st) 130985, the Illinois Appellate Court, First District – Fifth Division, was asked to decide whether the automatic transfer of a minor defendant from juvenile court to adult criminal court under Section 5-130 of the Juvenile Court Act of 1987 ("Act") (705 ILCS 405/5-130 (West 2002)) and subsequent 45-year prison sentence for first degree murder under subdivision (a)(1)(d)(iii) of Section 5-8-1 and subdivision (a)(2)(i) of Section 3-6-3 of the Unified Code of Corrections ("Code of Corrections") (730 ILCS 5/5-8-1(a)(1)(d)(iii); 730 ILCS 5/3-6-3(a)(2)(i) (West 2002)) violated the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art. I, § 11). Section 5-130 of the Act provides that a minor who is at least 15 years of age at the time of the offense and charged with certain offenses shall be prosecuted in adult criminal court. Sections 5-8-1 and 3-6-3 of the Code of Corrections, when read together, provide in pertinent part that the minimum sentence for the defendant in this case, who personally discharged a firearm in the commission of first degree murder, is 45 years in prison. The defendant argued that *People v. Patterson*, 2014 IL 115102 (page [XXXX] of this Report) was wrongly decided and that Section 5-130 of the Act, either alone or in conjunction with the sentencing provisions of the Code of Corrections, is unconstitutional as applied to him because it did not afford the trial court the opportunity to consider the defendant's youthfulness. The State argued that the transfer to adult court and subsequent sentence was proper under *Patterson*. The court agreed with the State, holding that the automatic transfer statute is constitutional. The court reasoned, "However, even if we were to disagree with the well-reasoned analysis in *Patterson*, which we do not, '[t]he appellate court lacks authority to overrule decisions of [the supreme] court, which are binding on all lower courts.'" The court further noted that the trial court had taken the opportunity to consider factors in aggravation and mitigation before imposing the minimum sentence. Public Act 99-258, effective January 1, 2016, removed the mandatory transfer provisions and established factors for the court to consider in sentencing a minor.

JUVENILE COURT ACT OF 1987 – HABITUAL JUVENILE OFFENDERS

The Illinois Appellate Court urges the General Assembly to grant trial judges more discretion in sentencing juveniles under the habitual offender sentencing provisions of the Act.

In *In re Shermaine S.*, 2015 IL App (1st) 142421, the Illinois Appellate Court was asked to decide whether the mandatory sentencing provisions for habitual offenders under Section 5-815 of the Juvenile Court Act of 1987 (705 ILCS 405/5-815 (West 2012)) are constitutional under the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution (U.S. CONST. amend. VIII) and the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art. I, § 11). Section 5-815 of the Act provides that a minor who is adjudicated a delinquent minor three times for offenses that would constitute felonies in adult criminal court shall be adjudged a habitual juvenile offender and committed to the Department of Juvenile Justice until the age of 21. The defendant argued that Section 5-815 of the Act is unconstitutional because it does not take into account the severity of the offenses committed and the inherent differences between juveniles and adults, including juveniles' reduced culpability and greater ability to change. Relying on 35-year-old case law, the court rejected this argument, holding that Section 5-815 does not violate either the United States Constitution or Illinois Constitution. In so holding, the court called upon the General Assembly to grant trial judges the discretion to consider mitigating factors in imposing sentences under Section 5-815 of the Act. The court wrote, "Recent research on the effect that the unique qualities and characteristics of youth may have on juveniles' judgment and actions warrants reconsideration of some provisions of the Act, particularly those that remove or reduce the trial judge's discretion in considering some of those qualities and characteristics in sentencing a juvenile . . . to ensure preservation of the fundamental purpose of juvenile proceedings – the child's rehabilitation, treatment, and welfare."

CRIMINAL CODE OF 2012* – STATUTE OF LIMITATIONS

The extended limitations period for financial exploitation of an elderly person commences when the aggrieved party has knowledge, rather than suspicion, that a crime has occurred.

In *People v. Chenoweth*, 2015 IL 116898, the Illinois Supreme Court was asked to decide whether the appellate court erred when it vacated the defendant's conviction of financial exploitation of an elderly person, holding that the extended period of limitations under paragraph (2) of subsection (a) of Section 3-6 of the Criminal Code of 2012 (720 ILCS 5/3-6(a)(2) (West 2004)) had expired. Subsection (a) of Section 3-6 extends the general statute of limitations for theft involving a breach of fiduciary obligation, and paragraph (2) of that subsection provides that the prosecution may be commenced "within one year after the discovery of the offense by an aggrieved person . . . or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense." The State argued that the prosecution was timely because it was commenced within one year after the State's Attorney was informed of the offense. The defendant argued that subsection (a) was triggered when the victim learned from a detective that the defendant had written unauthorized checks, and that because the charges were brought more than a year after that date, the prosecution was outside of the extended limitations period. The court agreed with the State, holding that the limitations period commenced "when the . . . State's Attorney became aware of the offense." The court reasoned that paragraph (2) of subsection (a) requires more than mere suspicion of a crime, but rather "awareness or knowledge that there has been a violation of a penal statute." Under the court's interpretation of paragraph (2) of subsection (a), the victim learning that the defendant had written unauthorized checks amounted to suspicion of a crime, but not to absolute knowledge that the crime occurred. The court further noted in its reasoning that "the legislature enacted Section 3-6(a) specifically to deal with the offender who has successfully avoided detection of his or her breach of fiduciary obligation for the term of the general time limitation."

* 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

CRIMINAL CODE OF 2012 – BURGLARY

Burglary convictions based on the pawning of stolen property were vacated because the theft occurred prior to the defendant's entry into the pawn shop.

