2017 CASE REPORT

Legislative Reference Bureau
112 State Capitol
Springfield, Illinois 62706
(217) 782-6625

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State of Illinois
LEGISLATIVE REFERENCE BUREAU
112 State House, Springfield, IL 62706-1300
Phone: 217/782-6625

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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 2017 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 2016 to the summer of 2017.

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 – DUTY OF CARE

There is no legal duty to safeguard personal information under Illinois law.

In *USAA Federal Savings Bank v. PLS Financial Services, Inc.*, 2017 WL 2345537, the District Court for the Northern District of Illinois was asked to decide whether to dismiss a negligence complaint against a check cashing and payday loan corporation. The plaintiff argued that the defendant "had a duty to exercise reasonable care to avoid causing foreseeable harm" to the plaintiff by taking "steps to prevent unauthorized access to its database of financial information." The plaintiff argued that, despite the refusal to recognize a common law negligence duty in similar circumstances, "a heightened requirement applies to financial institutions, which must protect their customers' confidential information from identity theft." The defendant argued that a duty to safeguard financial information does not exist under Illinois law. The court agreed with the defendant, holding that Illinois does not recognize a common law duty to safeguard personal information. The court reasoned that the plaintiff provided no cases in Illinois law that supported a duty to safeguard personal information, stating, "The Illinois Appellate Court has refused to create a new legal duty beyond legislative requirements to safeguard an individual's personal information or protect it from disclosure," citing that "the legislature could create a duty to safeguard personal data if it felt it appropriate to do so."

ILLINOIS CONSTITUTION - PROPORTIONATE PENALTIES CLAUSE

There is a split in authority concerning whether de facto life sentences imposed on young adult offenders violate the proportionate penalties clause of the Illinois Constitution.

In *People v. Harris*, 2016 IL App (1st) 141744 (2016), the First Division of the First District Appellate Court of Illinois was asked to decide whether sentencing of a defendant who was 18 years of age at the time of the commission of the offenses of first degree murder and attempted first degree murder to an aggregate sentence of 76 years contravenes the proportionate penalties clause of the Illinois Constitution. Article I, Section 11 of the Illinois Constitution (ILL. CONST. art I, §11) provides that "(a)ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." The defendant argued that his sentence, as applied, contravenes the proportionate penalties clause of the Illinois Constitution. The court agreed with the defendant, vacating the defendant's 76-year sentence and holding that it was a de facto life sentence. The court reasoned that the Illinois Constitution mandates that penalties should have the objective of restoring the offender to useful

citizenship. The court held that the Illinois Supreme Court, in *People v. Thompson*, 2015 IL 118151, has recognized that research on juvenile maturity and brain development might also apply to young adults. The court urged the General Assembly to consider the research regarding brain development in young adults who are not legally juveniles while drafting sentencing statutes for adults, including consecutive sentencing, truth in sentencing, and mandatory sentencing enhancements. The Illinois Supreme Court granted leave to appeal in this case on May 24, 2017.

In *People v. Thomas*, 2017 IL App (1st) 142557, the Second Division of the First District Appellate Court of Illinois was asked to decide, among other things, whether sentencing a defendant to 80 years total sentence when the defendant was 18 years old at the time that he committed the offenses of first degree murder, attempted first degree murder, and attempted armed robbery violates the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art I, §11). The defendant argued that because the trial court was bound by the mandatory firearm sentencing enhancements that applied in his case, the court was not able to consider his age or the mitigating factors related to his youth to impose a term of less than 80 years. The court, rejecting the reasoning of *People v. Harris*, 2016 IL App (1st) 141744, reasoned that it was for the General Assembly and not the courts to revisit the sentencing scheme and afford greater discretion to trial judges for defendants 18 years of age or older.

ILLINOIS CONSTITUTION – PUBLIC FUNDS FOR SECTARIAN PURPOSES

An analogous constitutional provision of another state violates the free exercise clause of the First Amendment of the United States Constitution when applied to declare a church ineligible for a grant for playground resurfacing.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, the Supreme Court of the United States was asked to decide whether the United States Court of Appeals for the Eighth Circuit erred when it held that the policy of the Missouri Department of Natural Resources to deny churches grants for playground resurfacing did not violate the free exercise clause of the First Amendment of the United States Constitution. The free exercise clause of the First Amendment of the United States Constitution (U.S. CONST. amend. I) provides, "Congress shall make no law . . . prohibiting the free exercise [of religion]." The plaintiff, a church, argued that the defendant's policy that churches are ineligible to compete for the grant violated its free exercise rights. The defendant argued that its policy that churches were ineligible for the grant did not violate the free exercise clause and was mandated by an antiestablishment provision contained in Section 7 of Article I of the Missouri Constitution (MO. CONST. art. I, § 7), which provides

that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof . . . ." Section 3 of Article X of the Illinois Constitution (ILL. CONST. art. X, § 3) contains a similar antiestablishment provision, which provides that "[n]either the General Assembly nor any county . . . or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school . . . controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose." The Court agreed with the plaintiff, holding that the defendant's "exclusion of [the church] from a public benefit for which it is otherwise qualified, solely because it is a church," violates the free exercise clause of the United States Constitution. The Court analyzed the defendant's policy using the "most rigorous scrutiny" because the policy requires the church to make the choice of whether to participate in an otherwise available benefit program or to remain a church. The Court concluded that the defendant's "policy preference for skating as far as possible from religious establishment concerns . . . cannot qualify as compelling State interest," and, therefore, violates the free exercise clause. A dissenting opinion argued that "a State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns" and that the Court's decision would "all but [invalidate]" the antiestablishment provision in the Missouri Constitution and similar provisions of the constitutions of 38 other states, including Illinois.

OPEN MEETINGS ACT – REQUIRED PUBLIC RECITAL

The public recital required by the Act need not provide an explanation of the terms or significance of a particular transaction or issue.

In *The Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, the Illinois Supreme Court was asked to decide whether the public recital required by the Open Meetings Act must include an explanation of the significance of the contemplated action and whether the board of School District No. 186 violated the public recital requirement at the open meeting at which the board voted to approve a separation agreement of its then-superintendent of schools. Subsection (e) of Section 2 of the Open Meetings Act (5 ILCS 120/2(e) (West 2012)) provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." The board argued that its actions were valid because its agenda included the separation agreement and it announced at the open meeting

that the board was considering the separation agreement and which employee it concerned. The Attorney General argued the board's actions violated the Act because the board did not include "other information that will inform the public of the business being conducted" including "key terms" of the separation agreement. The court agreed with the board, holding that the board complied with the Act by announcing the separation agreement to be voted upon and by disclosing the employee with whom the separation agreement involved. The court reasoned that the plain language of the Act does not require "key terms" to be publicly recited prior to final action. The court provided that "a public recital must take place at the open meeting before the matter is voted upon; [and] the recital must announce the nature of the matter under consideration, with sufficient detail to identify the particular transaction or issue, but need not provide an explanation of its terms or its significance."

STATE OFFICIALS AND EMPLOYEES ETHICS ACT – SOVEREIGN IMMUNITY AND PERSONAL LIABILITY

The Eleventh Amendment bars suits brought under the Act against the State in federal, but not State, court, and State employees may be subject to personal liability under the Act.

In *Gnutek v. Illinois Gaming Board*, 2017 WL 2672296, the District Court for the Northern District of Illinois was asked to decide whether the Eleventh Amendment of the United States Constitution barred a whistleblower protection suit brought under the State Officials and Employees Ethics Act. The Eleventh Amendment (U.S. CONST. amend. XI) grants states sovereign immunity. Section 15-10 of the State Officials and Employees Ethics Act (5 ILCS 430/15-10) prohibits retaliatory action by an officer, member, State employee, or State agency against State employees that engage in certain whistleblowing activities. The plaintiff argued that the suit was not barred since it sought injunctive relief against defendants acting in their official capacities. The defendant argued that a claim under the Act is barred by the Eleventh Amendment. The court agreed with the defendant, holding that the plaintiff's claim against the defendant Illinois Gaming Board or any of the individual defendants acting in their official capacities, whether seeking damages or injunctive relief, is barred by the Eleventh Amendment. The Court stated that under the Eleventh Amendment, states, including state agencies like the Illinois Gaming Board, are not subject to suit unless such protection is waived by the state or abrogated by Congress. The court reasoned that while Illinois has expressly waived its immunity to suit under the Act in State court, citing Section 15-25 of the Act (5 ILCS 430/15-25) and Section 1 of the State Lawsuit Immunity Act (745 ILCS 5/1), it has not done so for federal court. The court noted that while an exception to the Eleventh Amendment does exist for official capacity

claims, it only applies when there is a federal interest involved, and not in suits against state officials on the basis of state law.

