2016 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, formerly included as an appendix to this publication, is available on the Bureau's website.

Respectfully submitted,

James W. Dodge
Executive Director

INTRODUCTION

This 2016 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 2015 to the summer of 2016.

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

COMMON LAW PUBLIC DUTY RULE – ABROGATION

The public duty rule no longer applies in Illinois.

In *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, the Illinois Supreme Court was asked to decide whether the circuit and appellate courts erred in applying the common law public duty rule to a claim against the defendant's response to a 911 call. The public duty rule provides that local governmental entities owe no duty to individual members of the general public to provide adequate government services, such as police and fire protection, except in limited cases where the municipality owes the injured party a special duty that is different from the duty it owes to the general public. The trial court dismissed the case, holding that the defendants were not liable under the public duty rule, and the appellate court affirmed. The Illinois Supreme Court, however, held that despite the fact that the public duty rule is a long-standing common law doctrine in Illinois, it would no longer apply in the State. The court reasoned that the jurisprudence surrounding the application of the rule has become confused and muddled. Furthermore, the court reasoned that the application of the public duty rule was inconsistent with the General Assembly's grant of limited immunity in cases of willful and wanton misconduct. Finally, the court reasoned that the continued applicability of the public duty rule is a policy determination that ultimately should be decided by the General Assembly, which has chosen to enact statutory immunities over relying on common law ones. A concurring opinion agreed that the General Assembly is free to enact a statute that codifies the public duty rule if it is deemed appropriate. The dissenting opinion disagreed with the holding, reasoning that the court was too willing to overrule past precedent without a change in the legal context to prompt such a change. The dissent also argued that the public duty rule serves the important purpose of preventing excessive court intervention in determining where local governments can and should spend limited government resources in responding to the needs of the community. Finally, the dissent argued that the public duty rule is based on the policy determination that holding a governmental entity liable for a breach of a public duty could cause the community to be mired in lawsuits for every infraction of the law.

ILLINOIS PUBLIC LABOR RELATIONS ACT – APPROPRIATION AND COLLECTIVE BARGAINING

Wage increases in collective bargaining agreements with the State are subject to appropriation by the General Assembly.

In *Department of Central Management Services v. American Federation of State, County and Municipal Employees, Council 31*, 2016 IL 118422, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that in absence of sufficient appropriated funds, the State was required to pay a wage increase to State union employees as required by a collective bargaining agreement. Subsection (b) of Section 2 of Article VIII of the Illinois Constitution (ILL. CONST. art. VIII, § 2(b)) provides that "the General Assembly by law shall make appropriations for all expenditures of public funds by the State." Furthermore, Section 21 of the Illinois Public Labor Relations Act (5 ILCS 315/21 (West 2014)) 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 it was against public policy for the State to pay the wage increase without an appropriation by the General Assembly and that the collective bargaining agreement states that "the provisions of this contract cannot supersede law." The plaintiff argued that the purpose of the Act was to expand the collective bargaining rights of public employees and to require appropriation would "cut back" on such rights. The court agreed with the State and reversed the appellate court, holding that Section 21 of the Act, along with Article VIII of the Illinois Constitution, "evinces a well-defined and dominant public policy under which multiyear collective bargaining agreements are subject to the appropriation power of the State, a power which may only be exercised by the General Assembly." The court reasoned that since "statutes and laws in existence at the time a contract is executed are considered part of the contract," Section 21 of the Act, along with the collective bargaining agreement's provision that the agreement cannot supersede law, prohibit any increase without appropriation by the General Assembly. The dissent argued that "state employees' contractual rights to raises [should be upheld] under the contract clause, even if that obligation cannot immediately be enforced because of insufficient appropriations."

ELECTION CODE – FULL SLATE REQUIREMENT

The Code's requirement that a political party offer a full slate of candidates in order to be listed on the ballot violates the First and Fourteenth Amendments of the United States Constitution.

In *Libertarian Party of Illinois v. Illinois State Board of Elections*, 164 F.Supp.3d 1023 (N.D. Ill. 2016), the United States District Court for the Northern District of Illinois was asked to decide in cross motions for summary judgment whether it was constitutional to require that new political parties on a local level submit a full slate of candidates in order to be listed on the ballot. Section 10-2 of the Election Code (10 ILCS 5/10-2 (West 2016)) provides that any petition to form a new political party ". . . shall at the time of filing contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held. . . ." The plaintiffs argued that the requirement that a new political party have a full slate of candidates in order to be listed on the ballot infringed on their rights under the First Amendment of the United States Constitution (U.S. CONST. amend. I), and that the fact that similarly situated, but already established, political parties are treated differently violates the Fourteenth Amendment (U.S. CONST. amend. XIV). The defendants argued that the full slate requirement protects the State's interest of ensuring the existence of sufficient support to permit identification, as well as the State's interest in preventing factionalism and party-splintering. The court agreed with the plaintiffs, holding that the full slate requirement violated the First and Fourteenth Amendments of the United States Constitution. The court reasoned that the full slate requirement did little to further the two interests advanced by the defendants, and that existing signature requirements already helped the State achieve its goals far more effectively. The court also noted that established political parties do not need to meet the same requirements. Finally, the court noted that Illinois was the only state that imposes this type of requirement on political parties.

ELECTION CODE – SIGNATURE REQUIREMENT FOR INDEPENDENT CANDIDATES

Various provisions of the Code concerning signature requirements for independent or new party candidates are potentially unconstitutional as applied to an independent congressional candidate.

In *Gill v. Scholz*, 2016 WL 4487836 (C.D. Ill.), the United States District Court for the Central District of Illinois was asked to decide whether certain restrictions imposed by the Election Code, as applied to an independent candidate for U.S. Representative in the 13th Congressional District of Illinois, violated the First and Fourteenth Amendments of

the United States Constitution (U.S. CONST. amend. I; U.S. CONST. amend. XIV). Section 10-3 of the Code (10 ILCS 5/10-3 (West 2014)) requires an independent candidate to file nomination papers signed by qualified voters of the district equaling not less than 5% nor more than 8% of the number of persons who voted in the preceding regular election in such a district (but not to exceed the lesser of 1% of the voters who voted in the preceding Statewide general election or 25,000). Section 10-4 of the Code (10 ILCS 5/10-4 (West 2014)) provides that the candidate must certify and swear before a notary "that none of the signatures on the sheet were signed more than 90 days preceding the last day for the filing of the petition." Section 10-8 of the Code (10 ILCS 5/10-8 (West 2014)) provides that nomination papers that are "in apparent conformity with [the Code]" are deemed valid unless an objection is made. The plaintiff argued that the signature requirement, combined with the 90-day period for collecting signatures and the notarization requirement, considered with the size and rural nature of the 13th Congressional District imposed a severe burden on the plaintiff's First and Fourteenth Amendment rights under the United States Constitution. The defendant argued that these type of restrictions have been found constitutional in the past and, therefore, do not constitute a severe burden. The defendant further argued that the challenged statutes are reasonable and nondiscriminatory regulations designed to protect the integrity of the election process. The court agreed with the plaintiff, holding that the plaintiff had demonstrated a likelihood of success on the merits and granted the plaintiff's motion for a preliminary injunction. The court reasoned the plaintiff presented sufficient evidence to suggest that no independent or new party candidate was able to meet the 5% signature requirement and that other similar candidates were only permitted on the ballot because no objections were filed. The court further reasoned that the fact the defendants allowed other individuals on the ballot with none or very few of the signatures required by Section 10-3 of the Code simply because no objections were filed called into question the defendant's justification that the 5% signature requirement was necessary. On October 6, 2016, the plaintiff announced that he would be ending his campaign.

CIVIL AND EQUAL RIGHTS ENFORCEMENT ACT – DUTIES OF ATTORNEY GENERAL

Despite the use of the term "shall" in the Act, the Attorney General does not have a mandatory duty to investigate claims made under the Act.

In *Cebertowicz v. Madigan*, 2016 IL App (4th) 140917, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that the Attorney General was not required to investigate a claim that Department of Corrections employees were violating the civil rights of a prisoner pertaining to that prisoner's religious beliefs. Section 1 of the Civil and Equal Rights Enforcement Act (15 ILCS 210/1 (West 2012)) provides

that the Attorney General "shall investigate all violations of the laws relating to civil rights and the prevention of discriminations against persons by reason of race, color, creed, religion, sex, national origin, or physical or mental disability, and shall, whenever such violations are established, undertake necessary enforcement measures." The plaintiff argued that the use of the term “shall” in Section 1 of the Act imposes a mandatory duty on the Attorney General to investigate the plaintiff’s civil rights claim. The defendant argued that a statute’s use of the term “shall” is not a clear indication of a mandatory duty. The court agreed with the defendant, holding that the Act’s use of the term “shall” is directory rather than mandatory, and as such, the defendant did not have a mandatory duty to investigate the plaintiff’s claim. The court reasoned that “statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with a provision,” and without a showing of such intent, the statute is directory. Because the plain language of the Act appears to reveal no consequence for noncompliance, the court reasoned that it was the General Assembly’s intent that the statute be construed as directory rather mandatory, and concluded that the Attorney General has no duty to investigate under the Act.

ILLINOIS HEALTH FACILITIES PLANNING ACT – HEALTHCARE FACILITY REGULATION

The stated purpose of the Act appears to the court to have been overrun by the potential for political corruption.

In *Mercy Crystal Lake Hospital and Medical Center v. Illinois Health Facilities and Service Review Board*, 2016 IL App (3d) 130947, the Illinois Appellate Court was asked to decide whether the circuit court correctly upheld the administrative decision of the Illinois Health Facilities and Service Review Board approving an application for a “certificate of need” to build a hospital. The plaintiff argued that the Board’s decision was clearly erroneous, arbitrary and capricious, and a violation of due process. The defendant contested those claims. The court, based upon the facts of the case, disagreed with the plaintiff’s arguments and affirmed the judgment of the circuit court confirming the Board’s decision. In delivering its opinion, however, the court also delivered a concurring opinion offering a critique of the Illinois Health Facilities Planning Act (20 ILCS 3960/1 et seq. (West 2010)). The concurrence stated that the Act was enacted “in an effort to reverse the trend of increasing healthcare costs resulting from unnecessary construction or modification of healthcare facilities,” but argued that the Act’s stated purpose is no longer applicable. The concurrence argued that the Act constitutes “nothing more than an additional corruption tax added to the cost of healthcare in Illinois” that is “clearly anti-consumer, but pro-politician,” because it puts the ability to build healthcare facilities in the hands of Board members who have been appointed by the Governor. Furthermore,

the concurring opinion stated that by "restricting the output of healthcare services and diminishing incentives to pursue innovation, the Planning Act imposes significant and unnecessary costs on healthcare consumers . . . the people of Illinois." The majority, addressing the concurring opinion, stated:

"By taking the public on a tour of the sausage factory in Springfield, Justice Schmidt risks triggering a collective case of indigestion. On the other hand, Justice Schmidt may be this generation's Upton Sinclair. A little dyspepsia might be a small price to pay for some much needed (and long overdue) transparency. After all, as Justice Brandeis so aptly put it, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 93 (1914). We can only hope that the light that Justice Schmidt shines on the factory floor in Springfield leads to the production of more sanitary and wholesome sausages in the future. For now, to paraphrase Captain Renault from *Casablanca*, we will merely note that we are shocked, *shocked* to find that political considerations are influencing the legislative process in Illinois."