In *People v. Murphy*, 2015 IL App (4th) 130265, the Illinois Appellate Court was asked to determine whether the defendant's burglary convictions should be reversed. The State charged the defendant with two counts of burglary under Section 19-1 of the Criminal Code of 2012 (720 ILCS 5/19-1(a) (West 2010)) alleging that he twice entered a pawn shop with the intent to commit therein a theft. The defendant admitted pawning electronics, but he denied going into a residential home and stealing them. Rather, he claimed that he bought the items "on the street." Under Section 19-1 of the Code, a person commits burglary by, without authority, knowingly entering or remaining within a building "with intent to commit therein a felony or theft." Under Section 16-1 of the Code (720 ILCS 5/16-1(a) (West 2010)), a person commits theft when he knowingly "obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him or her to believe that the property was stolen . . . and . . . intends to deprive the owner permanently of the use or benefit of the property . . ." The defendant argued that the State failed to prove that he entered the pawn shop with the intent to commit therein a theft of stolen property, and therefore could not be convicted of burglary. The court agreed, finding that all of the elements of theft occurred prior to the defendant's entry into the pawn shop and not inside or upon entry into the pawn shop. Therefore, the defendant could not have entered the pawn shop with the intent to commit therein a theft. Because the theft had already occurred, the defendant could not be found guilty of burglary based on his conduct inside the pawn shop, and his convictions were vacated. The dissent argued that the majority had misapplied the theft statute. The dissent reasoned that Section 16-1 requires proof the defendant used, concealed, or abandoned the property after he obtained control over it. In the dissent's view, a rational trier of fact could conclude that, by pawning the stolen property, the defendant used the property in such a manner as to deprive the owner permanently of its use or benefit.

CRIMINAL CODE OF 2012 – WEAPON LENGTH

"Overall length" of a weapon is measured by a straight line between the two farthest points of the gun, not from a line parallel to the bore, and includes any removable component at the end of the rifle's barrel.

In *People v. Shreffler,* 2015 IL App (4th) 130718, the Illinois Appellate Court was asked to decide whether the trial court erred when it convicted the defendant of unlawful use of weapons based upon possession of two shotguns, each with an overall length less

than 26 inches, and one rifle with a barrel less than 16 inches in length. Subdivision (a)(7)(ii) of Section 24-1 of the Criminal Code of 2012 (720 ILCS 5/24-1(a)(7)(ii) (West 2010)) provides that a person commits the offense of unlawful use of weapons when he or she knowingly possesses "any rifle having one or more barrels less than 16 inches in length or a shotgun having one or more barrels less than 18 inches in length or any weapon made from a rifle or shotgun, whether by alteration, modification, or otherwise, if such a weapon as modified has an overall length of less than 26 inches." With regard to the two shotguns, the State argued that "overall length," as used in the Code, is measured from a straight line parallel to the bore of the shotgun. The defendant argued that "overall length" is measured by the two farthest points on the gun, not along a line parallel to the bore. The court agreed with the defendant, holding that because "overall length" is not defined in the Code, there was no support for the State's assertion that the line of measurement must be restricted to a line parallel with the shotgun's bore. With regard to the rifle with a barrel allegedly less than 16 inches in length, the State argued that the legal length of a rifle barrel under the Code does not include a flash suppressor attached to the end of the barrel. The defendant argued that the attached flash suppressor should have been included in the measurement of the rifle barrel's length. The court agreed with the defendant and held that the flash suppressor should have been included in measuring the rifle barrel. The court reasoned that a flash suppressor, like a barrel, is a gun part through which bullets travel as they are discharged from a firearm. The court noted the lack of statutory guidance regarding whether a flash suppressor should be included when measuring barrel length for purposes of the Code. The court concluded that until the General Assembly promulgates more specific statutory definitions for "overall length" and "barrels less than 16 inches in length," these ambiguous phrases will be construed in favor of the defendant.

CRIMINAL CODE OF 2012 – UNLAWFUL USE OF A WEAPON; FELONY CLASSIFICATION

An out-of-state prior felony for delivery of a controlled substance cannot be used to enhance a charge of unlawful use of a weapon by a felon from a Class 3 felony to a Class 2 felony without the State providing notice of its intent to seek an enhanced felony classification.

In *People v. Whalum*, 2014 IL App (1st) 110959-B, the Illinois Appellate Court was asked to decide whether the circuit court erred when it imposed an enhanced sentence upon the defendant for a Class 2 felony because of the defendant's prior out-of-state felony conviction for delivery of a controlled substance. Subsection (a) of Section 24-1.1 of the Criminal Code of 2012 (720 ILCS 5/24-1.1(a) (West 2010)) provides, "It is unlawful for a person to knowingly possess . . . any firearm . . . if the person has been convicted of a felony under the laws of this State or any other jurisdiction." Subsection (e) of that Section

provides that a first violation is a Class 3 felony and further provides that a violation by a person who has been convicted of a "Class 2 or greater felony under the Illinois Controlled Substances Act . . ." is guilty of a Class 2 felony. The State argued that the Class 2 felony sentence was proper because the defendant's out-of-state conviction for felony delivery of a controlled substance is analogous to a Class 2 felony under the Illinois Controlled Substances Act. The defendant argued that the Class 2 felony sentence was improper because he was not convicted of any felonies under the Illinois Controlled Substances Act, nor did his conviction fall within the other categories of felonies listed in subsection (e) of Section 24-1.1 of the Code. The court agreed with the defendant, holding that because the defendant had not been convicted of a violation of the Illinois Controlled Substances Act, the defendant could only be sentenced for a Class 3 felony. In rejecting the State's argument, the court reasoned that if the General Assembly had intended to include violations of similar crimes in other states, "it would have done so not by listing specific statutes but, rather, setting out a general description of the crime." The court further noted that forcible felonies, stalking, and aggravated stalking had been listed as general descriptions of crimes that would qualify for a Class 2 felony sentence, and reasoned that if the General Assembly could have done the same thing concerning out-of-state violations analogous to those under the Illinois Controlled Substance Act.