The court was also asked to decide whether a state law claim could be brought under the Act against the individual defendants in their individual capacities. The plaintiff argued that the individual defendants were subject to suit. The defendants argued that the General Assembly did not intend to impose individual liability for violations of the Act. The defendants pointed to the language of Section 15-25 of the Act, which concerns civil remedies, and noted that the two remedies that the Section specifically mentions, reinstatement and back pay, can only come from the State. The defendants argued that Section 15-10 of the Act had originally omitted State employees but that State employees were subsequently added to Section 15-10 not for the purpose of imposing individual liability, but rather to give the State a basis for awarding remedies under Section 15-25 of the Act and for imposing sanctions against State employees under Section 50-5 of the Act (5 ILCS 430/50-5), which imposes penalties on a person that violates the whistleblower provisions of the Act. The court agreed with the plaintiff, holding that the General Assembly intended to make State employees subject to personal liability under the Act. The court noted that while the defendants offered a plausible theory, they failed to offer any citation of authority in support of their position. As such, the court interpreted the statutory language without reference to legislative intent. In support of its holding, the court cited the reasoning of the court from *Crowley v. Watson*, 2016 IL App (1st) 142847, which suggested that the Act allows individual and State liability. The court reasoned that the expansive nature and plain and ordinary meaning of the statutory language, the policies and problems sought to be remedied by the Act, and the reasoning of the court in *Crowley* indicated that the General Assembly intended to make State employees subject to individual liability and outweighed the listing of employer-centric remedies in Section 15-25 and lack of specific statutory language permitting individual liability.

ELECTION CODE – PARTICIPATION IN MULTIPLE POLITICAL PARTIES

A candidate of one political party who signs a nominating petition for another political party after submitting the candidate's nomination papers is not barred from running for office in the first political party.

In *Schmidt v. Illinois State Board of Elections*, 2016 IL App (4th) 160189, the Illinois Appellate Court was asked to decide whether the defendants erred in holding the plaintiff's challenge to a candidate's nominating papers valid, where the candidate was a candidate for the Democratic Party but then signed a nominating petition of the Republican Party candidate. Section 8-8 of the Election Code (10 ILCS 5/8-8 (West 2014)) provides that a qualified primary elector "of a party may not sign petitions for or be a candidate in the primary of more than one party." The plaintiff argued that because the candidate was a

candidate for the Democratic Party but signed a petition for the Republican Party, the candidate was prohibited from running for office as a Democratic Party candidate. The candidate argued that because she submitted her candidacy papers for the Democratic Party first, her candidacy was valid. The court agreed with the candidate, holding that her candidacy was valid notwithstanding her signing of the nominating petition for the Republican Party candidate. The court followed the reasoning of a First District case that held that in cases of a violation of Section 8-8, the first signature is valid while subsequent signatures are not. The court noted that although the consequences for violating Section 8-8 are vague and ambiguous, the General Assembly has failed to amend the statutory language since the First District pointed out the problem in 1984, leading to the presumption that the General Assembly acquiesced to the First District's interpretation.

ELECTION CODE – MEDICAL CANNABIS CAMPAIGN CONTRIBUTIONS

A prohibition on campaign contributions from medical cannabis cultivation centers and dispensaries violates the First Amendment.

In *Ball v. Madigan*, 2017 WL 1105447, the U.S. District Court for the Northern District of Illinois was asked to decide whether to grant summary judgment in a case concerning a ban on campaign donations to political committees from medical cannabis cultivation centers and dispensaries that the plaintiffs argued was an unconstitutional restriction of First Amendment rights. Section 9-45 of the Election Code (10 ILCS 5/9-45) provides that it "is unlawful for any medical cannabis cultivation center or medical cannabis dispensary organization or any political action committee created by any medical cannabis cultivation center or dispensary organization to make a campaign contribution to any political committee established to promote the candidacy of a candidate or public official." Plaintiffs, candidates for Illinois offices from the Libertarian Party, argued that they should be allowed to accept donations from medical cannabis cultivation centers and dispensaries because the restriction fails under intermediate scrutiny. Under the intermediate scrutiny test, plaintiffs argue that the statute is not closely drawn to the sufficiently important governmental interest in preventing *quid pro quo* corruption or its appearance to avoid the unnecessary abridgment of the freedom of association under the First Amendment to the United States Constitution (U.S. CONST. amend. I). The defendants argued that a flat prohibition on contributions is proportionate to the government's interest in avoiding the risk of actual or perceived corruption because the centers and dispensaries "reap profits from the industry and require State licensure to operate," meaning they pose the greatest risk of corruption. The court agreed with the plaintiffs, holding that Section 9-45 violated the First Amendment. The court reasoned that an outright ban was not closely drawn to the interest of preventing corruption, especially since the defendants' arguments concerning licensure and profit reaping could apply to any State-regulated industry, and no

other industries are similarly targeted by a flat ban. Furthermore, the court reasoned that even if Section 9-45 was struck down, the centers and dispensaries would still be subject to the more general contribution limits under Illinois law.

ELECTION CODE – JUDICIAL REVIEW PROCEDURES

The Code does not allow for judicial review of multiple decisions of electoral boards in a single cause of action.

In *Ervin v. Alsberry*, 2017 IL App (1st) 170398, the Illinois Appellate Court was asked to decide whether the trial court erred in dismissing an action to review multiple petitions filed with an electoral board because the petitioner filed objections to multiple petitions in one cause of action. Subsection (a) of Section 10-10.1 of the Election Code (10 ILCS 5/10-10.1(a) (West 2014)) provides that "a candidate or objector aggrieved by the decision of an electoral board may secure judicial review of such decision in the circuit court of the county in which the hearing of the electoral board was held. The party seeking judicial review must file a petition with the clerk of the court and must serve a copy of the petition upon the electoral board and other parties to the proceeding by registered or certified mail within 5 days after service of the decision of the electoral board." The plaintiff argued that judicial economy and trial convenience allowed her to file multiple petitions in one cause of action. The defendant argued that a strict construction of the statute did not allow for that course of action. The court agreed with the defendant, holding that the multiple petitions under one cause of action was improper. The court reasoned that nothing in the Election Code allowed the combination of petitions, and that the General Assembly made no provision to do so.

ELECTION CODE – WRITE-IN CANDIDACIES

A candidate who lost a primary election may run in the general election as a write-in candidate if the candidate is not seeking the precise seat for which the candidate lost the primary election.

In *Ahmad v. Board of Election Commissioners of the City of Chicago*, 2016 IL App (1st) 162811, the Illinois Appellate Court was asked to decide whether the circuit court erred in issuing a writ of *mandamus* requiring the defendants to accept a write-in declaration and to count votes validly cast for the plaintiff for a judicial seat in Cook County, despite the fact that the plaintiff had lost a primary election contest for a different judicial seat. Section 18-9.1 of the Election Code (10 ILCS 5/18-9.1 (West 2014)) provides that a "candidate for whom a nomination paper has been filed as a partisan candidate at a

primary election, and who is defeated for his or her nomination at the primary election, is ineligible to file a declaration of intent to be a write-in candidate for election in that general or consolidated election." The plaintiff argued that Section 18-9.1 did not bar her from seeking a judicial seat that was not the precise seat for which she sought election in the primary election. The defendant argued that the court should apply a stricter interpretation of Section 18-9.1 that bars a candidate from seeking election for the same type of seat. The court agreed with the plaintiff, holding that because the plaintiff was seeking a different judicial seat, the plaintiff could run a write-in campaign. The court reasoned that the Illinois Supreme Court has construed ballot access laws liberally and that the court has held that "bars against candidacy are to be strictly construed," and that courts should resolve "all doubts in favor of a candidate's eligibility" and that access to the ballot "is not to be prohibited or curtailed except by plain provisions of law." The court furthered reasoned that the purpose of the statute was to discourage intra-party feuding and reserve major struggles for the general election ballot, and that these interests were not implicated in this case because the plaintiff was running against a different opponent in the general election.

RETAILERS' OCCUPATION TAX ACT; USE TAX ACT – COFFEE BEANS TAX RATE

The sale of bulk coffee beans is subject to a 6.25% tax rate and is not eligible for the lower 1% tax rate if the retailer provides premises for the consumption of food.

In *Bartolotta v. Dunkin' Brands Group, Inc.*, 2016 WL 7104290, the United States District Court for the Northern District of Illinois was asked to decide whether, based on rules adopted by the Illinois Department of Revenue, the sale of bulk coffee beans should be taxed at a higher rate of 6.25% or at a lower rate of 1%. Section 2-10 of the Retailers' Occupation Tax Act (35 ILCS 120/2-10 (West 2016)) and Section 3-10 of the Use Tax Act (35 ILCS 105/3-10 (West 2016)) provide that the tax rate for the sale of property made in the course of business is 6.25%, unless the sale is for food that is to be consumed off the premises where it is sold. The tax rate for food consumed off the premises where it is sold is 1%. Subsection (b) of Section 130.310 of the Illinois Administrative Code (86 Ill. Admin. Code 130.310(b)) provides that if the retailer selling food provides premises for the consumption of the food, then there is a presumption that all food sold by that retailer is for immediate consumption and subject to the 6.25% tax rate. This presumption can be rebutted if the retailer satisfies a two-part test. The plaintiff argued that, based on the plain language of the two Acts, the tax rate of 1% should be applied to the sale of bulk coffee beans because, by their very nature, coffee beans must be consumed off the premises of where they are sold. The defendant argued that because the plaintiff provides premises for consumption and based on the presumption in the Code, the tax rate of 6.25% should be applied to the sale of bulk coffee beans. The court agreed with defendant, holding that the

tax rate of 6.25% should apply to the sale of bulk coffee beans. The court reasoned that while it is true that agency rules may not be used to broaden a tax imposition authorized by a statute, the defendant had to assume that the regulation in the Code is law until it is authoritatively decided that the Department exceeded its authority when it issued the regulation. The court stated that the issue of whether the Department exceeded its authority is not before the court in this case and cannot be decided at this time. Lastly, the court noted that the regulations are confusing, especially in conjunction with the statutes, and a definitive opinion from the Department explaining what tax rate would apply would help alleviate the confusion.