PROPERTY TAX CODE – HOSPITAL EXEMPTION

A provision of the Code granting a charitable use exemption for certain hospital property violates the charitable use requirements of the Illinois Constitution.

In *Carle Foundation v. Cunningham Township*, 2016 Ill App (4th) 140795, the Illinois Appellate Court was asked to determine whether the trial court erred when it held that Section 15-86 of the Property Tax Code (35 ILCS 200/15-86 (West 2014)) applies to property owned by the plaintiff, a hospital organization. Section 15-86 was added by Public Act 97-688 and grants a charitable property tax exemption to property owned by a not-for-profit hospital or hospital affiliate that performs certain specified charitable activities or services in excess of a monetary threshold. The defendants argued that Section 15-86 is facially unconstitutional because it allows hospitals to receive a charitable use exemption even if the property is not used exclusively for charitable purposes, as required by Section 6 of Article IX of the Illinois Constitution (ILL. CONST. art. IX, §6). The plaintiff argued that Section 15-86 should be construed to include a requirement of exclusive charitable use and also argued that the defendants could not prove that there is no set of circumstances under which a Section 15-86 exemption would be constitutional. The court agreed with the defendants, holding that the statute is unconstitutional because it does not contain a requirement of exclusive use for an exempt purpose; it merely requires the hospital entity to "pay for" its exemption by providing charitable services. The resulting exemption is, therefore, in addition to the exemptions authorized by Section 6 of Article IX. After examining the plain language of Public Act 97-688, the court also found that the General Assembly intended Section 15-86 to apply retroactively. The court acknowledged

the defendants' concerns that applying the statute retroactively would allow taxpayers to "raise an exemption claim long after the [equalized assessed valuation] for a given year has been certified to the Department." Nevertheless, the court stated that, "if such open ended retroactivity is unwise or impractical as a public policy, the remedy is with the legislature, not with us." On May 25, 2016, the Illinois Supreme Court granted the Plaintiff's Petition for Leave to Appeal.

ILLINOIS PENSION CODE – BENEFIT REDUCTIONS

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

In *Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 2016 IL 119618, the Illinois Supreme Court was asked to decide whether the circuit court erred when it held that the changes made to Articles 8 and 11 of the Illinois Pension Code (40 ILCS 5/arts. 8, 11 (West 2012)) by Public Act 98-641 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 . . . any unit of local government . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." For certain retirees, Public Act 98-641 decreased the amount of the automatic annual increase to the retirement annuity, delayed the initial increase to the retirement annuity, and eliminated the automatic annual increase to the retirement annuity for certain years. Public Act 98-641 also increased the amount of employee and City of Chicago ("City") contributions to each Fund and authorized the Boards of Trustees of the Funds to initiate a *mandamus* proceeding to require the City to make the contributions to the Funds. The defendant argued that (i) "[Public Act 98-641], when read as a whole, does not diminish or impair benefits but, instead, saves them in a manner that confers a 'net benefit' or 'offsetting benefit' to members" because Public Act 98-641 increases the amount that the City will contribute to the Funds and contains a guarantee that the City will make those contributions; and (ii) the diminishments to benefits were the result of a "bargained-for exchange supported by consideration" because, at a meeting before the legislation was presented to the General Assembly, the member unions negotiated over the legislation's terms and the majority of elected representatives from the unions voted to support the legislation. The court agreed with the plaintiffs, holding that Public Act 98-641 was unconstitutional in its entirety. The court reasoned that because members already have the legally enforceable right to receive their benefits, the funding guarantee and increased City contributions were not a benefit that could be offset against the diminishment in benefits. Additionally, the court recognized that benefits may be changed in accordance with usual contractual principles, but reasoned that the unions were not acting as authorized agents and that "the individual members of the Funds have done

nothing that could be said to have unequivocally assented to the new terms or to have 'bargained away' their constitutional rights."

COUNTIES CODE – STATE'S ATTORNEY AND PUBLIC DEFENDER RECORDS AUTOMATION ASSESSMENTS

State's Attorney and public defender records automation assessments under the Code are fines and not fees despite statutory language to the contrary.

In *People v. Camacho*, 2016 IL App (1st) 140604, the Appellate Court on appeal from the trial court was asked to decide whether the State's Attorney and public defender's records automation assessments under the Code are fees or fines. Subsection (c) of Section 4-2002.1 of the Counties Code (55 ILCS 5/4-2002.1(c) (West 2012)) provides, "State's attorneys shall be entitled to a $2 fee to be paid by the defendant on a judgment of guilty or a grant of supervision for a violation of any provision of the Illinois Vehicle Code or any felony, misdemeanor, or petty offense to discharge the expenses of the State's Attorney's office for establishing and maintaining automated record keeping systems," including costs for "hardware, software, research, and development costs and personnel." Section 3-4012 of the Counties Code (55 ILCS 5/3-4012 (West 2012)), which establishes the public defender's records automation assessment, contains provisions nearly identical to the State's Attorney assessment, and, for that reason, the court analyzed both assessments together. The plaintiff argued that both assessments qualified as fines because they do not reimburse the State for the costs of prosecuting a particular defendant. The State argued that both assessments were fees, as written in the Counties Code. The court agreed with the plaintiff, holding that both assessments, despite their labels, were fines and not fees. The court noted, citing judicial precedent, that a fee exists only when an assessment recoups costs for prosecuting a particular defendant. The court reasoned that because the assessments were used for the creation and maintenance of automated record keeping systems, which were not costs associated with prosecuting a particular defendant, they could not be fees and, therefore, must be fines. The court further noted that the public defender records automation assessment applied to individuals guilty of both crimes for which they would be assigned a public defender and those for which they would not, indicating the assessment's purpose was not to recoup costs associated with representing a particular defendant.

ILLINOIS EDUCATIONAL LABOR RELATIONS ACT – ARBITRATION

The Illinois Educational Labor Relations Board erred in finding that the refusal to permanently hire teachers on probationary status was subject to arbitration.

In *Board of Education of the City of Chicago v. Illinois Educational Labor Relations Board*, 2015 IL 118043, the Illinois Supreme Court was asked to decide whether the defendant committed clear error when it determined that the plaintiff's decision to not permanently hire certain teachers on probationary status was subject to arbitration. Section 4 of the Illinois Educational Labor Relations Act (115 ILCS 5/4 (West 2012)) provides that employers "shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the . . . selection of new employees . . . ." The plaintiff argued that the decision to not hire the teachers was not subject to arbitration because hiring decisions are an inherent managerial right and therefore not required to be bargained over under the Act, and Section 10 of the Act (115 ILCS 5/10 (West 2012)) states that parties shall not arbitrate over provisions inconsistent with the Act. The defendant argued that the collective bargaining agreement at issue in the case clearly forbids the plaintiff from refusing to hire the teachers without arbitration. The court agreed with the plaintiff, holding that the arbitration of the grievances would conflict with Section 4 of the Act. The court reasoned that Section 4 excludes the selection of new employees from bargaining; therefore, they are exempt from arbitration as well. A dissenting opinion disagreed with this analysis. The dissent reasoned that because Section 4 instead deals with matters that cannot be bargained over rather than matters that can be arbitrated, the Section does not apply to the current dispute. The dissent also noted that the plaintiff can agree to follow certain procedures before making hiring decisions, including providing notice and hearing, and that those matters can be bargained over and arbitrated.

ILLINOIS INSURANCE CODE – OWNED VEHICLE EXCLUSION

The owned-vehicle exclusion for uninsured-motorist policies also applies to underinsured-motorist policies.

In *Goldstein v. Grinnell Select Ins. Co.*, 2016 IL App. (1st) 140317, the Illinois Appellate Court was asked to decide whether a 1995 amendment to the Illinois Insurance Code that permitted the owned-vehicle exclusion for uninsured-motorist policies also applied to underinsured-motorist coverage. Subsection (1) of Section 143a of the Illinois Insurance Code (215 ILCS 5/143a(1) (West 1996)) provides, "Uninsured motor vehicle coverage does not apply to bodily injury, sickness, disease, or death resulting therefrom, of an insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the insured, a resident spouse or resident relative, if that motor vehicle is not

described in the policy under which a claim is made or is not a newly acquired or replacement motor vehicle covered under the terms of the policy." Section 143a-2 of the Illinois Insurance Code (215 ILCS 5/143a-2 (West 2010)) which addresses coverage for underinsured motor vehicles does not contain an owned-vehicle exclusion akin to that found in subsection (1) of Section 143a of the Illinois Insurance Code. The plaintiff argued that the owned-vehicle exclusion was unenforceable in underinsured-motorist policies because Section 143a-2 was not amended to add an exclusion as Section 143a had been, and that the policies behind the two provisions differed. The defendant argued that the exclusion did apply to underinsured-motorist polices. The court agreed with the defendant, holding that the owned-vehicle exclusion applied to underinsured-motorist policies. The court reasoned that because the General Assembly had overridden the public policy behind the uninsured-motorist provision in relation to the exclusion, there was no rational reason to reach "a different result in the context of the underinsured-motorist statute on the ground that the public policies behind the two statutes differ." The court further noted that underinsured-motorist coverage is a kind of uninsured-motorist coverage and, therefore, there is "no rational basis for arriving at a different conclusion regarding the enforceability of the owned-vehicle exclusion."

PUBLIC UTILITIES ACT – EXCLUSIVE JURISDICTION

The Act is ambiguous as to whether the Illinois Commerce Commission has exclusive jurisdiction over claims against alternative retail electric suppliers concerning rate or charge disputes.