CODE OF CRIMINAL PROCEDURE OF 1963 – PERSONAL KNOWLEDGE REQUIREMENT

An out-of-court statement made by a witness of a defendant's admission is inadmissible if the witness has no personal knowledge of the events that formed the subject matter of the defendant's admission.

In *People v. Simpson*, 2015 IL 116512, the Illinois Supreme Court was asked to decide whether the appellate court erred when it reversed the defendant's conviction and remanded for a new trial, finding that a witness's out-of-court videotaped statement revealing that the defendant confessed to him responsibility for the crime was erroneously presented as substantive evidence of the crime at trial because the witness did not actually see the events the defendant confessed to that formed the subject matter of the statement. Subsection (c) of Section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1(c) (West 2014)) provides, "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if . . . the statement (1) was made under oath at a trial, hearing, or other proceeding, or (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge . . . ." The State argued that the witness met the requirements under this Section because the witness must simply have personal knowledge of the defendant's admission, and not the crime being described, for his out-of-court statement to be admissible. The defendant argued that the State's

interpretation of the personal knowledge requirement was contrary to legislative intent and arbitrarily assumed that that the personal knowledge requirement was met when the witness perceived the admission of the defendant, as opposed to the underlying events of the admission. The court agreed with the defendant's interpretation of the statute, holding that the witness's out-of-court statement is not admissible unless the witness actually perceived the events that are the subject of the statement. The court reasoned that in order to be admissible the out-of-court statement must narrate, describe, or explain an event or condition and the witness must have personal knowledge of that event or condition. In this case, the witness only stated what the defendant had confessed to him, and the witness lacked any personal knowledge of the events the defendant described. The court also reasoned that the statute in question has been consistently interpreted by the appellate court with the broad "personal knowledge" requirement, rather than the narrow interpretation advocated by the State, and that it would be inappropriate for the higher court to change this interpretation.

CODE OF CRIMINAL PROCEDURE OF 1963 – INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant may not allege ineffective assistance of counsel in a post-conviction petition if there is sufficient evidence that he or she is guilty.

In *People v. Richardson*, 2015 IL App (1st) 113075, the Illinois Appellate Court was asked to decide whether the circuit court erred when it dismissed the defendant's pro se post-conviction petition, which alleged ineffective assistance of counsel, as being "frivolous and patently without merit." Subdivision 122-1(a)(1) of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(a)(1) (West 2010)) provides a method by which persons under criminal sentences may assert that their convictions resulted from a "substantial denial" of their constitutional rights. That subdivision further provides that the first stage of post-conviction proceedings, the trial court must independently review the petition, taking the allegations as true, and determine whether the petition is "frivolous or is patently without merit." The defendant argued that his counsel at trial was ineffective for failing to have him evaluated for his ability to understand his *Miranda* rights when there was evidence that the defendant was mentally retarded and that, if he was of such limited functioning that he could not understand his *Miranda* rights, then it was at least arguable that the trial court would have suppressed his confession following the hearing on his motion. The court affirmed the lower court's dismissal of the petition, holding that the defendant failed to make an arguable claim that his motion to suppress the confession would have succeeded if the trial counsel had presented evidence of his mental deficiency. The court noted the overwhelming evidence that the defendant had committed the crime, in addition to the defendant's confession, and that the defendant demonstrated sufficient understanding of his constitutional rights during the interrogation. A dissenting opinion

argued that the decision went against the spirit of the Code because it dismissed the defendant's allegation of ineffective assistance of counsel in his petition when there was significant evidence of the ineffective assistance beyond the alleged failure to investigate the defendant's ability to understand his *Miranda* rights. The court also noted that the Code is lacking because it does not provide the defendant with an attorney to aid in drafting the defendant's post-conviction petition.

SEXUALLY DANGEROUS PERSONS ACT – INDEPENDENT EVALUATOR

The trial court's appointment of the State's psychiatric expert and its denial of the respondent's request for an independent expert of his choice violated the respondent's due process rights.

In *People v. Grant*, 2015 IL App (5th) 130416, the Illinois Appellate Court was asked to decide whether the trial court erred when it granted the State's motion for the appointment of an independent evaluator after the respondent filed an application for discharge or conditional release under the Sexually Dangerous Persons Act (725 ILCS 205/0.01 *et seq.* (West 2012)). The Act provides that, at a recovery hearing, the State is required to prove that the respondent remains a sexually dangerous person by clear and convincing evidence (725 ILCS 205/9(b) (West 2012)). The Act also provides that the respondent must be examined by an evaluator or a team of evaluators chosen by the Department of Corrections (725 ILCS 205/9(a) (West Supp. 2013)). The Act does not expressly provide either party the right to additional court-appointed experts; however, the Act does allow the respondent to submit "any other relevant evidence," including evidence prepared by an expert of his own choosing who is retained at the respondent's expense. The respondent also has the right to a court-appointed psychiatric expert if he can show that the evaluators chosen by the Department of Corrections are biased against him. In this case, the evaluation team chosen by the Department of Corrections recommended that the respondent be conditionally released. The State then filed a motion for the appointment of an independent psychiatrist. The respondent objected to the State's motion and requested that the court appoint an independent psychiatrist for him in the event that it granted the State's motion. The trial court granted the State's motion and denied the respondent's request for his own independent expert, noting that the respondent had not shown that the evaluators chosen by the Department of Corrections were biased against him. On appeal, the respondent argued that trial court erred in granting the State's motion for the appointment of an independent psychiatrist because the State was held to a different standard than the respondent with respect to the State's motion; specifically, the State was not required to show that the evaluators chosen by the Department of Corrections were biased against it. The respondent also argued that this mistake was compounded by the fact that his request for an independent evaluator was denied. The State argued that it should

be entitled to have an independent expert appointed without showing any bias on the part of the evaluators chosen by the Department of Corrections because the State has a different role in the proceeding and because the State bears the burden of proof. The appellate court agreed with the respondent, holding that the trial court's decision "ran afoul of the requirements of due process." The court also reasoned that the Act does not contemplate the appointment of an independent expert chosen by the State's Attorney, although the court acknowledges that there may be "unusual circumstances" under which the State objects to the report prepared by the Department of Corrections' evaluators. On September 30, 2015, the Illinois Supreme Court granted the State's Petition for Leave to Appeal.