VOLUNTEER EMERGENCY WORKER JOB PROTECTION ACT – MONETARY INCENTIVES

Volunteer emergency workers who earn more than $240 per year in monetary incentives are not protected under the Act.

In *Seeman v. Wes Kochel, Inc.*, 2016 IL App (3d) 150640, the Illinois Appellate Court was asked to decide whether the plaintiff's termination violated the Volunteer Emergency Worker Job Protection Act and common law public policy, when the plaintiff was late due to responding to a fire call as a volunteer firefighter. The plaintiff received incentive pay between $492.50 and $1142.50 each year as a volunteer firefighter for training ($5.00 per training session) and fire calls ($7.50 per fire call). Subsection (a) of Section 5 of the Act (50 ILCS 748/5(a) (West 2014)) provides that "[n]o public or private employer may terminate an employee who is a volunteer emergency worker because the employee, when acting as a volunteer emergency worker, is absent from or late to his or her employment in order to respond to an emergency prior to the time the employee is to report to his or her place of employment." Section 3 of the Act (50 ILCS 748/3 (West 2014)) limits the definition of a "volunteer emergency worker" to "a firefighter who does not receive monetary compensation . . . ." Subsection (f) of Section 6 of the Fire Protection District Act (70 ILCS 705/6(f) (West 2014)) provides that volunteer firefighters who have at least 5 years of service may be provided monetary incentives that do not exceed $240 per year. The plaintiff argued that the plaintiff received allowable monetary incentives under the Fire Protection District Act and there was a question for a jury as to whether the defendant violated the Act. The defendant argued that since the plaintiff earned more than $240 each year, he was not eligible for the protections afforded by the Volunteer Emergency Worker Job Protection Act. The court agreed with the defendant, holding that the plaintiff was not protected by the Act because the plaintiff received more than the Fire Protection District Act's "plainly expressed limitations" of $240 per year and did not have at least 5 years of service when receiving those payments. The court reasoned that any common law retaliatory discharge claim was superseded by the Act and that the General

Assembly must modify the Fire Protection District's Section 6's prescription of the maximum amount of permissible "monetary incentives" in order for such a claim to proceed for those earning more than $240 per year. The concurrence questioned the wisdom of a public policy that limits the universe of volunteer firefighters protected by the Act to those earning less than the plaintiff.

COUNTIES CODE – COOK COUNTY SHERIFF'S MERIT BOARD APPOINTMENT TERMS

Individuals may not be appointed the Cook County Sheriff's Merit Board for a term of less than six years, including interim appointments.

In *Taylor v. Dart*, 2017 IL App (1st) 143684-B, the Illinois Appellate Court was asked to decide whether a Cook County Sheriff's Merit Board member that was appointed by the Sheriff on June 2, 2011 in place of a vacated seat that expired March 19, 2012 was a lawfully appointed member of the Board on February 27, 2013. Section 3-7002 of the Counties Code (55 ILCS 5/3-7002 (West 2012)) provides, in relevant part, that "[u]pon the expiration of the terms of office of those first appointed . . . , their respective successors shall be appointed to hold office from the third Monday in March of the year of their respective appointments for a term of six years and until their successors are appointed and qualified for a like term." The plaintiff (who was discharged by the Board by the Board's February 27, 2013 hearing) argued that because the Board member appointment was for less than six years, the appointment was invalid and the decision by the Board was void. The defendant argued that the Sheriff was authorized to appoint for less than a six-year term, and can make interim appointments that last until a permanent appointment is made. The court agreed with the plaintiff, holding that there is no provision for the appointment of a member for a term of less than six years. The court reasoned that Section 3-7002 does not either explicitly or by implication authorize an individual to be appointed for less than a six-year term, including interim appointments, and requires that all successors be appointed "for a like term."

COUNTIES CODE – JUROR COMPENSATION

Provisions of Public Act raising the amount paid to each juror are not severable from unconstitutional provisions.

In *Kakos v. Butler*, 2016 IL 120377, the Illinois Supreme Court was asked to decide whether portions of Public Act 98-1132 found to be unconstitutional could be severed from the remainder of the Act. Public Act 98-1132 amended subsection (b) of Section 2-1105 of

the Code of Civil Procedure (735 ILCS 5/2-1105(b) (West 2014)) to reduce the jury size to six. Public Act 98-1132 also amended Section 4-11001 of the Counties Code (55 ILCS 5/4-11001 (West 2014)) to provide that "each county shall pay to grand and petit jurors for their services in attending courts the sums of $25 for the first day and thereafter $50 for each day of necessary attendance, or such higher amount as may be fixed by the county board." The court found "that the provision reducing the size of a jury cannot be severed from the remainder of the Public Act . . . and that the entirety of the Act is invalid." The court reasoned that the legislative purpose of the Act would be frustrated "if the provision raising the amount to be paid to each juror remains valid while the provision reducing the size of the jury is invalidated" because there would be no offset for the cost of juries.

ILLINOIS MUNICIPAL CODE – AUTHORITY OF POLICE OFFICERS TO EXERCISE EXTRAJURISDICTIONAL POLICE POWERS

Despite provisions of the Code of Criminal Procedure of 1963 that suggest otherwise, officers may make extrajurisdictional arrests for petty offenses in adjoining municipalities within the same county.

In *People v. Bond*, 2016 IL App (1st) 152007, the Illinois Appellate Court was asked to decide whether a Blue Island police officer had the authority to exercise his police power in the city of Chicago after observing the defendant illegally parked in the roadway (a petty offense). Section 7-4-7 of the Illinois Municipal Code (65 ILCS 5/7-4-7 (West 2014)) provides that a police district is "[t]he territory which is embraced within the corporate limits of adjoining municipalities within any county in this State." Section 7-4-8 of the Illinois Municipal Code (65 ILCS 5/7-4-8 (West 2014)) provides that the "police of any municipality in such a police district have full authority and power as peace officers and may go into any part of the district to exercise that authority and power." The State argued that the police officer was authorized to enter the city of Chicago under the cited provisions of the Code. The defendant argued that the police officer was prohibited from entering into the city of Chicago because of paragraph (2) of subsection (a-3) of Section 107-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/107-4(a-3)(2) (West 2014)), which allows officers to make arrests in any jurisdiction when, in relevant part, the officer "becomes personally aware of the immediate commission of a felony or misdemeanor . . . ." The court agreed with the State, holding that an officer may make an extrajurisdictional arrest for a petty offense in an adjoining municipality under Sections 7-4-7 and 7-4-8 the Illinois Municipal Code. The court reasoned that the "legislature had the opportunity to, but did not, qualify or limit the extrajurisdictional authority and power of police officers." The court further reasoned that while Sections 7-4-7 and 7-4-8 the Illinois Municipal Code apply to adjoining municipalities and the city of Chicago is within the same county as Blue Island, Section 107-4(a-3)(2) of the Code of Criminal Procedure of 1963 "only restricts the

officer's exercise of his police power beyond those boundaries [citation removed] and is therefore not relevant to the facts presented in this case."

SCHOOL CODE – ADMINISTRATIVE REVIEW

The court must give greater deference to the decision of a school board, rather than a hearing officer, when adjudicating a petition for administrative review.

In *Beggs v. Board of Education of Murphysboro*, 2016 IL 120236, the Illinois Supreme Court was asked to decide whether the Appellate court erred when it gave deference to the findings of fact and recommendations of a hearing officer when it affirmed the circuit court's decision to reinstate and award back pay to the plaintiff, a teacher who had been dismissed by the defendant. Subsection (d) of Section 24-12 of the School Code (105 ILCS 5/24-12(d) (West 2012)) provides that the circuit court "shall give consideration to the school board's decision and its supplemental findings of fact, if applicable, and the hearing officer's findings of fact and recommendation in making its decision." The plaintiff argued that the hearing officer's recommendation plays a pivotal role in administrative review and should be given deference. The defendant argued that, under the Code, the school board should be given greater deference because it is the entity that makes the final decision for purposes of administrative review. The court agreed with the defendant, holding that the decision of the school board is the final decision for purposes of administrative review. The court reasoned that the plain statutory language of Section 24-12 supports its holding, noting that the General Assembly is presumed to know the standards governing administrative review and could have amended the Code to make clear that the hearing officer's findings are entitled to greater deference.

HOSPITAL LICENSING ACT – EX PARTE COMMUNICATIONS

Ex parte communications between a plaintiff's treating doctor who is part of the control group of a medical group LLC facing suit and the LLC's counsel are not necessarily barred.