In *Zahn v. North American Power & Gas, LLC*, 815 F.3d 1082 (7th Cir. 2016), the United States Court of Appeals for the Seventh Circuit was asked to decide whether the district court erred in declaring that the Illinois Commerce Commission has exclusive jurisdiction over disputes concerning rates or charges from alternative retail electric suppliers under the Electric Service Customer Choice and Rate Relief Law of 1997 of the Public Utilities Act (220 ILCS 5/16-101 *et seq.* (West 2016)) and dismissing the case. Section 9-252 of the Act (220 ILCS 5/9-252 (West 2016)) grants the Illinois Commerce Commission the authority to hold hearings and decide complaints against a "public utility" alleged to have "charged an excessive or unjustly discriminatory amount for its product, commodity or service." However, paragraph (9) of subsection (b) of Section 3-105 of the Act (220 ILCS 5/3-105(b)(9) (West 2016)) expressly excludes alternative retail electric suppliers from the definition of "public utility." The plaintiff argued that because alternative retail electric suppliers are specifically excluded from the definition of public utility, the Illinois Commerce Commission does not have exclusive jurisdiction over claims against them under the Act. The plaintiff further argued that the General Assembly's intent was to partially deregulate the electricity market and to allow for competition, including

allowing rates from alternative retail electric suppliers to go unregulated by the Illinois Commerce Commission. The plaintiff also pointed to subsection (b) of Section 16-115B of the Act (220 ILCS 5/16-115B(b) (West 2016)), which gives the Illinois Commerce Commission the authority to enjoin and fine alternative retail electric suppliers, but does not explicitly give the Commission the power to order that financial remedies be made to the consumer for violations or breaches of the Electric Service Customer Choice and Rate Relief Law of 1997. The defendant argued that, despite the plain language, both the Illinois Commerce Commission and an Illinois appellate court have interpreted the Act to include alternative retail electric suppliers in the definition of "public utility" and therefore under the Commission's exclusive jurisdiction. Furthermore, the defendant argued that the General Assembly wanted to ensure that certain safeguards in alternative retail electric suppliers were in place to protect the public's interest as the competitive electricity market developed, so the suppliers should fall under the Illinois Commerce Commission's exclusive jurisdiction to hear claims requesting reparations from the suppliers. The court, on its own motion, decided that the question was one of first impression and certified the question to be settled by the Supreme Court of Illinois. The court reasoned that there were no controlling cases on point and that the statutory language and legislative intent indicated either interpretation of the Act could be accurate, and that such a question should be settled by state courts.

PUBLIC UTILITIES ACT – FORMULA RATE STRUCTURE

The Illinois Commerce Commission's interpretation of the meaning of "formula rate structure" was reasonable.

In *Commonwealth Edison v. Illinois Commerce Commission*, 2016 IL App (1st) 150425, the Illinois Appellate Court was asked to decide whether the Illinois Commerce Commission erred in determining that the term "formula rate structure," as used in the Public Utilities Act, only includes two specific schedules submitted by utilities that reflect the format and organization of major elements of a utility's revenue requirement for the year. Subsections (c) and (d) of Section 16-108.5 of the Public Utilities Act (220 ILCS 5/16-108.5 (West 2012)) provide a certain procedure for certain rate adjustments with specified statutory deadlines to apply, and require other rate adjustments to undergo a longer process under the Act. The Act, however, does not define "formula rate structure," and the defendant argued that the term should be interpreted to exclusively include two specific schedules submitted by the plaintiff. The plaintiff argued that the plain language definition of the term includes not just the specified schedules, but all of the supporting schedules, appendices, and other documents supported with the specified schedules. The plaintiff further argued that its interpretation would encourage specificity, standardization, and transparency. The Commission, however, argued that the term "formula rate structure"

is ambiguous, leaving it up to the Commission to decide how to define the term. The Commission further argued that the plaintiff's proposed definition could extend the adjustment process under Section 16-108.5 to up to two years in length, and therefore would not further the goals of specificity, standardization, or transparency. The court agreed with the Commission, holding that the term "formula rate structure" is ambiguous and that the court should defer to the Commission's interpretation of the term. The court reasoned that the interpretation of the Commission was a reasonable reading of the General Assembly's intent with the law. The court further reasoned that the Commission is permitted to examine the potential results of various interpretations of a statute, and that its determination that following the plaintiff's interpretation would result in longer periods of time before the Commission could adjust utility rates was a valid concern that the Commission could take into account. The court found nothing sufficient to overcome the presumption that the Commission's interpretation of the meaning of "formula rate structure" was reasonable.

ILLINOIS VEHICLE CODE – RIDING LAWNMOWERS

The definition of "motor vehicle" includes a riding lawnmower.

In *Goldstein v. Grinnell Select Ins. Co.*, 2016 IL App. (1st) 140317, the Illinois Appellate Court was asked to decide whether a riding lawnmower is a motor vehicle under the Illinois Vehicle Code. Section 1-146 of the Illinois Vehicle Code (625 ILCS 5/1-146 (West 2010)) defines a "motor vehicle" as "[e]very vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails, except for vehicles moved solely by human power, motorized wheelchairs, low-speed electric bicycles, and low-speed gas bicycles." The plaintiff argued that the Illinois Vehicle Code's definition of a "motor vehicle" did not apply to riding lawnmowers because they are more like low-speed electric bicycles. The plaintiff also argued that the portion of the Illinois Vehicle Code concerning all-terrain and recreational off-highway vehicles excluded lawnmowers. The defendant insurance company argued that a riding lawnmower was a "motor vehicle" for purposes of triggering an automobile insurance policy's owned-vehicle exclusion. The court agreed with the defendant, holding that a riding lawnmower is a "motor vehicle" under the Illinois Vehicle Code. The court reasoned that a riding lawnmower fits the definition of a "motor vehicle" and is not specifically excluded, as other devices are, from the definition. The court noted that the General Assembly could have chosen to exclude riding lawnmowers, as it did with other devices, but did not do so. The court also reasoned that the provision excluding lawnmowers from the definitions of all-terrain and recreational off-highway vehicles only excluded "lawnmowers" and not "riding lawnmowers."

ILLINOIS VEHICLE CODE – CHEMICAL TEST AFTER FATAL ACCIDENT

It is unconstitutional to suspend a person's driver's license for refusal to consent to a chemical test two days after a fatal motor vehicle accident.

In *McElwain v. Office of Illinois Secretary of State*, 2015 IL 117170, the Illinois Supreme Court was asked to decide whether the circuit court erred when it found Section 11-501.6 of the Illinois Vehicle Code (625 ILCS 5/11-501.6 (West 2012)) unconstitutional as applied to the plaintiff. Section 11-501.6 provides that a driver who is arrested for a traffic violation related to a fatality or other serious personal injury automatically consents to having his or her blood, breath, or urine tested for the presence of alcohol or drugs, and that refusal to submit to the testing results in an automatic suspension of the person's driver's license. The plaintiff argued that when police sought drug and alcohol testing two days after an accident, it constituted an unlawful search under the Fourth Amendment (U.S. CONST. amend. IV), and violated the plaintiff's due process rights under the Fourteenth Amendment (U.S. CONST. amend. XIV). The plaintiff also argued that the court should read a time limit for chemical testing into the statute. The defendant argued that it is not unconstitutional to condition the suspension of a driver's license on consent to a chemical test if the individual is involved in a serious motor vehicle accident because there is an essential nexus between the State's interest in protecting the public from intoxicated drivers and requiring consent to a chemical test following an arrest for a moving violation related to a serious accident. The court agreed with the plaintiff, holding the statute unconstitutional as applied, but refused to read a time limit into the statute. The court reasoned that generally, the statute is constitutional and does not violate a driver's Fourth Amendment rights because during a short time period after an accident, the test is less intrusive and the driver has a diminished expectation of privacy. However, the court reasoned that the plaintiff no longer has a diminished expectation of privacy two days after an accident, and the intrusiveness is no longer lessened. The court found that two days after an accident, there is no longer an essential nexus between the State's interest and requiring a chemical test. Lastly, the court refused to read a time limit for chemical testing into the statute, explaining that it cannot depart from plain statutory language by reading into the statute exceptions, limitations, or conditions not expressed by the General Assembly. The court noted that the General Assembly did not intend a time limit in the statute because the statute does not expressly state a time limit and because the General Assembly recently considered two pieces of legislation that would have added a one-hour time limit to the testing, but both pieces of legislation failed.

CRIMINAL CODE OF 2012* – VIOLATION OF BAIL BOND

A violation of bail bond is a continuing offense for purposes of determining a limitation period.

In *People v. Casas*, 2016 IL App (2d) 150456, the Illinois Appellate Court was asked to decide whether the trial court erred by granting the defendant's motion to dismiss and finding that the defendant's prosecution for violation of bail bond was time-barred. Section 3-8 of the Criminal Code of 2012 (720 ILCS 5/3-8 (West 2014)) provides that "[W]hen an offense is based on a series of acts performed at different times, the period of limitation prescribed by this Article starts at the time when the last such act is committed." The defendant argued that under *People v. Grogan*, 197 Ill. App. 3d 18 (1st Dist. 1990), a violation of bail bond is not a continuing offense; therefore, his prosecution was time-barred because it took place outside the three-year statute of limitations. The State argued that the court precedent upon which the trial court relied was improperly decided and should be overturned, and that the Illinois Appellate Court should find that a violation of bail bond is a continuing offense. The court agreed with the State and held that a violation of bail bond is a continuing offense for purposes of determining a limitation period. The court reasoned that the decision in *Grogan* was incorrect for two reasons. First, the *Grogan* court erroneously held that a defendant who violates his or her bail bond does not pose a continuing threat to the public. Instead, the court reasoned, the violation is a continuing threat to the public. The court inferred that the General Assembly recognized this threat when it implemented mandatory consecutive sentencing for any felony committed while a defendant is on bond. Second, the offense of violation of bail bond is similar to that of the offense of escape because it is a single course of conduct that continues beyond the initial commission of the offense. The court stated that the General Assembly intended violation of bail bond to be treated as a continuing offense because the offense aggregates the entirety of the defendant's criminal conduct, and such a view of the crime effectuates the "legislature's intent and, furthermore, fosters a just result." On September 28, 2016, the Illinois Supreme Court granted the defendant's Petition for Leave to Appeal.

* 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 - VOID SENTENCE RULE ABOLISHED

The common law void sentence rule, that a sentence that does not conform to a statutory requirement is void, is abolished.

In *People v. Castleberry*, 2015 IL 116916, the Illinois Supreme Court was asked to decide whether the appellate court erred when it overturned the circuit court and held that a 15-year sentence enhancement under subdivision (d)(1) of Section 12-14 of the Criminal Code of 2012 (720 ILCS 5/12–14(d)(1) (West 2008) (now 720 ILCS 5/11-1.30(d)(1)) was a mandatory statutory requirement, rendering the sentence imposed by the circuit court void under the common law void sentence rule. The void sentence rule provides that a sentence which does not conform to a statutory requirement is void. The defendant argued that a sentence is void only if it is entered by a court without subject matter jurisdiction. Further, the defendant argued that because the void sentence rule relied upon by the appellate court was no longer valid in light of recent precedent, the appellate court had no authority to consider the State's request to increase the sentence. The State argued that while the void sentence rule could no longer be considered valid, there was nothing improper about the appellate court increasing the defendant's sentence even if the void sentence rule did not provide a basis for the decision. The Illinois Supreme Court agreed with the defendant, holding that the void sentence rule was constitutionally unsound and should be abandoned. The court reasoned that a circuit court is a court of general jurisdiction under the State Constitution, and does not need to look to a statute for jurisdictional authority. The court further reasoned that while the General Assembly can create new justiciable matters with new rights and duties through new legislation, the failure to comply with a statutory requirement does not negate the circuit court's subject matter jurisdiction.

CRIMINAL CODE OF 2012 – FORCIBLE FELONY

Not all aggravated battery offenses qualify as forcible felonies for sentencing purposes.