UNIFIED CODE OF CORRECTIONS – MAXIMUM COMMITMENT PERIOD OF A DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY

The calculation of the maximum commitment period of a defendant who is found not guilty by reason of insanity shall not take into account consecutive sentences that would have been imposed had the defendant been convicted on multiple felony charges.

In *People v. Steele-Kumi*, 2014 IL App (1st) 133068, the Illinois Appellate Court was asked to decide whether the trial court erred when it sentenced an insanity acquittee to a commitment period to reflect the maximum sentence of the most serious crime for which she not been acquitted, instead of imposing consecutive sentences for the defendant's multiple felony charges . Subsection (b) of Section 5-2-4 of the Unified Code of Corrections (730 ILCS 5/5-2-4(b) (West 2010)) provides that "if the [C]ourt finds the defendant in need of mental health services on an inpatient basis, . . . the initial order for admission of a defendant acquitted of a felony by reason of insanity shall be for an indefinite period of time. Such period of commitment shall not exceed the maximum length of time that the defendant would have been required to serve, less credit for good behavior . . .[,] had he been convicted of and received the maximum sentence for the most serious crime for which he has been acquitted by reason of insanity." The State argued that since convictions on the defendant's two felony counts would mandate imposition of consecutive sentences under the Unified Code of Corrections, the maximum commitment period must reflect the time that would be served on those two consecutive sentences. The defendant argued that the court must construe the statutory phrase "most serious crime" to mean that only one offense could affect the defendant's commitment length calculation. The court agreed with the defendant and upheld the trial court's ruling. The court reasoned that the plain language of subsection (b) of Section 5-2-4, specifically the instruction to apply the maximum sentence for the most serious crime for which the defendant has been acquitted by reason of insanity, precludes the incorporation of consecutive sentences when calculating the maximum period of commitment. The court concluded that subsection (b) does not permit consecutive involuntary commitments, as this would be contrary to the

General Assembly's intent to provide an indefinite period of commitment for the treatment of the acquittee's mental illness.

UNIFIED CODE OF CORRECTIONS – MANDATORY LIFE SENTENCE

The mandatory life sentence provisions of the Code have not been reenacted following their having been declared unconstitutional under the single subject rule.

In *People v. Crutchfield*, 2015 IL App (5th) 120371, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that subdivision (a)(1)(c)(ii) of Section 5-8-1 of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(c)(ii) (West 2010)) required a mandatory natural life sentence without the possibility of parole. At the time of the appeal, subdivision (a)(1)(c)(ii) provided that "the court shall sentence the defendant to a term of natural life imprisonment . . . if the defendant . . . is a person who, at the time of the commission of the murder, had attained the age of 17 or more and is found guilty of murdering an individual under 12 years of age; or, irrespective of the defendant's age at the time of the commission of the offense, is found guilty of murdering more than one victim." The defendant argued that resentencing was required because the Illinois Supreme Court had declared the Public Act creating the sentencing provision unconstitutional in its entirety for violating the single subject rule under subsection (d) of Section 8 of Article IV of the Illinois Constitution (ILL. CONST. art IV, §8) and the General Assembly never reenacted the Section so as to cure the constitutional defect. The State argued that subdivision (a)(1)(c)(ii) had been reenacted several times; therefore, the defendant's mandatory life sentence was appropriate. The court agreed with the defendant, holding that subdivision (a)(1)(c)(ii) had not been reenacted. The court reasoned that a statute that violates the single subject rule is void in its entirety, and the provision under which the defendant was sentenced is void as if it had never passed. The court further reasoned that when "the Illinois Supreme Court declares a statute unconstitutional, the only way in which the legislature may remedy the statute's infirmity is by amending or reenacting that statute" in a manner that does not offend the single subject rule. Despite the State's argument that several Public Acts had been enacted which had the effect of reviving subdivision (a)(1)(c)(ii), the court observed that none of those Public Acts specifically reenacted the provisions in response to the single subject issue which had invalidated subdivision (a)(1)(c)(ii). Public Act 99-69, effective January 1, 2016, amended the language of subdivision (a)(1)(c)(ii) without specifically addressing the single subject rule issues discussed in this case.

CODE OF CIVIL PROCEDURE – INSURANCE PRODUCERS

Agents for insurance companies must exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by an insured or proposed insured.

In *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that an insurance company's agent has a duty to exercise ordinary care and skill in procuring the specific insurance coverage requested by a customer. Subsection (a) of Section 2-2201 of the Code of Civil Procedure (735 ILCS 5/2-2201(a) (West 2010)) provides that an "insurance producer . . . shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." The Code does not define the term "insurance producer." The plaintiff argued that the term "insurance producer" includes both insurance brokers and insurance agents who work for a specific insurance company. The defendant, an agent of an insurance company, argued that the term is limited only to insurance brokers. The court agreed with the plaintiffs, holding that an insurance company's agents must exercise ordinary care and skill in procuring insurance coverage under the Code of Civil Procedure. The court reasoned that the use of the term "insurance producer" was ambiguous because it is undefined in the Code and in dictionaries and could reasonably be construed as referring to either agents or brokers, or both. Accordingly, the court examined the definition of "insurance producer" used in Section 500-10 of the Illinois Insurance Code (215 ILCS 5/500-10 (West 2010)). That Section defines the term as "a person required to be licensed . . . to sell, solicit, or negotiate insurance" and includes both insurance brokers and agents. Additionally, while the term "producer" is undefined in dictionaries, both "insurance agents" and "insurance brokers" are referred to in Black's Law Dictionary as "producers." The court also found that the legislative history did not reflect an intent to limit the term to only insurance brokers. Finally, the court reasoned that such a duty of care upon insurance agents does not place an undue burden on them in performing their duties.