In *McChristian v. Brink*, 2016 IL App (1st) 152674, the Illinois Appellate Court on interlocutory appeal was asked to decide whether the *Petrillo* doctrine prohibits a defense counsel for a podiatrist and medical group LLC from conducting *ex parte* communications with a plaintiff's non-defendant treating podiatrist who is a member of and part of the control group for the defendant LLC The *Petrillo* doctrine derives from *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581 (1st Dist. 1986), in which the Illinois Appellate Court held that *ex parte* communications between a plaintiff's treating doctor and defense

counsel are barred in order to: (1) preserve the confidentiality and trust of the doctor-patient relationship; and (2) not impair a doctor's fiduciary duty to his or her patients. The plaintiff argued that the *Petrillo* doctrine applied and barred the defense from conducting *ex parte* communications with the plaintiff's treating podiatrist. The defendant argued that the *ex parte* communications were not barred under *Petrillo* because the plaintiff consented to lesser privacy rights when she chose to sue the defendant podiatrist and LLC while seeing a treating podiatrist that was part of the defendant LLC's management. The defense supported its position by relying on *Burger v. Lutheran General Hospital*, 198 Ill.2d 21 (2001), in which the Illinois Supreme Court interpreted *Petrillo* to mean that a treating doctor may not engage in *ex parte* communications with a third party concerning a patient's care. The defense contended that the communications within the defendant LLC where the patient sought care were to be expected and did not qualify as third-party communications. The court agreed with the defendant, holding that *Petrillo* did not preclude *ex parte* communications between the defense counsel and the treating podiatrist who served in the management of the defendant LLC. However, the court placed conditions on the *ex parte* communications to balance the competing privileges of the parties. The court reasoned that preventing *ex parte* communications could hinder the treating podiatrist's ability to protect the LLC and ability to formulate a defense and that by suing a doctor, a patient necessarily waives some of the protections of the doctor-patient privilege. The court noted that the plaintiff created a conflict of interest by seeking the care of a different doctor within the same medical group and further complicated matters by subsequently suing the group when both her treating podiatrist and the defendant podiatrist were members of the LLC. The court also reasoned that communications among members of a medical group, including their attorneys, are not third-party communications. The court observed that the plaintiff's medical information was already in the LLC's possession when she sought care from the treating podiatrist and that as the treating podiatrist was part of the LLC's management, he was not a third party to the information. In terms of conditions, the court elaborated that the *ex parte* communications could not occur until after the plaintiff had the opportunity to depose the treating podiatrist. A dissenting opinion argued that *Petrillo* did prevent *ex parte* communications between the defense counsel and the treating podiatrist because the defendant medical group was an LLC. The dissent noted that the General Assembly created an exception to *Petrillo* that applied to hospitals by enacting subsections (d) and (e) of Section 6.17 of the Hospital Licensing Act (210 ILCS 85/6.17(d), (e) (West 2000)). Those provisions permit communications between a hospital's counsel and the hospital's staff concerning a patient's care, even staff not facing suit in the patient's lawsuit. The dissent emphasized that there was no reason to believe the court could extend this exception beyond hospitals to LLCs when the General Assembly "clearly declined to do so."

ILLINOIS INSURANCE CODE – INSURANCE POLICY DISCLOSURE

An umbrella insurance policy does not constitute a personal automobile liability insurance policy for purposes of policy disclosure.

In *Demarco v. CC Services Inc.*, 2017 IL App (1st) 152933-U, the Illinois Appellate Court was asked to decide whether the circuit court erred in dismissing the plaintiff's claim that the defendant misrepresented and concealed insurance policy limits, and holding that Section 143.23b of the Illinois Insurance Code (215 ILCS 5/143.24b (West 2010)) requires disclosure of only personal automobile liability insurance policies. Section 143.24b provides that "[a]ny insurer insuring any person or entity against damages arising out of a vehicular accident shall disclose the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy." The plaintiff argued that an umbrella policy constitutes a personal automobile liability insurance policy and that the defendant should have disclosed the $11 million umbrella policy that covered the insured driver. The plaintiff further argued that the circuit court's interpretation of Section 143.24b was "a severely restrictive view of the statute and is inconsistent with its obvious purpose—the disclosure of all liability coverage." The defendant argued that an umbrella policy is not a personal automobile liability policy requiring disclosure. The court agreed with the defendant, holding that the defendant did not violate Section 143.24b of the Illinois Insurance Code. The court reasoned that there is no indication that an umbrella policy would be considered a personal automobile liability insurance policy under Section 143.24b, and that Illinois courts have consistently held that an umbrella liability policy is different from an automobile policy.

PUBLIC UTILITIES ACT – ILLINOIS COMMERCE COMMISSION EXCLUSIVE JURISDICTION

The Illinois Commerce Commission does not have exclusive jurisdiction over a reparation claim brought by a residential consumer against an alternative retail electric supplier.

In *Zahn v. North American Power & Gas*, 2016 IL 120526, the Illinois Supreme Court was asked to decide whether the Illinois Commerce Commission has exclusive jurisdiction over a reparation claim brought by a residential consumer against an alternative retail electric supplier. Section 9-252 of the Public Utilities Act (220 ILCS 5/9-252 (West 2014)) provides that the Illinois Commerce Commission has exclusive jurisdiction over claims that a public utility has charged "an excessive or unjustly discriminatory amount for its product, commodity or service." Paragraph (9) of subsection (b) of Section 3-105 of the Act (220 ILCS 5/3-105(b)(9) (West 2014)) further provides that a public utility under the

Act does not include alternative retail electric suppliers. The plaintiff argued that the Illinois Commerce Commission does not have exclusive jurisdiction over her reparation claim, and that subject matter jurisdiction lies with the court. The defendant argued that exclusive jurisdiction lies with the Illinois Commerce Commission, and that the plaintiff's claim was properly dismissed for lack of subject matter jurisdiction. The court agreed with the plaintiff, holding that "the Illinois Commerce Commission does not have exclusive original jurisdiction over such claims," and that "such claims may be pursued through the courts." The court reasoned that if the General Assembly "intends for exclusive original jurisdiction to lie with the agency rather than with the circuit court when it has enacted such a comprehensive statutory scheme, it must make that intention explicit . . . [i]t has not done so here." The court noted that although Section 9-252 of the Public Utilities Act gives the Illinois Commerce Commission exclusive original jurisdiction over certain claims involving public utilities, "[alternative retail electric suppliers] are not public utilities" because they are expressly excluded from the definition of "public utility" in Section 3-105 of the Act.

COLLECTION AGENCY ACT – PRIVATE RIGHT OF ACTION

The Act does not create an express or implied private right of action.

In *Eul v. Transworld Systems*, 2017 WL 1178537, the District Court for the Northern District of Illinois was asked to decide whether to dismiss a complaint against various debt holders, debt servicers, and law firms retained to collect debt for violating the Collection Agency Act "by controlling the filing and prosecution of debt collection lawsuits against [the p]laintiffs." Section 8a-1 of the Collection Agency Act (225 ILCS 425/8a-1 (West 2016)) provides, "A collection agency shall not take any action that in fact or in appearance interferes with the professional relationship between the attorney and the creditor." Section 9 of the Act (225 ILCS 425/9 (West 2016)) allows the Department of Financial and Professional Regulation to take disciplinary action against collection agencies that "attempt or threaten to enforce a right or remedy with knowledge or reason to know that the right or remedy does not exist" or "engage in dishonorable, unethical, or unprofessional conduct of a character likely to deceive, defraud, or harm the public." The plaintiff argued that a private right of action under the Act should be implied because the Illinois Appellate Court, in *Sherman v. Field Clinic* (74 Ill. App. 3d 21 (1979)), recognized a private right of action under the circumstances of severe harassment and threats. The defendant argued that the Act does not create a private right of action, either expressly or implied. The court agreed with the defendant, holding that no implied private right of action exists under the Collection Agency Act. The court reasoned that it is not bound by *Sherman* and is not persuaded that an implied private right of action exists. Further, the court found that the "express authorization for private actions in [Section] 14a [of the Collection

Agency Act (225 ILCS 425/14a (West 2016))] shows that the legislature 'did not intend to imply rights of action to enforce other sections.'"

VIDEO GAMING ACT – JURISDICTION OVER VIDEO GAMING TERMINAL USE AGREEMENTS

The Illinois Gaming Board has exclusive jurisdiction to adjudicate the validity and enforceability of use agreements concerning the placement of video gaming terminals.