In *People v. Smith*, 2016 IL App (1st) 140496, the Illinois Appellate Court was asked to decide whether the trial court erred when it treated the defendant's prior conviction for aggravated battery to a peace officer as a forcible felony for purposes of enhancing sentencing for unlawful use of a weapon by a felon. Subsection (e) of Section 24-1.1 of the Criminal Code of 2012 (720 ILCS 5/24-1.1(e) (West 2012)) provides that a violation of unlawful use of a weapon by a felon by a person not confined in a penal institution who has been convicted of a forcible felony is a Class 2 felony. Section 2-8 of the Code (720 ILCS 5/2-8 (West 2012)) provides that the definition of "forcible felony" includes, among

other offenses, "aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." The defendant argued that his prior conviction of aggravated battery to a peace officer was not a forcible felony because it did not result in great bodily harm or permanent disability or disfigurement as expressed in the statute. The State argued that aggravated battery to a peace officer constitutes a felony which involves the use or threat of physical force or violence against any individual. The court agreed with the defendant, holding that the defendant's prior conviction of aggravated battery to a peace officer that did not result in great bodily harm or permanent disability or disfigurement was not within the statutory definition of a forcible felony and that the trial court erred in using it to enhance the defendant's conviction. The court noted that there is a split among appellate districts on the issue, but reasoned that the General Assembly intended the "any other felony" of the forcible felony statute to refer to felonies not previously specified in the preceding list of felonies contained within that Section. The court reasoned that by amending the forcible felony statute in 1990 to include the phrase "resulting in great bodily harm or permanent disability or disfigurement" to aggravated batteries, the General Assembly expressed its intent to limit the number and types of aggravated batteries that would qualify as forcible felonies.

ILLINOIS CONTROLLED SUBSTANCES ACT– DEFINITION OF "SCHOOL"

Whether a school building is "active" or "operational" as a school at the time of the offense is irrelevant when determining if the offense took place within 1,000 feet of a school.

In *People v. Toliver*, 2016 IL App (1st) 141064, the Illinois Appellate Court was asked to decide whether the State needed to prove that a structure was operating as a school at the time of an offense in order to establish that a drug offense took place within 1,000 feet of a school. Subdivision (b)(1) of Section 407 of the Illinois Controlled Substances Act (720 ILCS 570/407(b)(1) (West 2012)) provides that a person who commits certain violations of the Act within 1,000 feet of any school is guilty of a Class X felony, rather than a Class 1 felony. The State argued that the testimony of the prosecution's witnesses established that the offense occurred within 1,000 feet of a school and that the jury could reasonably conclude that the building was a school at the time of the offense. The defendant argued that the State needed to prove beyond a reasonable doubt that the building was actually used as a school on the date of the offense. The court agreed with the State, holding that the evidence at trial established beyond a reasonable doubt that the offense occurred within 1,000 feet of a school and that the State was not required to prove that the school was operational or active on the date of the offense. The court reasoned that through stipulation and concession to the jury, the defendant had waived the State's obligation to

prove the structure was operating as a school at the time of the offense. The court also reasoned that the issue of whether the school was active or operational at the time of offense is irrelevant because the statute does not require proof that the school was active or operational. A dissenting opinion pointed out that the school had been closed after the 2011-12 school year, and had been shuttered for over a year before the date of the offense. The dissent further argued that the State failed to prove beyond a reasonable doubt that the school existed at the time of the offense and that the General Assembly did not intend for the enhancement to be used when an offense occurs within 1,000 feet of a school that is "closed, shuttered, and no longer in operation."

ILLINOIS CONTROLLED SUBSTANCES ACT – MAXIMUM SENTENCE

The Act is ambiguous as to whether an enhanced sentencing provision is applicable only to a violation of the Act, or may be read in conjunction with another applicable enhanced criminal sentencing statute.

In *People v. Williams*, 2016 IL 118375, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the enhanced sentencing provision under subsection (a) of Section 408 of the Illinois Controlled Substances Act (720 ILCS 570/408(a) (West 2010)) could not be read in conjunction with other enhanced criminal sentencing provisions under subsection (b) of Section 5-4.5-95 of the Unified Code of Corrections (730 ILCS 5/5–4.5–95(b) (West 2010)). Subsection (a) of Section 408 of the Illinois Controlled Substances Act provides that "[a]ny person convicted of a second or subsequent offense under this Act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized." Subsection (b) of Section 5-4.5-95 of the Unified Code of Corrections provides that a person convicted a third time of a Class 1 or Class 2 felony shall be subject to the penalty for a Class X felony. The defendant argued that Section 408(a) was only applicable to offenses committed in violation of the Illinois Controlled Substances Act, and not to other felonies committed in violation of other statutes. The defendant argued that the penalty scheme was designed to deter abuse of controlled substances by punishing a second or subsequent violation of the Act more severely and was the only recidivist statute present when Section 408(a) was enacted. Alternatively, the defendant argued that because Section 408(a) was ambiguous as to whether "maximum term otherwise authorized" included terms under the Act or another term of imprisonment imposed for any criminal offense, he should be subject to the more lenient interpretation. The State argued that the "maximum term otherwise authorized" applicable was the defendant's enhanced potential Class X maximum sentence of 30 years under subsection (a) of Section 5-4.5-25 of the Unified Code of Corrections (730 ILCS 5/5–4.5–25(a) (West 2010)). The State argued that the sentence should be based upon the defendant's previous felony convictions, resulting in a maximum imprisonment of 60

years. The Illinois Supreme Court agreed with the defendant, holding that the language of Section 408(a) was ambiguous and invoking the rule of lenity. The court reasoned that neither the State's nor the defendant's interpretation were conclusively supported by the text of the statute, and that both interpretations were reasonable. The court encouraged the General Assembly to clarify "to what extent, if any, [S]ection 408(a) may apply to offenses other than those committed in violation of the [Illinois Controlled Substances] Act."

CODE OF CRIMINAL PROCEDURE OF 1963 – POST-CONVICTION PETITIONS

The State, and not post-conviction counsel, must move in writing to dismiss a defendant's successive post-conviction petition under the Code.

In *People v. Jackson*, 2015 IL App (3d) 130575, the Illinois Appellate Court was asked to decide whether the circuit court erred in dismissing a successive post-conviction petition when the defendant had filed the petition *pro se* and, subsequently, the defendant's post-conviction counsel filed a motion to dismiss the petition. Section 122-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-5 (West 2010)) provides, "Within 30 days [of a defendant being granted leave to file a successive post-conviction petition,] the State shall answer or move to dismiss. In the event that a motion is filed, the State must file an answer within 20 days after such denial." The State argued that the motion to dismiss was "exceptionally well taken" as they did "not see any merit whatsoever in anything [defendant has] filed" and supported the circuit court's ruling on the motion. The defendant argued that his successive post-conviction petition should not have been dismissed. The court agreed with the defendant and reversed and remanded to the lower court, holding that the post-conviction counsel's motion to dismiss was improper because the State failed to move to dismiss in writing. The court reasoned that the Code requires the State, and not post-conviction counsel, to bring a written motion to dismiss. The court noted that the State's acceptance of the post-conviction counsel's request to dismiss the petition did not constitute the State filing a motion to dismiss. Furthermore, the court ruled that the State's oral support of the post-conviction counsel's motion to dismiss did not equate to a motion to dismiss and that, even if it did, only a written, and not oral, motion to dismiss complies with the Code. A dissenting opinion argued that the court erred in granting the defendant leave to file a successive post-conviction petition because it was clear that the claims did not justify further proceedings. The dissent argued that the Code does not expressly require the State to file a written motion to dismiss, and that the State could adopt the post-conviction counsel's motion to dismiss. The dissent concluded that the General Assembly did not intend the Code to be "construe[d] in a manner that leads to absurd results," such as a defendant being permitted to continue to pursue a frivolous post-conviction petition absent the State filing a written motion to dismiss the petition.

SEXUALLY DANGEROUS PERSONS ACT – DISCHARGE ORDERS AND CONDITIONAL RELEASE

The Act is ambiguous as to whether a court must find an incarcerated sex offender to be either no longer sexually dangerous or no longer dangerous in general when determining if an order for discharge or conditional release is appropriate.

In *People v. Guthrie*, 2016 IL App (4th) 150617, the Illinois Appellate Court was asked to decide if the trial court erred when it ordered the defendant to be discharged without conditions from the Department of Corrections on the grounds that an order for conditional release was not appropriate because the State failed to present clear and convincing evidence that the defendant remained a sexually dangerous person as required under subsection (e) of Section 9 of the Sexually Dangerous Persons Act (725 ILCS 205/9(e) (West 2014)). Section 9(e) provides that "[if] the person is found to be no longer dangerous, the court shall order that he or she be discharged. If the court finds that the person appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that the person has fully recovered, the court shall enter an order permitting the person to go at large subject to the conditions and supervision by the Director [of Corrections] as in the opinion of the court will adequately protect the public." The State argued that the trial court misinterpreted the language under Section 9(e), noting that Section 9(e) specifically uses the term "dangerous" not "sexually dangerous." Asserting that the General Assembly's use of the term "dangerous" was intentional, the State contended that under Section 9(e), in order for a discharge order to be appropriate, it is not enough for a court to find that the person is no longer sexually dangerous; rather, the court must find that the person is no longer dangerous in general. The defendant did not file an appellee's brief. Observing that an appellee's brief was not necessary to reach the merits of the case, the appellate court ultimately rejected the State's argument and affirmed the trial court's ruling. In support of its holding, the appellate court noted that the State's interpretation of Section 9(e) "would lead to absurd results" as it would require a court to consider types of danger outside the scope of the Act when determining whether an order for discharge or conditional release is appropriate. The appellate court furthermore underscored the importance of giving "the language of the statute . . . its contextual meaning," noting that the Act concerns *sexually* dangerous persons not generally dangerous persons. A dissenting opinion characterized the language under Section 9(e) as ambiguous because it requires a court to assume that the General Assembly intended for the term "dangerous" to mean "sexually dangerous" even though "that is not what [the General Assembly] wrote." Observing that the General Assembly "can easily revisit the matter and fix the statute so it says what the legislature meant," the dissent called for a plain-language reading of the statute.

SEXUALLY VIOLENT PERSONS COMMITMENT ACT – SEXUAL ABUSE OF COMMITTED PERSONS

People civilly confined in facilities operated by the Department of Human Services under the Act are not protected by the same safeguards against sexual assault that are available to prison inmates.