CODE OF CIVIL PROCEDURE – INSURANCE PRODUCERS; DUTY

A plaintiff may bring a civil action against an insurance producer for breach of fiduciary duty even though the Code exempts civil actions against insurance producers for conduct that constitutes breach of fiduciary duty.

In *Mercola v. Abdou*, 2015 WL 4475287 (N.D. Ill.), the District Court for the Northern District of Illinois was asked to decide whether to grant the defendant's motion to dismiss on the grounds that the defendant was statutorily exempt from suit for breach of fiduciary duty. Subsection (b) of Section 2-2201 of the Code of Civil Procedure (735 ILCS

5/2-2201(b) (West 2014)) provides that a civil action may not be brought against an insurance producer "under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer . . . of any money that was received as premiums . . . ." The plaintiff argued that the defendant was not exempt from liability because when the defendant breached its fiduciary duty by procuring insurance coverage for the plaintiff that was not in the plaintiff's best interests, the defendant's actions constituted "misappropriation" of the premiums the plaintiff paid for that insurance. The plaintiff relied on *DOD Technologies v. Mesirow Insurance Services, Inc.*, 381 Ill. App. 3d 1042 (2008), which held that the "placement of policies with companies that [are] not the most advantageous for the consumers constitutes 'the wrongful . . . misappropriation' of money received as premiums." The court in *DOD Technologies* assumed that the General Assembly did not intend an unjust result and reasoned that "the placement of policies that are not the most advantageous for the consumer is most certainly unjust." The defendant argued only that *DOD Technologies* was distinguishable from the present case. Noting the circular nature of the plaintiff's argument – that an insurance producer cannot be sued for breach of fiduciary duty unless the alleged conduct breaches a fiduciary duty – the court nevertheless agreed with the plaintiff and denied the defendant's motion to dismiss. The court found that it could deviate from the holding in *DOD Technologies* only if the defendant had persuasively indicated that the Illinois Supreme Court would decide the issue differently. Because the defendant had not raised that argument, the court found it proper to deny the motion to dismiss.

CODE OF CIVIL PROCEDURE – STATUTE OF LIMITATIONS

In a wrongful death and survival suit based on medical malpractice, the Code's statute of limitations applies, rather than the common law discovery rule statute of limitations.

In *Moon v. Rhode*, 2015 IL App (3d) 130613, the Illinois Appellate Court was asked to decide whether the circuit court erred when it dismissed the executor plaintiff's wrongful death and survival action for the death of his mother because the action was untimely. Subsection (a) of Section 13-212 of the Code of Civil Procedure (735 ILCS 5/13-212(a) (West 2010)) provides that "no action for damages for injury or death . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than [two] years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first . . . ." In addition, Section 2 of the Wrongful Death Act (740 ILCS 180/2 (West 2010)) provides that actions "shall be commenced within 2 years after the death of such

person." The plaintiff argued that the common law discovery rule, which requires that the suit be brought within two years from the time plaintiff knew or should have known of the negligent conduct, applies to wrongful death cases based on medical malpractice. The plaintiff cited *Young v. McKiegue*, 303 Ill. App. 3d 380 (1999), and *Wells v. Travis*, 248 Ill. App. 3d 282 (1996), to support that argument. The defendant argued that subsection (a) of Section 13-212 of the Code applied, that the two-year statute of limitations for the action began to run at the time of the decedent's death, and that the plaintiff's action was untimely because the plaintiff had filed the action over two years after his mother's death. The court agreed with the defendant, holding that the Code governs the time restraints for wrongful death claims. The court reasoned that *Young* and *Wells* were wrongly decided because they relied on *Witherell v. Weime*, 85 Ill. 2d 146 (1981), which was a common law personal injury action. In contrast, wrongful death actions do not exist at common law and are creations of the General Assembly. The court reasoned that under the plain language of the statute, the discovery rule could not be found in either the Wrongful Death Act or the Code. Rather, the plain language of those statutes requires the plaintiff to file his or her claim within two years after he or she knew of the death. A dissenting opinion noted that extensive case law spanning nearly 40 years supports the opposite holding.

ILLINOIS CIVIL RIGHTS ACT – RETALIATION

The Act allows a cause of action for retaliation.

In *Weiler v. Village of Oak Lawn*, 2015 WL 1538498 (N.D. Ill.), the District Court for the Northern District of Illinois was asked to decide, among other things, whether the plaintiff had standing to sue the Village of Oak Lawn under the Illinois Civil Rights Act by claiming that he was fired in retaliation for his opposition to the Village's alleged racial discrimination. Subsection (a) of Section 5 of the Illinois Civil Rights Act (740 ILCS 23/5(a) (West 2008)) provides that no unit of local government shall "exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race, color, national origin, or gender." The plaintiff argued that he was terminated in violation of the Act because he publicly opposed the Village's alleged racial discrimination toward certain businesses looking to lease property from the Village. The defendant argued that the Act does not expressly create a cause of action for retaliation, and thus the plaintiff did not have standing to sue for retaliation under the Act. The court agreed with the plaintiff, holding that he had standing to sue on the theory of retaliation under the Act. The court reasoned that while there is no express cause of action for retaliation in the Act, the Act was modeled after Title VI of the federal Civil Rights Act of 1964, which prohibits race and national origin discrimination in federally-assisted programs, and is similar to the federal statute in many respects. As a result, Illinois courts "look to cases concerning alleged violations of federal

civil rights statutes to guide our interpretation of the Act." The court pointed out that other courts have interpreted Title VI to allow a cause of action for retaliation. Therefore, the court concluded that an individual is allowed to bring a claim for retaliation under the Act.