In *J & J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, the Illinois Supreme Court was asked to decide whether the appellate court erred in ruling that the Illinois Gaming Board has exclusive jurisdiction to adjudicate the validity and enforceability of use agreements that govern the placement of video gaming terminals in establishments licensed under the Act. Section 78 of the Video Gaming Act (230 ILCS 40/78 (West 2014)) grants the Board all powers necessary and proper to execute the provisions of the Act, provides the Board with jurisdiction over all gaming operations, obligates the Board to investigate and determine eligibility for licenses under the Act, and authorizes the Board to adopt rules under which all video gaming is to be conducted. The plaintiff argued that although the General Assembly passed the Act to legalize gambling through the use of video gaming terminals, the General Assembly did not explicitly divest the circuit courts of jurisdiction to adjudicate the validity and enforceability of the use agreements. The defendant argued that use agreements must fall within the Board's exclusive jurisdiction because contracts relating to video terminal gaming are legal only if they comply with the Act and rules adopted under the Act. The court agreed with the defendant, holding that the Board has exclusive, original jurisdiction to determine the validity and enforceability of agreements to control the placement and operation of video gaming terminals. The court reasoned that by passing the Act, the General Assembly created a comprehensive statutory scheme that, considered in its entirety, demonstrates the General Assembly's explicit intent for the Board to have exclusive jurisdiction over the video gaming industry and the use agreements necessary to take part in the industry.

LIQUOR CONTROL ACT OF 1934 – DELEGATION OF POWERS

The Act's provisions authorizing a local liquor control commissioner to order a licensed premises closed are ambiguous as to whether a police officer may seize a liquor license on behalf of the local liquor control commissioner without a warrant.

In *Lilah's, Inc. v. Lacey*, 2017 WL 1197102, the United States District Court for the Eastern Division of Illinois was asked to decide whether a police officer who, without a

warrant and acting on the direction of the mayor serving as the local liquor control commissioner, seized a liquor license was entitled to qualified immunity. Section 4-2 of the Liquor Control Act of 1934 (235 ILCS 5/4-2) provides that the "mayor . . . may appoint a person or persons to assist him in the exercise of the powers and duties herein provided for such liquor control commissioner." Section 7-5 of the Act (235 ILCS 5/7-5) provides that "[i]f the local liquor control commissioner has reason to believe that any continued operation of a particular licensed premises will immediately threaten the welfare of the community he may, upon the issuance of a written order stating the reason for such conclusion and without notice or hearing order the licensed premises closed for not more than 7 days . . . ." The defendant argued that the warrantless seizure was authorized by the Act and that he was assisting the local liquor control commissioner in the performance of the local liquor control commissioner's duties. The plaintiff argued that although the local liquor control commissioner was empowered under the Act to seize the plaintiff's liquor license, the defendant who seized the liquor license was not similarly empowered. The court agreed with the defendant, holding that the defendant was entitled to the application of qualified immunity because the plaintiff could not establish that the defendant violated the plaintiff's clearly established right. The court noted that the statute is ambiguous because it explicitly authorizes the local liquor control commissioner to unilaterally suspend or revoke a liquor license under certain circumstances and to delegate certain enumerated powers, but that the seizure of a liquor license was not specifically enumerated as a power that may be delegated. The court reasoned that "the obvious ambiguities . . . cry out for the application of qualified immunity, which 'protects police officers who reasonably interpret an unclear statute.'"

LIQUOR CONTROL ACT OF 1934 – ABSOLUTE IMMUNITY FOR LICENSE RENEWAL DECISIONS

A liquor commissioner is not entitled to absolute immunity for a decision to not renew a liquor license.

In *Brunson v. Murray*, 843 F.3d 698 (7th Cir. 2016), the United States Seventh Circuit Court of Appeals was asked to decide whether the United States District Court for the Southern District of Illinois erred in granting summary judgement to the defendant liquor commissioner on the basis of absolute judicial immunity in a matter concerning a license renewal decision. Section 7-9 of the Liquor Control Act of 1934 (235 ILCS 5/7-9) provides that a liquor licensee may seek an appeal of "an order or action of the local liquor control commission having the effect of . . . denying a renewal application." The plaintiff argued that the liquor commissioner was not entitled to absolute immunity because license renewal did not have the same procedural safeguards as other actions of the liquor commissioner. The defendant argued that the liquor commissioner was entitled to absolute

immunity because the action of renewing or not renewing a license is a judicial, rather than administrative act. The court agreed with the plaintiff, holding that absolute immunity should not apply to non-renewal decisions for liquor licenses. The court reasoned that a combination of federal and State court rulings and the language of Section 7-9 of the Act demonstrated that the renewal decision process was a bureaucratic and administrative act that lacked the hallmarks of a judicial act that would entitle it to absolute immunity. The court noted that the General Assembly had amended Section 7-9 to add language permitting appeals for license renewals without providing the same procedural requirements applicable to appeals of decisions to suspend or revoke licenses.

RESTROOM ACCESS ACT – IMPLIED PRIVATE RIGHT OF ACTION

An implied private right of action exists under the Act.

In *Pilotto v. Urban Outfitters West, LLC*, 2017 IL App (1st) 160844, the Illinois Appellate Court, in a case of first impression, was asked to decide whether the trial court erred when it granted the defendant's motion to dismiss and held that a private right of action does not exist under the Restroom Access Act. Section 10 of the Restroom Access Act (410 ILCS 39/10 (West 2014)) provides that a retail establishment shall allow a customer to use the employee restroom during normal business hours under certain circumstances. Section 15 of the Act (410 ILCS 39/15 (West 2014)) provides that a retailer or employee is not liable for a violation of the Act if an act or omission: (i) occurs without willful or gross negligence, (ii) occurs in an area of the establishment not accessible to the public, and (iii) results in injury to or death of the customer or any individual other than the employee accompanying the customer. Section 20 of the Act (410 ILCS 39/20 (West 2014)) provides that a violation of Section 10 of the Act is a petty offense punishable by a fine of not more than $100. The plaintiff argued that the General Assembly intended for an implied private right of action to be available to customers injured due to a retailer's willful or grossly negligent acts or omissions in complying with the Act and, therefore, it logically follows that an implied private right of action also exists when a retailer refuses to comply with the Act. The plaintiff further argued that the fine under the Act was not substantial enough to ensure compliance by retailers and that individuals would likely be reluctant to report a violation of the Act due to the potentially embarrassing disclosure it would require. The defendant argued that the violation provision of Section 20 expressed the extent of what the General Assembly intended to be adequate for enforcement. The court agreed with plaintiff, holding that a private right of action exists under the Act. The court, following precedent for implying a private right of action, noted that neither party contested that the plaintiff fell within the class for whose benefit the statute was enacted and that the injury she suffered was one that the Act was designed to prevent. The court reasoned that (1) "[i]t would make no sense" for the Act to be read in a manner that a retailer could be

liable for its actions when complying with the Act, but could not be liable when not complying with the Act, and (2) the petty offense remedy provided under the Act is inadequate to make a plaintiff whole, unlikely to ensure a defendant's compliance, and a party would be unlikely to pursue a claim under the Act given the "reluctan[ce] to divulge embarrassing information." Looking to the express language of the Act, the court found nothing prohibiting or impeding an implied private right of action, nor did the court find implying a private right of action to be inconsistent with the Act's purpose. Additionally, the court pointed out that there have been several occasions where a court has determined that a remedy expressed by the General Assembly in a statute is inadequate for enforcement and has subsequently implied a private right of action.

ILLINOIS VEHICLE CODE – MOTORCYCLE TRANSPARENT SHIELD

A passenger on a motorcycle equipped with a transparent shield who is not wearing glasses or goggles does not raise enough suspicion for an officer to conduct a traffic stop.

In *People v. Vance*, 2016 IL App (3d) 160032-U, the Illinois Appellate Court was asked to decide whether the trial court erred when it granted the defendant's motion to quash arrest and suppress evidence. Subsection (a) of Section 11-1404 of the Illinois Vehicle Code (625 ILCS 5/11-1404(a) (West 2014)) provides that the operator of a motorcycle must be protected by glasses, goggles, or a transparent shield. Subsection (b) of that Section defines "transparent shield" as "a windshield attached to the front of a motorcycle that extends above the eyes when an operator is seated in the normal, upright riding position . . . . " The State argued that because the passenger of the defendant's motorcycle was sitting higher than defendant, she was not protected by the motorcycle's transparent shield and, because she was not wearing glasses or goggles, the defendant violated Section 11-1404 of the Code. The defendant argued that the traffic stop by the officer was improper because even though his passenger was not wearing glasses or goggles, his motorcycle was equipped with a transparent shield that came up to his eye level. The court agreed with the defendant, holding that the defendant did not violate Section 11-1404 of the Code. The court reasoned that the statutory language is clear that failure to wear glasses or goggles alone does not raise a violation of the statute when the motorcycle is equipped with a transparent shield. The court noted that a passenger who is not wearing glasses or goggles does not raise enough suspicion for an officer to believe that a violation of Section 11-1404 of the Code has occurred and to conduct a traffic stop when the motorcycle is equipped with a transparent shield.

JUVENILE COURT ACT OF 1987 – SERVICE PLAN FILING

Language providing that the Department of Children and Family Services "shall" prepare and file a service plan with the court within 45 days was discretionary and not mandatory.