In *Smego v. Meza*, 2015 WL 5636459 (C.D. Ill.), the District Court for the Central District of Illinois was asked to decide whether the plaintiff's complaint sufficiently stated a claim for relief when alleging, among other things, that the facility operated by the Illinois Department of Human Services ("IDHS") in which the plaintiff was civilly committed under the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq*.) violated the plaintiff's equal protection rights under the Fourteenth Amendment to the United States Constitution (U.S. CONST. amend. XIV). The plaintiff argued that the facility failed to have a reliable procedure for reporting and investigating sexual assaults allegedly occurring at the facility, and that his equal protection rights were violated because prisons operated by the Illinois Department of Corrections ("IDOC") have more thorough sexual assault reporting and investigation procedures than the facility operated by IDHS. The court dismissed the plaintiff's complaint for failing to state a claim, reasoning that because the plaintiff is in an IDHS facility, he is not similarly situated to an inmate in an IDOC prison. The court also opined that the difference between the reporting and investigation procedures for IDHS facilities and IDOC prisons might be because IDHS facilities are not subject to the federal Prison Rape Elimination Act of 2003 (42 U.S.C. § 15601 *et seq*.).

UNIFIED CODE OF CORRECTIONS – CLASS X SENTENCING

The Code is ambiguous as to when a defendant must be over the age of 21 in order to be eligible for Class X sentencing under an enhanced sentencing provision.

In *People v Brown*, 2015 IL App (1st) 140508, the Illinois Appellate Court was asked to decide whether the trial court erred in sentencing the defendant as a Class X offender under subsection (b) of Section 5-4.5-95 of the Unified Code of Corrections (730 ILCS 5/5-4.95-95(b)) when he was not over 21 years of age at the time of commission or charging, but was over the age of 21 years at the time of conviction. Section 5-4.5-95(b) provides that “[w]hen a defendant, over the age of 21 years," is convicted of third felony that is Class 2 or greater, the defendant shall be sentenced as a Class X offender. The defendant argued that because he was not yet older than 21 years old at the time the offense was committed and when he was charged with the offense, Class X sentencing under Section 5-4.5-95(b) was not authorized. The State argued that only the age of the defendant at the time of conviction was relevant for Class X sentencing eligibility, and in this case,

the defendant was over 21 years of age at the time of conviction and thus, eligible for Class X sentencing. The court agreed with the defendant, finding that the language of the statute was ambiguous and applying the rule of lenity. The court observed that although the General Assembly had recently amended Section 5-4.5-95 (P.A. 99-69, effective January 1, 2016), the fact that it did not amend subsection (b) suggested that the General Assembly was unaware of the split of authority in Illinois courts concerning the interpretation of this provision. A dissenting opinion argued that reading the statute as a whole clearly required the defendant to be 21 years old when convicted, and that if the General Assembly had wanted the statute to apply only to defendants who are age 21 or older when charged, it could have drafted the statute to read "when a defendant over the age of 21 years *is charged*."

UNIFIED CODE OF CORRECTIONS – CONSECUTIVE TERMS OF IMPRISONMENT

A defendant participating in a county impact incarceration program is not considered to be in custody of the Department of Corrections for purposes of determining consecutive terms of imprisonment.

In *People v. Lashley*, 2016 IL App (1st) 133401, the Illinois Appellate Court was asked to decide whether the trial court erred when it ordered the defendant to serve his prison sentence consecutively with two prior sentences. Subsection (d)(6) of Section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4(d)(6) (West 2012)) provides, "If the defendant was in the custody of the Department of Corrections at the time of the commission of the offense, the sentence shall be served consecutive to the sentence under which the defendant is held by the Department of Corrections." The State argued that the defendant was serving his sentence for the two prior offenses at the time he was arrested and the statute mandates consecutive sentencing. The State argued that the reference to the "Department of Corrections" in the statute includes county corrections officials and the Cook County Department of Corrections. The defendant argued that the statute does not apply to him because he was not in the custody of the Department of Corrections at the time he committed the offense, but rather, in the custody of Cook County corrections officers as part of his participation in the Cook County impact incarceration program. The defendant argued that the use of the phrase "in the custody of the Department of Corrections" refers to the Illinois Department of Corrections and not to county sheriffs who administer county impact incarceration programs. The court agreed with the defendant, holding that subsection (d)(6) is ambiguous and that the rule of lenity requires ambiguous criminal statutes to be generally construed in the defendant's favor. The court reasoned that subsection (d)(6) is ambiguous for two reasons. First, it is reasonable to interpret "Department of Corrections" to refer only to the Illinois Department of Corrections and

not also to the county officials responsible for administering a county impact incarceration program. Second, the use of the word “held” in the subsection creates another ambiguity because it suggests that the statute applies to individuals only in physical custody of a corrections facility and not to individuals held on monitored release, such as the defendant. The court reasoned that if the General Assembly intended for the statute to include individuals in the custody of county officials, it would have used language to include those individuals.

MURDERER AND VIOLENT OFFENDER AGAINST YOUTH REGISTRATION ACT – JUVENILE OFFENDERS

The requirement that a juvenile convicted or adjudicated of a violent crime must register as a violent offender against youth does not violate a juvenile defendant’s constitutional rights.

In *In re M.A., a Minor*, 2015 IL 118049, the Illinois Supreme Court was asked to decide whether registration under the Murderer and Violent Offender Against Youth Registration Act violates the substantive due process, procedural due process, and equal protection rights of a 13-year old juvenile defendant who was adjudicated delinquent for assaulting her brother with a knife. Paragraph (2) of subsection (a) of Section 5 of the Murderer and Violent Offender Against Youth Registration Act (730 ILCS 154/5(a)(2) (West 2012)) provides that a juvenile is required to register under the Act if that juvenile is "adjudicated a juvenile delinquent as the result of committing or attempting to commit an act which, if committed by an adult, would constitute any of the [specified violent] offenses. . ." under Illinois law or the law of another jurisdiction. The defendant argued that the requirement that she register as an adult under the Act when she turned 17 violated: (i) her equal protection rights under the Fourteenth Amendment to the United States Constitution (U.S. CONST. amend. XIV) because juveniles required to register under the Act were treated differently than juvenile sex offenders; (ii) her procedural due process rights under the Fourteenth Amendment, because it requires the defendant to register at age 17 without regard to the circumstances of the offense, without regard to whether the defendant is a danger to society, and without an additional hearing; and (iii) her substantive due process rights under the Fourteenth Amendment because she was only 13 at the time of the offense and she poses no threat as an adult. The State argued that: (i) no equal protection violation exists because sex offenders and juveniles required to register under the Act are not similarly situated; (ii) the procedures afforded to the defendant during her adjudication were adequate; and (iii) registration was based upon the conviction or adjudication of a violent offense and not the personal situation of the defendant. The court agreed with the State, holding that the Act was not unconstitutional and did not violate the defendant’s equal protection or due process rights. The court reasoned that: (i) the juveniles

required to register under the Act were not similarly situated because non-sexual violent offenders are not required to register as sex offenders; (ii) the proceedings prior to a defendant's conviction or adjudication were sufficient to provide procedural due process prior to registering under the Act; and (iii) requiring defendants convicted or adjudicated of violent offenses against youth to register is a rational way to protect the public from such defendants. In a separate concurrence, four justices opined that the General Assembly should reexamine the Act "with the same level of scrutiny that it applied to the Sex Offender Registration Act when it amended that Act in 2007" to "take into account the unique characteristics of juveniles. . . ."

CODE OF CIVIL PROCEDURE – SUBSTITUTION OF JUDGE AS OF RIGHT

A trial court may deny a plaintiff's request for a substitution of a judge as of right if the plaintiff has voluntarily dismissed the case and refiled, if the judge in the refiled case made substantive rulings in the previously dismissed case.

In *Bowman v. Ottney*, 2015 IL 119000, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that after a case in which substantive rulings have been made has been voluntarily dismissed and then refiled, the trial court may deny a plaintiff's request for a substitution of the judge as of right. Paragraph (2) of subsection (a) of Section 2-1001 of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2014)) provides that each party shall be entitled to one substitution of judge without cause as a matter of right, if it is presented before trial or hearings begin and before the judge to whom it is presented has ruled on any substantial issue in the case. The plaintiff argued that the plain meaning of the phrase "in the case" meant only the case presently before the court and not the previously dismissed case. As the judge had yet to make a substantive ruling in the refiled case, the plaintiff contended that the court had no discretion to deny the motion for a substitution. The defendant argued that the intent of the Code was to prevent "judge shopping" and, therefore, the court should be able to look at the "overall controversy between the parties" rather than just the refiled case when considering a motion for substitution of a judge. The court agreed with the defendant and affirmed the lower court, holding that a trial court does have the discretion to deny a substitution in such circumstances. The court reasoned based on statutory history that the General Assembly intended to discourage "judge shopping" and that following the plaintiff's interpretation would "create a loophole that allows the purpose of the statute to be defeated." In light of the statutory history, the court stated that the Code must "be read as referring to all proceedings between the parties in which the judge to whom the motion is presented has made substantial rulings with respect to the cause of action before the court." In this situation, the court noted, while the plaintiff's dismissal and refiling yielded two lawsuits with separate docket numbers, both suits concerned the same cause of action against the

defendant. A dissenting opinion argued that the majority improperly construed the Code "in a way to defeat plaintiff's right to a single substitution of judge." The dissent reasoned that the Code grants plaintiffs an absolute right to a substitution and that the majority's conclusion creates a new requirement for previously dismissed cases that is not supported by the language of the Code.

CODE OF CIVIL PROCEDURE − REDUCTION IN AWARD

A jury award in a medical malpractice case may not be reduced by the amount of medical bills that have been written off by the plaintiff's health care provider.

In *Miller v. Sarah Bush Lincoln Health Center*, 2016 IL App (4th) 150728, the Illinois Appellate Court was asked to decide whether the trial court erred when it reduced a jury's award in a medical malpractice case by the amount of the plaintiff's medical bills that were written off by the plaintiff's health care providers. Section 2-1205 of the Code of Civil Procedure (735 ILCS 5/2-1205 (West 2014)) provides that a judgment in medical malpractice case shall be reduced by "100% of the benefits provided for medical charges, hospital charges, or nursing or caretaking charges, which have been paid, or which have become payable to the injured person by any other person, corporation, insurance company, or fund in relation to a particular injury." Section 2-1205 also provides that the reduction shall not apply "to the extent that there is a right of recoupment through subrogation, trust agreement, lien, or otherwise." The defendants argued that the statute should be construed to allow a reduction for the same benefits that were included in the common law collateral source rule. This includes amounts that are written off by health care providers. The plaintiff argued that, since Section 2-1205 modifies the collateral source rule, the term "benefit," as it is used in that Section, should include only amounts that are (i) actually paid by the collateral source on behalf of the plaintiff; and (ii) not subject to recoupment. The court agreed with the plaintiff, holding that the plain language of the statute "does not allow the defendant to reduce a judgment by an amount that was neither paid to medical providers nor payable to the plaintiff." The court reasoned that the amounts written off by medical providers were never paid by anyone. Furthermore, the portion of the plaintiff's medical expenses that was paid by Medicare and private insurance is subject to recoupment by those entities. Therefore, the court concluded, the defendants are not entitled to a reduction.

CODE OF CIVIL PROCEDURE – VACATING A REVIEWING COURT'S JUDGMENT

A post-judgment petition for relief must be filed in the same court in which the contested judgment was entered.