FARM NUISANCE SUIT ACT – MUNICIPAL ORDINANCE PREEMPTION

The Act preempts local ordinances from classifying ongoing farm use of property as a nuisance.

In *Village of LaFayette v. Brown*, 2015 IL App (3d) 130445, the Illinois Appellate Court was asked to decide whether the trial court erred in issuing an injunction under a municipal ordinance that established that commercial farming within the boundaries of the Village of LaFayette was a nuisance. Section 3 of the Farm Nuisance Suit Act (740 ILCS 70/3 (West 2012)) provides that "[n]o farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year . . . ." The plaintiff village argued that the enactment of the municipal ordinance did not constitute a "changed condition" under the Act, and that the municipality's authority to enact a nuisance ordinance is not affected by Section 3. The defendant argued that Section 3 preempted the ordinance and that the change in municipal ordinance is a changed condition from which the farm is protected from being considered a nuisance. The court agreed with the defendant, holding that the new ordinance constituted a "changed condition in the surrounding area," and the farm is therefore not a nuisance. The court quoted Section 1 of the Act (740 ILCS 70/1 (West 2012)) to invoke the legislative intent of the Act: "[i]t is the purpose of this Act to reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed to be a nuisance." The court reasoned that the Act mandates that a farm shall not be deemed a nuisance if it satisfies the requirements of the Act, that the farm met the requirements of the Act, and that the ordinance is preempted by the Act because it declares a farm that is protected by the Act a nuisance. The dissent argued that the "changed conditions in the surrounding area" mentioned in Section 3 are clearly meant to be a change in the land use, ownership, or occupancy of the area surrounding the farm and the Act should not preempt the ordinance. The dissent noted that during the relevant timeline, the land was first used as a tree and prairie grass nursery, then was sold, then sat idle for nearly a year, then was used to grow corn and soybeans. The dissent reasoned that the change in land use changed the character of the farm so much that the farm could no longer be considered one that had been in existence for more than one year for purposes of the Act. Therefore, the dissent concluded, the farm was not protected under Section 3 and the plaintiff's ordinance was not preempted.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – WILLFUL AND WANTON CONDUCT

Provisions granting absolute immunity to public employees are not subject to exceptions for willful and wanton conduct contained in other portions of the Act.

In *Mack Industries, LTD. v. Village of Dolton*, 2015 IL App (1st) 133620, the Illinois Appellate Court was asked to decide whether the circuit court erred when it dismissed three of the four counts in the plaintiff's amended complaint alleging, among other things, willful and wanton retaliatory misconduct by the defendant. The amended complaint arose out of a dispute over outstanding water bill balances owed by the plaintiff. The plaintiff, the owner and manager of over 150 single-family homes located within the Village of Dolton, accused the defendant of "obstructing" the plaintiff's businesses by (i) arbitrarily issuing citations and reinspections of the plaintiff's properties, (ii) refusing to issue certain governmental permits and certificates, and (iii) refusing to provide police and fire services, among other things, in retaliation for the plaintiff filing suit against the defendant. The defendant village manager argued that he was immune from liability under Sections 2-206, 4-102, and 5-102 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-206; 4-102; 5-102 (West 2010)) which grant absolute immunity to public employees for any injury caused by (1) the issuance or denial of governmental permits or certificates and (2) the failure to provide police and fire protections. The plaintiff countered that the defendant was liable under Sections 2-202 and 2-208 of the Act (745 ILCS 10/2-202; 2-208 (West 2010)) which provide exceptions to immunity for willful, wanton, or malicious conduct. The Illinois Appellate Court affirmed the circuit court's dismissal on the grounds that Sections 2-206, 4-102, and 5-102 were controlling and, since the plain language of those Sections does not provide a willful, wanton, or malicious conduct exception to the absolute immunity granted, the court would not read such exceptions into those Sections. The court did, however, hold that Sections 2-202 and 2-208 were applicable with respect to the plaintiff's allegations that the defendant arbitrarily issued citations and reinspections of the plaintiff's properties. Nevertheless, the court reasoned that because the plaintiff only alleged that the defendant's actions caused an economic loss, the harm done was not the "physical harm" inferred from the definition of willful and wanton conduct under Section 1-210 of the Act (745 ILCS 10/1-210 (West 2010)). The court further reasoned that the plaintiff failed to provide sufficient evidence that the defendant acted maliciously and without probable cause when the defendant issued citations on the plaintiff's properties. A dissenting opinion argued that it was incorrect for the majority to hold that the absolute immunity language under Sections 2-206, 4-102, and 5-102 trumped the willful, wanton, and malicious conduct exceptions provided under Sections 2-202 and 2-208, because the court had previously held in *Village of Sleepy Hollow v. Pulte Home Corp.*, 336 Ill. App. 3d 506 (2003) that "the various sections of the Act 'operate in conjunction with each other'" and that "[w]hen construing immunities under

the . . . Act, a court must view the statue as a whole, with all relevant parts considered together."

CONDOMINIUM PROPERTY ACT – PROPERTY INSURANCE

Subjecting insurance producers to an ambiguous provision, without reference to the Insurance Code, would be unjust.