In *In re L.O.*, 2016 IL App (3d) 150083, the Illinois Appellate Court was asked to decide whether the trial court erred in assigning the respondent tasks to complete when a service plan had not yet been filed by the caseworker as required by Section 2-10.1 of the Juvenile Court Act of 1987. Section 2-10.1 of the Juvenile Court Act of 1987 (705 ILCS 405/2-10.1) provides that [w]henever a minor is placed in shelter care with the Department or a licensed child welfare agency in accordance with Section 2-10, the Department or agency, as appropriate, shall prepare and file with the court within 45 days of placement under Section 2-10 a case plan which complies with the federal Adoption Assistance and Child Welfare Act of 1980 and is consistent with the health, safety and best interests of the minor." The petitioner Department of Children and Family Services argued that the statutory requirement regarding the filing of a service plan is directory and not mandatory, and that the caseworker's failure to comply with the requirement within the period specified did not deprive the trial court of its authority to order the respondent to complete the tasks assigned. The respondent argued that the trial court had no authority, as a part of its dispositional ruling, to order the respondent to complete assigned tasks when the service plan had not yet been filed by the caseworker as required by statute. The court agreed with the petitioner, holding that the requirement in Section 2-10.1 of the Juvenile Court Act of 1987 that the Department of Children and Family Services "shall" file a service plan with the court within 45 days after the minor's placement in shelter care is discretionary. The court reasoned that the presumption that a statutory command is discretionary must be applied because although "shall" is used in the phrasing of the command, the remainder of the statute contains no negative language that prohibits further action or imposes a specific consequence in the event of noncompliance. The court concluded that because the requirement is only directory, the fact the Department of Children and Family Services did not file a service plan within 45 days of placement or prior to disposition did not deprive the trial court of the authority to order the respondent to complete certain tasks as a part of its dispositional ruling. A concurring opinion argued that allowing the Department of Children and Family Services, the State, or the court to choose which parts of the statute should be followed and which can be intentionally ignored possibly undermines the legislative purpose of the Act.

CRIMINAL CODE OF 2012* – STATUTE OF LIMITATIONS

The statute of limitations serves as a bar to reinstating criminal charges even if the charges the defendant pled guilty to are later vacated on constitutional grounds.

In *People v. Shinaul*, 2017 IL 120162, the Illinois Supreme Court was asked to decide whether the trial court erred when it denied the State's motion to reinstate voluntarily dismissed charges under subsection (b) of Section 3-5 of the Criminal Code of 2012 (720 ILCS 5/3-5(a) (West 2012)). That statute provides that, except for certain specified charges, "a prosecution for any offense . . . must be commenced within 3 years after the commission of the offense if it is a felony." The State argued that the statute of limitations should be tolled when, as in this case, a defendant successfully has his conviction vacated after the period of limitations has expired on the original charges that were dismissed in accordance with a plea agreement. The State further argued that the prosecution of the charges was still pending because the defendant still had a final disposition on appeal. The defendant argued that if the plea agreement is no longer enforceable, the criminal statute of limitations constitutes an absolute bar against reinstating the voluntarily dismissed charges. The court agreed with the defendant, holding that the charges could not be reinstated. The court reasoned that the State cites no authority for its proposition that the statute should be tolled in these circumstances, and that under the State's theory, the statute of limitations would be tolled in perpetuity when charges are dismissed. Additionally, the court reasoned that allowing the statute of limitations to be tolled in this case would defeat the purpose of having a statute of limitations. A dissenting opinion argued that at heart, a plea agreement is a contractual bargain, and that the voiding of an underlying criminal statute acts as an unforeseeable intervening event. The dissent further argued that under contractual principles, once the underlying purpose of the agreement was frustrated, the State could seek discharge of its duties and return the parties to the positions they occupied before the defendant entered the negotiated plea which, in this case, is a point in time in which the statute of limitations had not expired.

* 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 – SEX OFFENDERS IN PARKS

The blanket prohibition on sexual predators and child sex offenders knowingly being present in any public park building or on real property comprising any public park is unconstitutional.

In *People v. Pepitone*, 2017 IL App (3d) 140627, the Illinois Appellate Court was asked to decide whether a statute that prohibits sexual predators and child sex offenders from being present in public parks is unconstitutional. Subsection (b) of Section 11-9.4-1 of the Criminal Code of 2012 (720 ILCS 5/11-9.4-1(b) (West 2012)) provides that "[i]t is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park." The defendant argued that the Section is too broad and is therefore unconstitutional on its face, because it bears no reasonable relationship to protecting the public and abridges his substantive due process rights under the Fourteenth Amendment (U.S. CONST. amend. XIV). The State argued that the statute is rationally related to the State's objectives of keeping sex offenders away from areas where children are present. The court agreed with the defendant, holding that the statute is facially unconstitutional. The court reasoned that the statute is not "drafted in such a way as to effect [the goal of protecting the public] without arbitrarily stripping a wide swath of innocent conduct and rights from a person who has paid the penalty for his crime and is compliant with "collateral consequences" requirements established by the General Assembly." The dissent would not have held the statute facially unconstitutional because it "[kept] sex offenders who have committed sex offenses against children away from areas where children are present" and "the legislature could have rationally sought to avoid giving those sex offenders an opportunity to reoffend." The Illinois Supreme Court allowed the State's appeal on May 24, 2017.

CRIMINAL CODE OF 2012 – STALKING AND CYBERSTALKING

The portions of the stalking and cyberstalking statutes prohibiting communications to or about persons are facially unconstitutional.

In *People v. Relerford*, 2017 IL 121094, the Illinois Supreme Court was asked to decide whether the stalking and cyberstalking statutes are facially unconstitutional. Subsection (a) of Section 12-7.3 of the Criminal Code of 2012 (720 ILCS 5/12-7.3(a) (West 2017) - stalking) and subsection (a) of Section 12-7.5 of the Criminal Code of 2012 (720 ILCS 5/12-7.5(a) (West 2012) - cyberstalking) provide that a person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, including "communicates to or about" a person, and he or she shows or should know that this course of conduct would cause a reasonable person to either: fear for his or her safety

or the safety of a third person; or suffer other emotional distress. The State argued that the statutes were facially constitutional and constitutional as applied to the defendant because the restricted communications and conduct fall within either the exception for true threats or the exception applicable to speech that is integral to criminal conduct. The defendant argued that his convictions should be vacated because the stalking statutes violate the First Amendment to the United States Constitution (U.S. CONST. amend. I) because they restrict a substantial amount of protected speech. The court agreed with the defendant, holding that the statutes were facially unconstitutional because they are overbroad and impose content-based restrictions on speech that do not meet the strict scrutiny standard of review. The court reasoned that the proscription against communications to or about a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient. The court observed that many other types of conduct, such as repeatedly attending town meetings, are subject to prosecution under the provisions. The court concluded that the statutes are remedied by not giving effect to the phrase "communicates to or about."

CRIMINAL CODE OF 2012 – UNLAWFUL USE OF A WEAPON BY FELON

A conviction under a provision of the aggravated unlawful use of a weapon statute, which was held unconstitutional, may be used as a predicate felony for purposes of the unlawful use of a weapon of a felon statute.

In *People v. Spivey*, 2017 IL App (1st) 123563, the Illinois Appellate Court was asked to decide whether the defendant's conviction for unlawful use of a weapon by a felon (UUWF) should be vacated because the predicate felony, aggravated unlawful use of a weapon (AUUW), was subsequently held unconstitutional by the Illinois Supreme Court. Subsection (a) of Section 24-1.1 of the Criminal Code of 2012 (720 ILCS 5/24-1.1 (West 2010)) provides that "[i]t is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon . . . or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." The defendant argued that the conviction for UUWF should be reversed because the AUUW statute was held unconstitutional and that Supreme Court precedent requires that the conviction for AUUW be reversed. The State argued that Illinois Supreme Court precedent applied because the Illinois Supreme Court was aware of the Supreme Court precedent when it issued its decision in *People v. McFadden*, 2016 IL 117424. The court, applying *McFadden*, held that because the defendant had not cleared the AUUW conviction before being convicted of UUWF, the use of the AUUW conviction as the predicate felony for UUWF was proper. In delivering its ruling, the court also delivered a separate concurrence. The concurrence suggested that the General Assembly "should consider amending the relevant statutes to indicate that if a

person was convicted under the AUUW statute, that void conviction may not be used to enhance a later charge." The concurrence further noted that "it is incumbent on the Illinois legislature, the promulgators of the unconstitutional criminal statute, to avoid compounding an injustice in the system by fixing it."

CRIMINAL CODE OF 2012 – RESISTING ARREST AND USE OF FORCE TO RESIST ARREST

Prohibitions against resisting arrest and the use of force to resist arrest override a claim of defense of dwelling.