In *Price v. Philip Morris, Inc.*, 2015 IL 117687, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the circuit court improperly denied the plaintiff's petition for relief from a judgment rendered by the Illinois Supreme Court under subsection (b) of Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401(b) West 2012)). That statute provides that a post-judgment petition for relief from judgment "must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof." The plaintiff argued that a lower court could grant relief from an order issued by a reviewing court because Section 2-1401 is broadly worded in order to provide a means for relief in every case, and that the statute contains no exceptions for judgments rendered by a reviewing court. The defendant argued that the circuit court did not have authority to grant the relief the plaintiff was seeking because the judgment was rendered by a higher court. The Illinois Supreme Court agreed with the defendant, holding that Section 2-1401 does not authorize the circuit court to vacate the judgment of a reviewing court and that the plaintiff must file such a motion in the reviewing court that rendered the contested judgment. The court reasoned that even though the phrase "same proceeding" under subsection (b) of the statute is not defined, the use of the phrase by the General Assembly has a long understood meaning that a post-judgment petition must be filed in the same court in which the contested judgment was entered and, when possible, assigned to the same judge. The court further reasoned that the General Assembly did not intend to give circuit courts the power to vacate the judgment of a reviewing court in violation of *stare decisis*, characterizing such action "unconstitutional." The court concluded by emphasizing that when an argument for relief is based on the underlying merits of the case, the petition or motion must be brought to the reviewing court where the judgment was rendered and where the decision on the merits occurred. A dissenting opinion argued that the plaintiff properly filed the Section 2-1401 motion in the circuit court because it was the circuit court that entered the final order of the original proceeding. The opinion asserted that the Illinois Supreme Court went beyond the legislative intent of the statute by reading an exception to a statute that did not appear in the plain language of the statute, maintaining that when construing a statute, ". . . a court presumes that the legislature did not intend to enact a statute that leads to absurdity, injustice, or inconvenience." As to the matter of *stare decisis*, the dissent argued that *stare decisis* has been "historically viewed as a command, obligation, or rule" and not a constitutional mandate. Lastly, the dissent emphasized that the Illinois Supreme Court has recognized that ". . . a [S]ection 2-1401 petition invokes the equitable powers of a circuit court where

necessary to prevent injustice" and that the unique nature and unusual procedural background of this case calls for equitable relief."

CODE OF CIVIL PROCEDURE – PERSONAL PROPERTY OF FORMER TENANT AFTER EVICTION

A landlord owes a duty of care to the personal property of an evicted former tenant when the landlord acts as an actual or constructive bailee with respect to the tenant's property.

In *Zissu v. IH2 Property Illinois, L.P.*, 157 F.Supp.3d 797 (N.D. Ill., 2016), the United States District Court for the Northern District of Illinois was asked to decide whether a duty of care of a landlord to a tenant arises when the landlord acts as an actual or constructive bailee with respect to a tenant's property. The plaintiff argued that the defendant negligently removed personal property of the plaintiff from the premises following the plaintiff's eviction under Article IX of the Code of Civil Procedure (735 ILCS 5/Art. IX), causing much of it to be damaged or stolen. The defendant argued that the plaintiff cannot state a claim for negligence because the defendant, as landlord, did not owe a duty to protect the personal property of the plaintiff left on the premises following the eviction. The court agreed with the plaintiff, holding that, as a matter of first impression, although a landlord does not have a general duty under common law to care for the personal property of a former tenant after a proper and legal eviction, a duty of care does arise when a landlord acts as an actual or constructive bailee with respect to the tenant's property. The court reasoned that in many states, the legislature has spelled out the extent of a landlord's obligation with respect to personal property left behind by a tenant after eviction. The court reasoned that while Illinois does not have such a law, the common law of bailment permits the conclusion that, although a landlord does not owe a duty to care for a former tenant's personal property as a general matter, such a duty does arise when a landlord participates in removing the property from the premises or otherwise assumes control or possession over the property.

WHISTLEBLOWER ACT – REPORTING A VIOLATION BY A THIRD PARTY

The Act applies when an employee discloses a possible violation by a third party rather than the employer.

In *Coffey v. DSW Shoe Warehouse, Inc.*, 145 F.Supp.3d 771 (N.D. Ill. 2015), the United States District Court for the Northern District of Illinois was asked to decide whether the Whistleblower Act applied when an employee contacted the police to report a

suspected shoplifter and was terminated for violating the store's policy against contacting the police to report suspected shoplifters. Subsection (b) of Section 15 of the Whistleblower Act (740 ILCS 174/15(b) (West 2012)) provides, “An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation." The plaintiff argued that her termination fell within the Act because she was retaliated against for disclosing a possible violation of State law to a law enforcement agency. The defendant argued that the Act’s legislative history and public policy concerns suggested that the statute was intended to cover only situations in which the retaliated-against employee was exposing the employer’s violation of law, not that of a third party. The court agreed with the plaintiff, holding that the Act applied in a situation in which the retaliated-against employee disclosed a possible violation of State law by a third party rather than misconduct by the employer. The court reasoned that the General Assembly never debated the issue and nothing in the statutory language or the legislative history suggested that the General Assembly intended to limit the Act’s protections to only situations in which an employee exposed misdeeds by the employer. Further, the court saw no ambiguity in the plain language of the statute and suggested that the General Assembly could have limited the language to information that “discloses the employer’s violation” of the law, rather than “discloses a violation.”

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – APPLICABILITY

The Act applies to damages but not to equitable relief sought under the Illinois Human Rights Act.

In *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493, the Illinois Appellate Court, on interlocutory appeal, asked to decide whether the Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act") applies to civil actions brought under the Illinois Human Rights act seeking damages, reasonable attorney fees, and costs. Section 2-101 of the Tort Immunity Act (745 ILCS 10/2-101 (West 2014)) provides that the Act does not affect "the right to obtain relief other than damages." Section 2-109 of the Tort Immunity Act (745 ILCS 10/2-109 (West 2014)) provides that public entities are not liable for injuries resulting from an "act or omission of its employee where the employee is not liable" and that "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." Section 1-204 of the Tort Immunity Act (745 ILCS 10/1-204 (West 2014)) provides that the term "injury" "includes any injury alleged in a civil action . . . based upon the . . . Constitution of the

State of Illinois . . . ." The plaintiff argued that the Tort Immunity Act did not apply because the relief sought was equitable and the plaintiff was not seeking an award of damages. The defendant argued that the Tort Immunity Act applied to the Human Rights Act under two theories: (1) claims under the Illinois Human Rights Act are not constitutional claims; and (2) the Tort Immunity Act does not apply only to tort claims. The court agreed with the defendant in part, holding that the Tort Immunity Act applies to damages but not to equitable relief sought under the Illinois Human Rights Act. The court reasoned that under the language of Section 2-101, the Tort Immunity Act applies only to damages, and that, as the Illinois Human Rights Act protects rights found in the Illinois Constitution, an action under the Illinois Human Rights Act fits the definition for "injury" under the Tort Immunity Act. The court noted that Illinois Supreme Court had impliedly overruled the notion that the Tort Immunity Act only applies to tort actions. A dissenting opinion argued that the Illinois Supreme Court had not overruled earlier cases that provided that the Tort Immunity Act applied only to tort actions. The dissent also argued "that the specific inclusion of municipal corporations in the Human Rights Act meant the legislature intended that public employees be given the same rights as employees in the private sector."

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – MAINTENANCE

The requirement that maintenance awards that deviate from the statutory guidelines shall set forth the amount of maintenance or the duration that would have been required under the guidelines and the reasoning for departing from the guidelines is directory, not mandatory.

In *In re Marriage of Leake and Wilson*, 2016 IL App (2d) 150846-U, the Illinois Appellate Court was asked to decide whether the trial court abused its discretion when it deviated from the statutory guidelines related to maintenance awards under Section 504 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/504). Paragraph (2) of subsection (b-5) of that Section (750 ILCS 5/504(b-5)(2)(West Supp. 2015)) provides that, if the court deviates from the guidelines, the court "shall state in its findings the amount of maintenance (if determinable) or the duration that would have been required under the guidelines and the reasoning for any variance from the guidelines." The appellant argued that the trial court's order should be reversed because it failed to state the duration of the maintenance award, as required by the statute. Although the Illinois Appellate Court acknowledged that this was true, it reasoned that the requirement that the trial court state the amount of maintenance and duration was directory, rather than mandatory, and is not a basis for reversing the trial court's determination. In doing so, the court cited *In re Marriage of Tumminaro and Warlick*, 2013 Ill App (2d) 120287, which noted that the word "shall" is directory unless there is a penalty for noncompliance.

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – CHILD SUPPORT

Proceeds from a wrongful death settlement constitute income for purposes of calculating child support.

In *In re Marriage of Fortner*, 2016 IL App (5th) 150246, the Illinois Appellate Court was asked to decide whether the trial court erred when it found that proceeds from a wrongful death settlement the respondent received did not constitute income for purposes of child support. Paragraph (3) of subsection (a) of Section 505 of the Illinois Marriage and Dissolution Act (750 ILCS 5/505(a)(3) (West 2014)) defines net income for purposes of determining child support as "the total of all income from all sources, minus" specific deductions, none of which include proceeds from a settlement. The petitioner argued that the wrongful death settlement should be treated as inheritance since the respondent received the proceeds as the sole heir of his father's estate. The respondent argued that the proceeds from the settlement do not constitute income because they are analogous to damages for pain and suffering, which another district appellate court determined "are designed to recompense" an injured party, rather than provide enrichment (*Villanueva v. O'Gara*, 218 Ill. Dec. 105, 668 (1996)). The court agreed with the petitioner, holding that the wrongful death settlement proceeds did constitute income for purposes of calculating whether the respondent's income had increased to justify modifying child support. The court reasoned that the other district court's decision on which the respondent relied was flawed and at odds with the principle that the broad and expansive statutory definition of income for child support purposes includes all benefits and gains received by a supporting parent unless such gains are excluded by statute. The court relied on the Illinois Supreme Court's view that income "includes gains and benefits that enhance a noncustodial parent's ability to support a child" (*In re Marriage of Mayfield*, 2013 IL 114655) and the consistent holdings from other courts that the definition of income "is a broad and expansive definition." Public Act 99-764, effective July 1, 2017, significantly amended the income calculation provisions of Section 505.

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – AWARD OF LOST WAGES

A pro se litigant may not be awarded lost wages for time spent in litigation in a post dissolution proceeding to enforce an order or judgment under the Act.

In *In re Marriage of Pickering*, 2016 IL App (2d) 150898, the Illinois Appellate Court was asked to decide whether a *pro se* litigant in a post dissolution of marriage contempt petition may be awarded lost wages for the time that the person spent in litigation.