In *Royal Glen Condominium Association v. S.T. Neswold and Associates, Inc.*, 2014 IL App (2d) 131311, the Illinois Appellate Court was asked to decide whether Section 12 of the Condominium Property Act (765 ILCS 605/12 (West 2010)) creates a duty on the part of an insurance producer to pay for repairs in excess of policy limits. Subsection (a) of Section 12 provides, "No policy of insurance shall be issued or delivered to a condominium association, and no policy of insurance issued to a condominium association shall be renewed, unless the insurance coverage under the policy includes . . . (1) . . . [p]roperty insurance . . . in a total amount of not less than the full insurable replacement cost of the insured property, less deductibles, but including coverage for the increased costs of construction due to building code requirements, at the time the insurance is purchased and at each renewal date." The defendant insurance producer only covered $1 million of the $1.3 million damage sustained by the plaintiff condominium association's property, arguing that the policy contract limited the coverage to $1 million. The plaintiff argued that subdivision (a)(1) of Section 12 of the Act imposes a duty on an insurance producer to procure a policy that includes the increased costs of construction due to building code requirements; therefore, the insurance company is required to pay for the whole cost of replacement despite contractual policy limits. The defendant countered by arguing that Section 12 applies only to condominium association boards and not to insurance producers. The court agreed with the defendant holding that the Section only requires condominium association boards to obtain the specified coverage. The court noted that Section 12 is ambiguous. In construing the provision, the court reasoned that subjecting insurance producers to an ambiguous provision in the Condominium Property Act, without reference to the Illinois Insurance Code (215 ILCS 5/1 *et seq.*), would be unjust "and cannot be what the legislature intended in enacting [S]ection 12." The court further reasoned that the Act regulates only condominiums and that the legislative history supports its conclusion.

MECHANICS LIEN ACT – LAND IMPROVEMENTS; ENGINEERING WORK

A mechanics lien for services rendered in relation to property is not valid unless the work performed actually improved the property or enhanced the value of the land.

In *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois*, 2015 IL App (3d) 140064, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that the plaintiff's work did not constitute an improvement to the property for purposes of establishing a mechanics lien under Section 1 of the Mechanics Lien Act (770 ILCS 60/1 (West 2012)). Subsection (a) of Section 1 provides that any person who contracts "with the owner of a lot or tract of land . . . to improve the lot or tract of land or for the purpose of improving the tract of land," is a contractor under the Act and has a lien upon that lot or tract of land. The plaintiff argued that the engineering work it performed in anticipation of development was improvement to the property for purposes of establishing a mechanics lien, even though the planned development never took place. The defendant argued that the services provided by the plaintiff did not improve the property because they did not increase the value of the land. The court agreed with the defendant, holding that the plaintiff failed to establish that its work improved the relevant property. The court, citing case law, reasoned that the "purpose of the Act is to permit a lien upon premises where a benefit has been received by the owner and where the value or condition of the property has been increased or improved by reason of the furnishing of labor and materials." The court further reasoned that though the plaintiff performed work related to platting of the property that was required prior to development of the property, there is no case law stating that recording of a final plat resulting from an engineering company's work enhances the value of that land. A dissenting opinion was filed, arguing that the services provided by the plaintiff as an engineer fall within the provisions of the Act, and entitle the plaintiff to a lien. The dissent reasoned that the court's inquiry should have been whether the services were "provided for the purpose of improving the subject property," rather than whether the property was actually improved. The dissent further reasoned that the Act "allows a lien to be imposed regardless of whether the services actually 'improved' the land as long as the services were performed 'for the purpose of improving' a tract of land." The dissent also noted that since the General Assembly specifically amended the Act to allow liens for services provided by professional engineers, the plaintiff, as a professional engineer, is entitled to a lien. On May 27, 2015, the Illinois Supreme Court granted the Plaintiff's Petition for Leave to Appeal.

WORKERS' COMPENSATION ACT – STATUTE OF LIMITATIONS: EVIDENCE

The three-year statute of limitations contained in the Act does not bar the introduction of evidence relevant to an injury that dates to more than three years prior to the manifestation of a repetitive-trauma injury.

In *PPG Industries v. Illinois Workers' Compensation Commission*, 2014 IL App (4th) 130698WC, the Illinois Appellate Court was asked to decide whether the circuit court erred in finding that the three-year statute of limitations for the filing of workers' compensation claims also acts as a bar to the presentation of evidence of work activities that took place more than three years prior to the date of the accident or manifestation of a repetitive-trauma injury. Subsection (d) of Section 6 of the Workers' Compensation Act (820 ILCS 305/6(d) (West 2008)) provides that in any case "unless the application for compensation is filed with the [Workers' Compensation] Commission within 3 years after the date of the accident . . . the right to file such application shall be barred." The plaintiff employer argued that because subsection (d) contained no exception for repetitive-trauma claims, the three-year limitation not only limited when a claim could be filed, but also prevented the claimant from introducing evidence from more than three years prior to the date of the accident or manifestation of the injury. The claimant, however, argued that there is nothing in the language to suggest that subsection (d) was meant to act as an evidentiary limitation and noted that repetitive-trauma injuries may take years to develop, making it important that claimants be allowed to present evidence of duties throughout the time of employment that may have caused the injury. The court agreed with the claimant, reversing the circuit holding that evidence of a repetitive-trauma injury may be introduced to the Commission, even if the evidence dates to more than three years prior to the date of the claim or the date of the manifestation of the injury. The court reasoned that the plain and ordinary language of subsection (d) contained no evidentiary limitation, but only provided a limit with respect to when the claim may be filed. The court also examined previous case law and found that courts routinely looked to evidence beyond the three years prior to the manifestation of the injury.

WORKERS' COMPENSATION ACT – MAXIMUM WEEKLY BENEFIT

The maximum rates applied to wage-differential awards, apply with reference to the date of the injury and not some later point in time.