In *Martinez v. City of Chicago*, 2017 WL 178233, the United States District Court for the Northern District of Illinois was asked to decide if the plaintiff was entitled to judgment as a matter of law on his unlawful arrest claim against three Chicago police officers after a jury in a civil trial found that the officers had probable cause to arrest the plaintiff for resisting and obstructing a peace officer in violation of Section 31-1(a) of the Criminal Code of 2012 (720 ILCS 5/31-1(a)). In a case of mistaken identity, the plaintiff was arrested inside his home after Chicago police officers conducted a warrantless search of the plaintiff's residence in order to locate and apprehend the plaintiff's brother who had abandoned his vehicle, tossed away a gun, and fled on foot from police during an attempted traffic stop. The plaintiff was charged with, and later acquitted of, resisting and obstructing a peace officer. Section 31-1(a) provides that "[a] person who knowingly resists or obstructs the performance by one known to the person to be a peace officer . . . any authorized act within his or her official capacity commits a Class A misdemeanor." Relying on the Illinois Appellate Court's finding in *People v. Young*, 100 Ill. App.2d 20 (1968), that Section 31-1(a) "does not proscribe resistance to an illegal search," the plaintiff argued that the jury's probable cause finding at the civil trial was improper because, under *Young*, he had "a right to resist the unlawful search of his home by pulling away from the officers." The defendants argued that the search of plaintiff's home was not unlawful because the police were in "hot pursuit of a fleeing suspect" (the plaintiff's brother) and under the exigent circumstances exception to the Fourth Amendment's warrant requirement (U.S. CONST. amend. IV), warrantless searches are permissible "when the police have a reasonable belief that exigent circumstances require immediate action and there is not time to secure a warrant." The defendants further argued that there was probable cause to arrest the plaintiff for a violation of Section 31-1(a) because he resembles his brother, shares his brother's surname, and was located by police in the same residence his brother was seen running into during the police chase. The district court ultimately agreed with the defendants and denied the plaintiff's motion, holding that *Young* did not apply to the plaintiff's case because *Young* involved police officers executing a search warrant at the wrong residence. In contrast, the police officers in the plaintiff's case were attempting to *arrest* the plaintiff after mistakenly identifying him as his brother. The district court noted that under Section 7-7 of the Code (720 ILCS 5/7-7), a person is prohibited from using

force to resist an arrest "which he knows is being made . . . by a peace officer . . . even if he believes that the arrest is unlawful and the arrest in fact is unlawful." Additionally, the court noted that both Sections 7-7 and 31-1(a) "ordinarily override a claim of defense of dwelling because they specifically pertain to the use of force in an arrest situation." In light of the plaintiff's testimony that he knew the defendants were police officers when they confronted him inside his residence, the district court concluded that the plaintiff's resistance of the admittedly unlawful arrest violated Section 31-1(a) making the jury's probable cause finding proper. In a footnote to the case, the district court noted that the plaintiff requested that Section 7-7 be repealed or amended to create a "nominal physical resistance" exception for residents who are ordered by police, in their own homes, to "get on the ground and put their hands behind their back." Asserting that nominal physical resistance was not "criminal in nature," the plaintiff argued that a nominal physical resistance exception is necessary to uphold the U.S. Constitution's prohibition against the exercise of those police powers which are "more consistent with a police state." The court ultimately declined the plaintiff's request, holding that the General Assembly is in a better position to repeal or revise Section 7-7.

CRIMINAL CODE OF 2012 – GOVERNMENT EMPLOYEE INTENT TO DEFRAUD

The offense of unlawful participation does not require evidence of an affirmative act to establish an intent to defraud, nor does it require a showing of financial loss caused by the defendant's conduct.

In *People v. Tepper*, 2016 IL App (2d) 160076, the Illinois Appellate Court was asked to decide whether the defendant acted with sufficient evidence of "intent to defraud" so as to establish unlawful participation by an employee of a unit of local government. Section 33E-17 of the Criminal Code of 2012 (720 ILCS 5/33E-17 (West 2012)) provides that an employee of a unit of local government commits unlawful participation when he or she "participates, shares in, or receiv[es] directly or indirectly any money, profit, property, or benefit through any contract with the unit of local government or school district, with the intent to defraud the unit of local government or school district." The State argued that there was sufficient evidence to establish the "intent to defraud" element of an unlawful participation conviction was satisfied by the defendant's concealment through silence. The defendant argued that his trial court conviction was based upon insufficient evidence of his "intent to defraud" in that such intent required an "affirmative act" rather than an "omission" or "mere silence." The defendant also argued that his conviction for unlawful participation was improper because such a conviction requires the State to plead and prove a pecuniary loss resulting from the defendant's conduct. The court agreed with the State, holding that there was sufficient evidence to establish the defendant's "intent to defraud." Citing case law, the court reasoned that "fraud encompasses anything calculated to deceive,

as in acts, omissions, and concealment, including silence, if accompanied by deceptive conduct or the suppression of material facts." As such, the court held that silence was sufficient to establish "intent to defraud" on a conviction for unlawful participation. The court also held that Section 33E-17 does not require proof of pecuniary loss to establish an unlawful participation conviction. Section 17-0.5 of the Criminal Code of 2012 (720 ILCS 5/17-0.5 (West 2012)) defined the phrase "with intent to defraud" as an "act knowingly, and with the specific intent to deceive or cheat, for the purpose of . . . bringing some financial gain to oneself, regardless of whether any person was actually defrauded or deceived." Based upon this definition, the court reasoned that the defendant's unlawful participation conviction may be affirmed regardless of whether the State proved that the plaintiff suffered any financial loss. The court also added that it is a matter for the General Assembly to determine or clarify whether the offense of unlawful participation requires evidence of financial loss.

ILLINOIS CONTROLLED SUBSTANCES ACT – SENTENCE

The imposition of a 15-year sentence for delivery of a controlled substance within 1,000 feet of a church is not an abuse of discretion.

In *People v. Wilson*, 2016 IL App (1st) 141063, the Illinois Appellate Court was asked to decide whether the trial court abused its discretion when it imposed a 15-year sentence for delivery of a controlled substance within 1,000 feet of a church. At the time of the offense, subsection (b) of Section 407 of the Illinois Controlled Substances Act (720 ILCS 570/407) provided, in part, that a person who sells one gram or more, but less than 15 grams, of any substance containing heroin within 1,000 feet of the real property comprising any church, synagogue, or other building, structure, or place used primarily for religious worship is guilty of a Class X felony. The defendant argued that his sentence was unreasonable relative to the seriousness of his offense because the amount of heroin involved in the sale was only 0.04 grams above the Class X threshold; he further argued that the sentence does not serve the goals of deterrence, rehabilitation, incapacitation, or retribution. He also argued that his sentence is disproportionate in light of the small dollar amount of the transaction and that it exceeds the average sentence for more serious crimes. The State argued that the trial court did not abuse its discretion because the sentence was within the statutory guidelines, and the trial court properly considered all of the aggravating and mitigating factors. Although the appellate court found the defendant's arguments for reducing his sentence persuasive, the court ultimately agreed with the State, reasoning that an appellate court is constrained by Supreme Court precedent and by the sentencing guidelines prescribed by the legislature. In a dissenting opinion, Justice Hyman argued that the sentence does not serve the stated purpose of the Controlled Substances Act because it treats "the unlawful user or occasional petty distributor of controlled substances with the

same severity as the large-scale unlawful purveyors and traffickers of controlled substances." The dissent also questioned the efficacy of safe zone statutes and argued that those zones can have a racially disparate effect. Public Act 100-3 subsequently reduced the scope of the safe zone around churches, synagogues, or other buildings, structures, or places used primarily for religious worship to 500 feet.

ILLINOIS CONTROLLED SUBSTANCES ACT – IMMUNITY FROM PROSECUTION FOR EMERGENCY MEDICAL ASSISTANCE

Immunity from prosecution for possession of a controlled substance does not apply to a defendant who was administered emergency medical assistance as a result of police officers' observation of suspected drugs and drug paraphernalia.

In *People v. Teper*, 2016 IL App (2d) 160063, the Illinois Appellate Court was asked to decide whether the trial court erred in denying the defendant's motion to dismiss and holding that the immunity from prosecution found in the Illinois Controlled Substances Act did not apply. Subsection (e) of Section 414 of the Illinois Controlled Substances Act (720 ILCS 570/414(e) (West 2014)) provides that immunity "shall not be extended if law enforcement has reasonable suspicion or probable cause to detain, arrest, or search the person . . . for criminal activity and the reasonable suspicion or probable cause is based on information obtained prior to or independent of the individual taking action to seek or obtain emergency medical assistance and not obtained as a direct result of the action of seeking or obtaining emergency medical assistance." The defendant argued that the drugs were found as a direct result of her receiving emergency medical assistance when the officers first arrived at the scene. The State argued that the defendant did not seek or obtain emergency medical assistance for her drug overdose. Instead, "she was the passive, unresponsive recipient of the assistance that the officers determined she needed to reverse her drug overdose" and that the officers had probable cause to detain, arrest, or search the defendant because her car was stopped in traffic. The court agreed with the State, holding that the police officers had independent probable cause for arrest and the immunity provision did not apply. The court reasoned that the defendant received emergency medical assistance as a result of the officers obtaining evidence of the defendant's drug use and possession by viewing objects in plain sight in the car when they arrived, rather than acquiring the evidence as a result of administering emergency medical assistance.

CODE OF CRIMINAL PROCEDURE OF 1963 – RESTORATION OF FITNESS

A psychiatrist or a psychologist to complete must complete a fitness report even though such a requirement is not explicitly stated in statute.