Subsection (b) of Section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508(b) (West 2014)) provides that "in every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party." The petitioner argued that her lost wages can be considered costs. The respondent argued that the Act does not allow reimbursing the lost wages of a *pro se* litigant. The court agreed with the respondent, holding that subsection (b) of Section 508 of the Act does not authorize an award of lost wages or similar compensation to a *pro se* litigant for the time that she has spent in litigation under the Act. The court reasoned that lost wages are not costs and to include them as such would be contrary to the plain and established meaning of the term. The court held that although a *pro se* litigant might suffer economically by spending time on her case, there is no basis in law to compensate her for the opportunity cost of proceeding *pro se*. The court concluded that the issue is for the General Assembly to address.

ILLINOIS DOMESTIC VIOLENCE ACT OF 1986 – SUBSTITUTION OF JUDGE AS OF RIGHT

When an order of protection petition is brought in conjunction with another civil proceeding, there is no substitution of judge as of right even if the other civil proceeding is not pending.

In *Petalino v. Williams*, 2016 IL App (1st) 151861, the Illinois Appellate Court was asked to decide whether the circuit court erred in denying a motion for substitution of judge as of right when an order of protection petition was brought in conjunction with a child custody case that was was not pending. Paragraph (2) of Subsection (a) of Section 2 1001 of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2014)) provides that each party shall be entitled to one substitution of judge without cause as a matter of right, if it is presented before trial or hearings begin and before the judge to whom it is presented has ruled on any substantial issue in the case. Paragraph (2) of subsection (a) of Section 202 of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/202(a)(2) (West 2014)) provides that an action for an order of protection may be commenced "[i]n conjunction with another civil proceeding. . . ." The petitioner argued that because the petition for an order of protection was filed in conjunction with another proceeding upon which substantive issues had been decided, the respondent was not entitled to a substitution of judge. The respondent argued that when a petition for an order of protection is filed in conjunction with another civil proceeding, Section 202(a)(2) of the Act requires the other civil matter to be pending at the time the order of protection petition was filed. The respondent further argued that because no substantive ruling had been made in regard to the order of protection petition,

the respondent's motion for substitution of judge as of right should have been granted. The court agreed with the petitioner, holding that the circuit court did not err in dismissing the motion for substitution of judge as of right. The court reasoned that when Section 202(a)(2) is read in conjunction with other portions of the Act, it is apparent that it was the legislature's intent to make a distinction between "pending civil cases" and "another civil proceeding." The court further reasoned that matters pertaining to child custody are ongoing proceedings that are best presided over by the same judge who is familiar with the parties and the facts of the case.

PROBATE ACT OF 1975 – COOPERATION WITH LAW ENFORCEMENT AND THE UNCLEAN HANDS DOCTRINE

The unclean hands doctrine does not apply to a person who fails to cooperate with law enforcement authorities with information concerning a potential beneficiary causing the death of a decedent.

In *In re Estate of Opalinska*, 2015 IL App (1st) 143407, the Illinois Appellate Court was asked to decide whether the trial court erred when it rejected the petitioner's argument that the respondent should not inherit from her mother's estate because of her "unclean hands" in lying to police who were investigating her mother's death. Section 2-6 of the Probate Act of 1975 (755 ILCS 5/2-6 (West 2012)) provides, "If the holder of any property subject to the provisions of this Section knows or has reason to know that a potential beneficiary caused the death of a person . . . the holder shall fully cooperate with law enforcement authorities and judicial officers in connection with any investigation of such death." The petitioner argued that the respondent violated Section 2-6 after lying to police and lying during a grand jury proceeding about circumstances surrounding her mother's death. The petitioner argued that because of the respondent's violation of Section 2-6, the respondent cannot inherit from her mother's estate because the unclean hands doctrine, which prohibits a party from seeking equitable relief if the party was guilty of fraud, misconduct, or bad faith in connection with the disputed matter, would bar inheritance. The defendant argued that no previous Illinois cases have applied the unclean hands doctrine to inheritance issues and to do so would constitute "judicial legislating." The court agreed with the respondent, holding that Section 2-6 of the Act does not bar the respondent from her mother's inheritance and the unclean hands doctrine does not apply when a person would otherwise take under the estate. The court reasoned that Section 2-6 does not provide a consequence for failing to cooperate with law enforcement and stated that the court cannot presume the General Assembly intended for the holder of property to be disinherited for failure to cooperate because if the General Assembly intended that result, it would have stated so in the statute. The court reasoned that the unclean hands doctrine does not apply to the respondent because she is seeking the inheritance under the Illinois Probate Act and

not under equitable principles. The court concluded that it is for the General Assembly, not the court, to decide whether the unclean hands doctrine should apply to situations where a person would otherwise take under the estate.

CONDOMINIUM PROPERTY ACT – CONDOMINIUM ASSESSMENT LIENS

A foreclosure sale purchaser of a condominium is liable for a prior owner's unpaid assessments if it fails to confirm the extinguishment of the assessment lien.

In *1010 Lake Shore Association v. Deutsche Bank National Trust Co.*, 2015 IL 118372, the Illinois Supreme Court was asked to decide whether the defendant failed to confirm the extinguishment of the plaintiff's assessment lien. Paragraph (3) of subsection (g) of Section 9 of the Condominium Property Act (765 ILCS 605/9(g)(3) (West 2008)) provides that the "purchaser of a condominium unit at a judicial foreclosure sale . . . shall have the duty to pay the unit's proportionate share of the common expenses for the unit assessed from and after the first day of the month after the date of the judicial foreclosure sale." That provision further provides that the purchaser's "payment confirms the extinguishment of any lien created . . . by virtue of the failure or refusal of a prior unit owner to make payment of common expenses." The plaintiff argued that the Act "requires the foreclosure sale purchaser to pay its common expense assessments following the sale," and without such payment, the defendant has failed to confirm extinguishment of the lien. The defendant argued that the Act provides foreclosure sale purchasers an alternative means of extinguishing a lien. Specifically, the defendant argued that the Act extinguishes assessment liens when the condominium association is joined as a party to the foreclosure action. The defendant argued that because it joined the plaintiff in a foreclosure action, the plaintiff's lien was extinguished. The court agreed with the plaintiff, holding that the defendant, as the foreclosure sale purchaser, failed to confirm extinguishment of the assessment lien. The court reasoned that under the plain language of the provision, the payment of sale assessments "formally approves and makes certain the cancellation" of the lien, and the extinguishment of the lien is confirmed only by making that payment. The court further added that the Act does not provide an alternative means of extinguishment, as argued by the defendant, because it requires that any action to extinguish a condominium association's lien "shall include the association as a party." Therefore, under Section 9 of the Act, joining the association as a party is a step towards extinguishment, but the foreclosure sale purchaser is still additionally required to pay the assessment to confirm extinguishment of the lien.

Despite the ruling of the court that the defendant failed to confirm the extinguishment of the assessment lien, and was therefore liable to the plaintiff for the unpaid assessment, the defendant also made another argument under Section 9 of the Act. Specifically, the defendant argued that under paragraph (4) of subsection (g) of Section 9,

it, as a mortgagee bank, was not liable for prior unpaid assessments. That provision provides that foreclosure sale purchasers of condominiums, other than a mortgagee, have a duty to pay six months of assessments owed by the previous owner. As a bank mortgagee, the defendant argued that it would be exempt under paragraph (4) from payment of assessments. Interpreting the provisions of paragraph (3) of subsection (g) as extending to mortgagees under paragraph (4), the court rejected this argument, reasoning that a mortgagee is exempted from liability for prior unpaid assessments only if that "mortgagee pays the assessments coming due following its purchase of the unit."

HEALTH CARE SERVICES LIEN ACT – HOSPITAL LIENS

A hospital lien may not be enforced against a patient who is a minor child, but may be enforced against that minor child's parents.

In *Manago ex rel. Pritchett v. County of Cook*, 2016 IL App (1st) 121365, the Illinois Appellate Court was asked to decide whether the circuit court erred in striking, dismissing, and extinguishing the statutorily established hospital lien against the plaintiff, who is a deceased minor. Subsection (a) of Section 10 of the Health Care Services Lien Act (Act) (770 ILCS 23/10(a) (West 2001)) provides that every "health care professional and health care provider that renders any service in the treatment, care, or maintenance of an injured person . . . shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges." The plaintiff argued that "there can be no lien against him because there is no underlying debt based on his status as a minor;" that is, a minor cannot incur debts. The defendant argued that a hospital lien may be enforced against a minor. The court agreed with the plaintiff to the extent that the hospital lien could not be enforced against the minor plaintiff, but also held that a minor could incur debt for which his or her parents would be liable. Paragraph (1) of subsection (a) of Section 15 of the Rights of Married Persons Act (750 ILCS 65/15(a)(1) (West 2004)) provides that the "expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them." Citing case law to go along with that "family expenses" provision, the court reasoned that "parents are liable for the medical expenses of their minor children," and that "any cause of action to recover for medical expenses is that of the parent and not of the child." As such, the defendant "cannot pursue a lien against plaintiff under the Act as it is the parent, and not the minor, who is liable for those expenses."

In coming to the conclusion that the parents of a minor child are liable for the medical expenses incurred by that child, the court made a point of interpreting the use of the term "injured person" as used in subsection (a) of Section 10 of the Health Care Services Lien Act. Reading that term in conjunction with the provisions of subsection (a) of Section 15 of the Rights of Married Persons Act, the court determined that the use of the

term “injured person” included the parents of a minor child based upon the “family expenses” language in the Rights of Married Persons Act. The court further reasoned that since the purpose of both provisions is to aid creditors, that “it is the clear intent of the legislature” that both provisions work in harmony. A dissenting opinion disagreed with the court’s interpretation, reasoning that “the legislature has given the health care professional or provider ‘a lien upon all claims and causes of action of the injured person,’” and “did not include any language in the Act that disallows a hospital lien . . . when the medical services have been provided to a minor.” The dissent further added that the “legislature’s intent was to allow hospital liens on minors’ recoveries from judgments or settlements for their injuries because the entire Act is devoid of any language limiting the recovery of minors.” Also, the concurring opinion, in agreement with the dissent, pointed out that the Act does not limit the lien’s enforceability to only recovery of the medical expenses of an injured person, and urges the General Assembly to clarify its language on that issue.

ILLINOIS HUMAN RIGHTS ACT – DISABILITY HARASSMENT

Certain provisions of the Act concerning sexual harassment also apply to disability harassment claims.

In *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493, the Illinois Appellate Court, on interlocutory appeal, was asked to decide, among other things, whether subsection (D) of Section 2-102 of the Illinois Human Rights Act (775 ILCS 5/2-1-2(D) (West 2014)), concerning sexual harassment parameters, applies to disability harassment claims. Subsection (D) of Section 2-102 of the Act provides that "an employer shall be responsible for sexual harassment . . . by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures." The plaintiff argued that the subsection (D) of Section 2-102 parameters do not apply to disability discrimination and therefore the limiting provisions of that statute were not applicable. The defendant argued that subsection (D) of Section 2-102 should apply to disability harassment. The court agreed with the defendant, holding that subsection (D) of Section 2-102 does apply to disability harassment, and that the burden of proof was on the plaintiff to show that the employer had been aware of the disability harassment and failed to take reasonable corrective measures. The court reasoned that the Act was ambiguous on the matter, and gave deference to the Human Rights Commission's use of the subsection (D) parameters for other forms of harassment, noting that the consistent treatment of all harassment furthered the purpose of the Act.