In *DiBendetto v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 133233WC, the Illinois Appellate Court was asked to decide whether the circuit court erred when it confirmed the determination of the Illinois Workers' Compensation Commission

that the date of the accident, rather than the date of the arbitration hearing should be used to calculate a claimant's maximum weekly benefits for a workers' compensation wage-differential award. Subdivision (b)(4) of Section 8 of the Workers' Compensation Act (820 ILCS 305/8(b)(4) (West 2006)) provides that for "injuries occurring on or after February 1, 2006, the maximum weekly benefit . . . shall be 100% of the [State average weekly wage] in covered industries under the Unemployment Insurance Act." The claimant argued that the Workers' Compensation Act "has consistently been interpreted to require that a wage-differential award be calculated based upon both the claimant's actual earnings at the time of the hearing and what the claimant would have been earning at the time of the hearing had he not been injured." The claimant claimed that using the average weekly wage in effect at the time of the hearing would result in the award nearest to the claimant's actual wage differential. The employer argued that the wage-differential award should be calculated using the average weekly wage in effect on the date of claimant's injury. The court agreed with the defendant, holding that relevant case law reflects that the date of injury controls the maximum rate applicable for wage-differential awards. The court reasoned that despite the fact that courts have generally held that wage-differential awards should be calculated at the time of an arbitration hearing, courts have also held that the maximum rate applicable is controlled by the date of the injury. The court further reasoned that because the General Assembly has not amended subdivision (b)(4) of Section 8, it has acquiesced to the "clear judicial determination" that the "limits on compensation . . . including maximum rates applicable to wage-differential awards, apply with reference to the date of the injury and not some later point in time."

WORKERS' COMPENSATION ACT – CIRCUIT COURT JURISDICTION

Circuit courts have jurisdiction to enter judgment of an award under the Act even if there is a proceeding to modify future installments of an award.

In *Sunrise Assisted Living v. Banach*, 2015 IL App (2d) 140037, the Illinois Appellate Court was asked to decide whether the circuit court had jurisdiction to consider an application under subsection (g) of Section 19 of the Workers' Compensation Act (820 ILCS 305/19(g) (West 2012)) despite an ongoing petition to increase the applicant's arbitration award under other provisions of the Act. Subsection (g) of Section 19 of the Workers' Compensation Act provides in relevant part that "either party may present a certified copy of the award of the [a]rbitrator . . . when no proceedings for review are pending . . . to the circuit court of the county in which such accident occurred or either of the parties are residents, whereupon the court shall enter a judgment in accordance therewith." The plaintiff argued that no judgment could be entered by the circuit court because the petition under subsection (h) of Section 19 (820 ILCS 305/19(h) (West 2012)), which provides for a "review" of an award under certain circumstances, qualifies as a

"proceeding for review" under subsection (g), which divests the circuit court of jurisdiction to enter an order. The applicant, however, argued that the court must look at the broader context and contrasting purposes of subsections (g) and (h) of Section 19. While subsection (g) contemplates review whether an award is proper, subsection (h) contemplates whether a material change in circumstances warrants a prospective modification of an award. The court agreed with the applicant, holding that a harmonious reading of subsections (g) and (h) of Section 19 provides that the circuit court may not enter judgment of the original award while the Workers' Compensation Commission is reviewing whether the award is proper, but the circuit court has jurisdiction to review the original award when the Commission is deciding whether a material change in circumstances warrants a prospective modification. The court reasoned that a literal interpretation of subsection (g) would lead to inconvenient results that run contrary to the purpose of the Act by allowing employers to block applications for judgment by initiating proceedings to modify future installments.

PUBLIC SAFETY EMPLOYEE BENEFITS ACT – CATASTROPHIC INJURY

A disease that qualifies for an occupational disease disability pension under the Downstate Firefighter Article of the Illinois Pension Code is a catastrophic injury for the purposes of the Act.

In *Bremer v. City of Rockford*, 2015 IL App (2d) 130920, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that a heart condition qualifying for an occupational disease disability pension ("ODD pension") under Section 4-110.1 of the Illinois Pension Code (40 ILCS 5/4-110.1 (West 2008)) qualifies as a catastrophic injury for the purposes of subsection (a) of Section 10 of the Public Safety Employee Benefits Act (820 ILCS 320/10(a) (West 2008)). Subsection (a) of Section 10 provides that certain public safety employees who suffer a "catastrophic injury" are entitled to have the entirety of their health care premiums paid for by the employer. Section 4-110.1 of the Illinois Pension Code provides an ODD pension for active firefighters found to be unable to perform their duties "by reason of heart disease, stroke, tuberculosis, or any disease of the lungs or respiratory tract, resulting from service as a firefighter." The plaintiff argued that he has a catastrophic injury because he had been granted an ODD pension for his heart condition and that the diseases and conditions that qualify for an ODD pension are synonymous with a catastrophic injury. The court agreed with the plaintiff, holding that a disease that qualifies for an ODD pension is sufficient to satisfy the catastrophic injury requirement of subsection (a) of Section 10 of the Act. The court discussed Illinois Supreme Court precedent holding that a person who is eligible for a line of duty disability pension ("LDD pension") is eligible for benefits under Section 10 of the Act. Section 4-110 of the Illinois Pension Code (40 ILCS 5/4-110 (West 2008)) establishes an LDD pension "[i]f a firefighter, as the result of sickness, accident or injury incurred in or

resulting from the performance of an act of duty or from the cumulative effects of acts of duty, is found . . . to be physically or mentally permanently disabled for service in the fire department so as to render necessary his or her being placed on disability pension . . . ." The court reasoned that an ODD pension is similar to an LDD pension and that the diseases and medical conditions that entitle a person to an ODD pension are examples of diseases and medical conditions that would also qualify for an LDD pension. A dissenting opinion discussed the differences between an ODD pension and an LDD pension and argued that the court's interpretation of the language establishing the ODD pension renders the ODD pension superfluous. Further, the dissenting opinion argued that the proceedings potentially involve different parties, different tribunals, and different evidence and that the findings of the pension board with regard to the determination of whether to grant an ODD pension under the Illinois Pension Code should not be binding on the trial court with regard to whether a person is entitled to benefits under the Public Safety Employee Benefits Act.

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