BUSINESS CORPORATION ACT OF 1983 – DISSOLVED CORPORATIONS: LIABILITY DETERMINATIONS

No equitable remedy is available for plaintiffs whose cause of action accrues after the expiration of a dissolved corporation's five-year wind-up period.

In *Adams v. Employers Insurance Company of Wausau*, 2016 IL App (3d) 150418, the Illinois Appellate Court was asked to decide if the circuit court erred when it dismissed the plaintiff's asbestos-related complaint for declaratory judgment against a dissolved corporation's shareholders and its liability insurers and a newly formed corporation on the grounds that (1) the dissolved corporation is immune from liability under Section 12.80 of the Business Corporation Act of 1983 (805 ILCS 5/12.80 (West 2012)); and (2) Illinois policy prevents direct action against insurance companies. Section 12.80 provides that the "dissolution of a corporation . . . shall not take away nor impair any civil remedy available to or remedy against a corporation, its directors, or shareholders for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of such dissolution." The plaintiff argued that Section 12.80 was inapplicable because the dissolved corporation was not being sued, but rather the plaintiff was seeking the right to sue the dissolved corporation's shareholders and the newly formed corporation as "nominal defendants . . . so that liability and damages may be established." The plaintiff further argued that even though the causes of action did not accrue until after the five-year wind-up period of the dissolved corporation, the General Assembly's failure to provide a remedy for persons similarly situated to the plaintiff necessitated an equitable remedy. Finally, the plaintiff asserted that the claim against the dissolved corporation's liability insurers was proper because the plaintiff was not seeking a liability judgment against the insurers, but merely "a ruling that [the insurers] had duties to defend and indemnify." The defendants argued for a strict application of Section 12.80 and asserted that the plaintiff's claim "constituted a direct action against insurance companies, which is prohibited by Illinois law." The circuit court agreed with the defendants and dismissed the plaintiff's complaint, holding that the plaintiff was ultimately asking the court to disavowal Illinois law and policy and "create an equitable avenue of recovery for [the plaintiff's] particular circumstance." The court reasoned that the General Assembly is in a better position to create the equitable remedy the plaintiff was seeking. In affirming the circuit court's ruling, the Illinois Appellate Court noted that contrary to the plaintiff's assertions, the General Assembly has not failed to fashion an equitable remedy, but rather has actually enacted a statute of repose that forecloses a liability determination in favor of the plaintiff." Although sensitive to the "tragic nature of the plaintiff's injuries," the court refused to circumvent Section 12.80 and Illinois' policy against direct actions against insurers, and instead encouraged the General Assembly "to revisit the creation of a remedy for individuals situated similarly to the plaintiff."

ILLINOIS SECURITIES LAW OF 1953 – INDEXED ANNUITIES

Indexed annuities issued by insurance producers are not securities.

In *Dyke v. White*, 2016 IL App (4th) 141109, the Illinois Appellate Court was asked to decide whether the Illinois Department of Securities had jurisdiction to discipline the fraudulent marketing and sale of indexed annuities by insurance producers. Section 2.1 of the Illinois Securities Law Of 1953 (815 ILCS 5/2.1 (West 2012)) includes "face amount certificates" in the definition of "securities." Section 2.14 of the Act (815 ILCS 5/2.14 (West 2012)) provides that "face amount certificates" includes "any form of annuity contract (other than an annuity contract issued by a life insurance company authorized to transact business in this State)." The plaintiff argued that the Department lacked jurisdiction over the marketing and sale of indexed annuities by insurance producers and insurance companies authorized to transact business in Illinois because an indexed annuity is not a security under the Act. The defendant argued that indexed annuities are securities under the Act and, even if they are not securities, the sale of them is subject to regulation under the Act because they "are investment contracts that pose significant investment risks to clients and raise considerations not involved in traditional annuities." The court agreed with the plaintiff, holding that indexed annuities are not securities and not subject to regulation by the Illinois Department of Securities under the Act. The court reasoned that the plain language of the Act excludes "an annuity contract issued by a life insurance company authorized to transact business in this State" and indexed annuities qualify as such. The court added that the General Assembly declared that variable annuities fall under the sole jurisdiction of the Department of Insurance and that "[i]t would make little sense for the [General Assembly] to place variable annuities out of the reach of the Securities Department but then subject annuity products such as indexed annuities to securities regulation."

MINIMUM WAGE LAW – FLIGHT ATTENDANT PAY

The minimum wage requirements under the Act, as applied to a national airline's compensation scheme for flight attendants, violate the commerce clause of the United States Constitution.

In *Hirst v. Skywest, Inc.*, 2016 WL 2986978 (N.D. Ill.), the United States District Court for the Northern District of Illinois was asked to decide whether a national airline's compensation scheme for flight attendants was in violation of subdivision (a)(1) of Section 4 of the Minimum Wage Law (820 ILCS 105/4(a)(1) (West 2014)). Section 4(a)(1) requires "every employer [to] pay each of his or her employees who is 18 years of age or older in every occupation wages of not less than $8.25 per hour." In a class action lawsuit, the

plaintiffs, three former flight attendants, accused the defendants, a national airline, of failing to meet the minimum wage requirements under Section 4(a)(1). The defendants moved to dismiss the plaintiffs' claim, contending that requiring a national airline to comply with Section 4(a)(1) would place a "substantial burden" on interstate commerce in violation of the commerce clause of the United States Constitution (U.S. CONST. art. I, §8). In response, the plaintiffs asserted that because wage regulation is a "historic police power of the States" and not of the federal government, the defendants should be subject to Section 4(a)(1). The court ultimately agreed with the defendants and dismissed the plaintiffs' claim, holding that requiring the defendants to comply with Section 4(a)(1) would impose "an undue burden on interstate commerce and would upend the uniform treatment of [flight attendants] across states (and across the airline industry)." In support of its ruling, the court noted that in order to comply with Section 4(a)(1), the defendants would have to tediously track and calculate every minute its flight attendants worked pre- or post-flight in Illinois, including "the amount of turn times between flights that [the flight attendants] spent in Illinois." The court further noted that the defendant would be subject to the minimum wage laws of every other state if required to comply with Section 4(a)(1), thus imposing "a labyrinth of potentially conflicting wage laws upon [flight attendants] based out of different states and cities, working on the same flights, literally moving through interstate commerce on a daily basis." Such a burden, the court observed, "is precisely the type of burden on interstate commerce that the commerce clause prohibits." The court also rejected the plaintiffs' assertion that Illinois' police powers insulate Section 4(a)(1) from the commerce clause's prohibition against state regulation of interstate commerce, noting that in *Bibb v. Navajo Freight Lines*, 395 U.S. 520 (1959), the Supreme Court found an Illinois statute requiring the use of a specific mudguard for truckers to be an undue burden on interstate commerce in spite of the statute passing under Illinois' police powers.

ILLINOIS WAGE PAYMENT AND COLLECTION ACT – PRIVATE CAUSE OF ACTION

An employee may not bring a private action for failure to produce itemized payroll information.

In *Williams v. Merle Pharmacy, Inc.*, 2015 WL 6143897 (C.D. Ill.), the District Court for the Central District of Illinois was asked to decide, among other things, whether Sections 10 and 11 of the Illinois Wage Payment and Collection Act ("IWPCA") (820 ILCS 115/10; 820 ILCS 115/11 (West 2014)) allowed for a private cause of action for failure to provide an employee with itemized payroll information, including wages and deductions, for each pay period worked. Section 10 of the IWPCA requires employers to provide such information to their employees. Section 11 of that Act gives Department of

Labor the duty to "institute the actions for penalties," and also provides that an employee aggrieved by a violation of the act "may file suit in circuit court of Illinois. . . ." The plaintiff argued that Section 11 did not specifically exclude the employee from bringing her own claim for wages, and therefore she should be permitted to file an action for violations of the record-keeping provisions on her own. The defendant argued that because Section 9 of the Illinois Minimum Wage Law (820 ILCS 105/9 (West 2014)) explicitly states that if there is no cause of action for violation of record keeping provisions, the court should find that no private cause of action exists under the IWPCA for similar claims. The court agreed with the defendant, holding that no private cause of action exists to enforce Section 10 of the IWPCA. The court reasoned that although Section 10 would support a separate cause of action for failure to provide the itemized payroll information, in looking to the purpose of the statute, the court found that the purpose of the IWPCA was to ensure that employers paid compensation for hours worked and the record provision was therefore designed only "to support that primary purpose." The court further reasoned that the statute did not provide a remedy for failure to provide records, and that absent such a penalty, it concluded that the General Assembly did not intend for that failure to be an "independent and redressable harm."

WORKERS' OCCUPATIONAL DISEASE ACT – EXCLUSIVITY PROVISION

An employee may not bring suit for damages against employer after the 25-year statute of repose.

In *Folta v. Ferro Engineering*, 2015 IL 118070, the Illinois Supreme Court was asked to decide, among other things, whether an action for damages by an employee against an employer for an asbestos-related workplace disease was barred by the exclusivity provisions of Section 5 of the Workers' Occupational Disease Act, (820 ILCS 310/5 (West 2010)) because symptoms of the disease did not manifest until after the statutory repose period of 25 years under Section 11 of that Act (820 ILCS 310/11 (West 2010)). Section 5 of the Act provides that the remedies are exclusive to the Act and bars any other actions at "common law or otherwise" to employees for injuries or diseases resulting from conditions of their employment. Section 11 of the Act limits recoveries for asbestos-related conditions to those actions that accrue within 25 years of the last exposure. The plaintiff argued that because the disease did not manifest until 40 years after the last exposure, the Act did not apply and common law remedies should be available. The defendant argued that the plaintiff did fall within the class of plaintiffs considered by the Act because it explicitly applies to asbestos-related diseases, the only remedial path for an employee against an employer for this type of injury is this Act, and symptoms that manifest themselves 25 years after exposure were not compensable. The court agreed with the defendant and held that the action was barred under the Act. The court observed that

Section 5 of the Workers' Compensation Act (820 ILCS 305/5 (West 2010)) contained analogous provisions and reasoned that the General Assembly intended that these two Acts created a "framework" for recovery to replace "common-law rights and liabilities" when an employee has suffered and asbestos-related diseases "arising out of, and in the course of employment." The court further reasoned that these provisions were included in the Acts in exchange for "no-fault liability upon the employer," and that to construe the scope of the exclusive remedy provisions to allow for common law action under such circumstances "would mean that the statute of repose would cease to service its intended function." The court recognized the result was "harsh" but further explained that the Acts only bar damages against the employer; the limitations under these Acts do not apply to any causes of actions that the plaintiff may choose to bring against any third party defendants.

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