In *People v. Gillon*, 2016 IL App (4th) 140801, the Illinois Appellate Court was asked to decide whether the trial court erred by relying solely on the parties' stipulation that the defendant was fit to stand trial. Subsection (b) of Section 104-17 of the Code of Criminal Procedure of 1963 (725 ILCS 5/104-17(b) (West 2012)) provides that "[i]f upon the completion of the placement process the Department of Human Services determines that the defendant is currently fit to stand trial, it shall immediately notify the court and shall submit a written report within 7 days. In that circumstance the placement shall be held pending a court hearing on the Department's report." The State argued that the trial court did not err in accepting the parties' stipulation based upon the Department of Human Services' report that the defendant was fit to stand trial. The defendant argued that the trial court erred by (1) relying on the parties' stipulation that the defendant was fit to stand trial rather than making an independent judicial determination on that issue; and (2) not *sua sponte* raising the fitness issue based upon the defendant's conduct during subsequent court proceedings. The court agreed with the defendant, holding that the trial court erred in accepting the parties' stipulation that the defendant was restored to fitness to stand trial. The court reasoned that the Department of Human Services' report was submitted by a licensed clinical social worker, rather than a physiatrist or physiologist, and while subsection (b) of Section 104-17 of the Code of Criminal Procedure of 1963 does not specifically require that a fitness decision be made by a psychiatrist or psychologist, subsection (a) of Section 104-13 (725 ILCS 5/104-13(a) (West 2012)) specifically requires the initial fitness examination to be performed by "one or more licenses physicians, clinical psychologists, or psychiatrists chosen by the court." The court reasoned that while the statute at issue does not specifically prohibit a licensed clinical social worker from conducting the Department's pretreatment evaluation, the social worker's decision restoring the defendant to fitness requires the court to perform a more thorough analysis that wouldn't be necessary if presented with an opinion from a psychiatrist or psychologist.

CODE OF CRIMINAL PROCEDURE OF 1963 – EX POST FACTO PROHIBITION

The ex post facto prohibition does not apply to a sentence credit statute that took effect 5 years after the offense occurred.

In *People v. Scalise*, 2017 IL App (3d) 150299, the Illinois Appellate Court was asked to decide whether the *ex post facto* prohibition of Section 16 of Article I of the Illinois

Constitution (ILL. CONST. art. I, § XVI) applies to subsection (b) of Section 110-14 of the Code of Criminal Procedure of 1963. Subsection (b) of Section 110-14 of the Code (725 ILCS 5/110-14(b) (West 2014)) provides that the $5-per day credit provided in subsection (a) of that Section, available to a person incarcerated on a bailable offense, does not apply to a person incarcerated for sexual assault. The defendant acknowledged that he is not eligible for the credit because he was incarcerated for predatory criminal sexual assault, but argued that subsection (b) of the statute violates the prohibition against *ex post facto* laws because the offense occurred 5 years before subsection (b) took effect. The court disagreed with the defendant, and held that the *ex post facto* prohibition does not apply to subsection (b) of the statute because the statute is not punitive in nature and does not have a punitive effect. However, a dissenting opinion disagreed with the court's analysis. The dissent argued that subsection (b) is punitive in nature because it eliminated an otherwise statutory right to a monetary credit and prohibits the defendant from even applying for the credit. The dissent further reasoned that prior to the enactment of subsection (b), the defendant would have been able to apply for the credit, and subsection (b) penalizes him by eliminating this right. The dissent concluded that this punitive effect renders subsection (b) of the statute *ex post facto* as applied to the defendant.

CODE OF CRIMINAL PROCEDURE OF 1963 – JUVENILE ENHANCED SENTENCING

A prior juvenile adjudication is the equivalent of a prior conviction for enhanced sentencing purposes.

In *People v. Jones*, 2016 IL 119391, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred in holding that the defendant's juvenile adjudication was a prior conviction for purposes of extended-term sentencing under subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963(725 ILCS 5/111-3(c-5) (West 2010)). That provision provides, in relevant part, that "[n]otwithstanding any provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging document or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and provide beyond a reasonable doubt." The defendant argued that because subparagraph (7) of subsection (b) of Section 5-5-3.2 of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(West 2010)) and subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963 do not expressly define a prior delinquency adjudication as a prior conviction, the defendant's prior adjudication must be alleged in the

indictment and proved beyond a reasonable doubt. The State argued that a prior juvenile adjudication of delinquency falls within the prior-conviction exception in subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963. The court agreed with the State, holding that the defendant's prior juvenile adjudication is the equivalent of a prior conviction under subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963. The court reasoned that although there is no constitutional right to a jury trial in juvenile proceedings, the defendant did have all the other procedural rights of adults in criminal proceedings, including the right of notice, counsel, confrontation, cross-examination, and proof of guilt beyond a reasonable doubt. The court reasoned that the presence of these processes in juvenile proceedings forecloses the conclusion that a juvenile adjudication is not the equivalent of a prior conviction. A dissenting opinion observed that in Illinois, for statutory purposes, the term "conviction" does not include juvenile delinquency adjudications, and called upon the General Assembly to clarify the issue in legislative action.

CODE OF CRIMINAL PROCEDURE OF 1963 – TIMELY POST-CONVICTION PETITION

Statutory deadlines for the timely filing of post-conviction petitions apply in situations in which a defendant that files a notice to appeal, but not a petition for leave to appeal.

In *People v. Johnson*, 2017 IL 120310, the Illinois Supreme Court was asked to decide whether a defendant's petition for post-conviction relief was timely when the defendant filed a notice of appeal but not a petition for leave to appeal. Subsection (c) of Section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1 (West 2008)) provides, "If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." The defendant argued that because the statute does not provide a time limit in which to file a post-conviction petition when a petition for leave to appeal was not filed, the statute does not bar the defendant's petition as untimely. The State argued that the "gap" the statute creates in the situation "should not be construed as providing a loophole that would allow defendants to file a post-conviction petition at any time." The court agreed with the State, holding that the defendant's post-conviction petition was untimely. The court reasoned "that a literal reading of the statute does not specifically include a deadline for filing a post-conviction petition when no petition for leave to appeal is filed" so the literal reading "must yield because it is at odds with the purpose of the statute." The court interpreted the statute to provide "that a post-conviction petition must be filed within six months of the date for filing a petition for certiorari or a petition for leave to appeal."

CODE OF CRIMINAL PROCEDURE OF 1963 – POST-CONVICTION COUNSEL

There is no constitutional right to assistance of counsel for a first stage post-conviction hearing.

In *People v. Garcia-Rocha*, 2017 IL App (3d) 140754, the Illinois Appellate Court was asked to decide whether the trial court erred in dismissing the defendant's post-conviction petition for unreasonable assistance of counsel during a first stage post-conviction hearing under subsection (a-5) of Section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(a-5) (West 2014)) provides that the trial court may summarily dismiss a post-conviction petition that is "frivolous or is patently without merit." The defendant argued that his post-conviction counsel's failure to amend the petition to include the issue of the trial court's failure to conduct an adequate fitness restoration hearing was unreasonable assistance of counsel. The State argued that the defendant did not have a constitutional right to assistance of counsel during the first stage of post-conviction relief and is therefore unable to sustain a claim for unreasonable assistance of counsel. The court agreed with the State, holding that the defendant may not sustain a claim of unreasonable assistance of post-conviction counsel. The court reasoned that a defendant has no constitutional right to the assistance of counsel and the Code guarantees "only a reasonable level of assistance, which is less than that afforded by the federal or state constitutions." The court further reasoned that neither the General Assembly or Illinois courts have recognized any right to counsel at the first stage of post-conviction proceedings. A dissenting opinion argued that when a prisoner retains counsel to prepare the initial post-conviction petition, the first and second post-conviction stages effectively merge, and retained counsel must identify and raise constitutional claims and put them in proper form for the court's consideration. The dissenting opinion concluded that the defendant's retained counsel had an obligation to provide reasonable assistance at the first stage and all stages of post-conviction proceedings.

UNIFIED CODE OF CORRECTIONS – SEX OFFENDER USE OF SOCIAL NETWORKING WEBSITES

An analogous statute of another state, restricting social networking website use by registered sex offenders, is unconstitutional because it restricts lawful speech in violation of the First Amendment of the United States Constitution.

In *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), the Supreme Court of the United States was asked to decide whether the North Carolina Supreme Court erred in holding that a North Carolina statute did not impermissibly restrict free speech by making it a felony for a registered offender to access a commercial social networking website. N.C.

Gen. Stat. Ann. §14-202.5(a), (e) provides that it is a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." A "commercial social networking Website" is an Internet Website that: (1) is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site; (2) facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges; (3) allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site; and (4) provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. (N.C. Gen. Stat. Ann. §14-202.5(b)).

In holding that the North Carolina statute restricted speech that is protected under the First Amendment of the United States Constitution (U.S. CONST. amend. I), the Court reasoned that to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. The Court further reasoned that it is well established that as a general rule, that the government "may not suppress lawful speech as the means to suppress unlawful speech." (*Ashcroft v. Free Speech Coalition*, 535 U.S., 234, at 255). The Court stated, that although the issue is particularly not before the Court, it can be assumed that First Amendment jurisprudence would permit a State to enact specific narrowly-tailored statutes that would prohibit a sex offender from engaging in conduct that precedes a sexual crime, such as contacting a minor or using a website to gather information about a minor.

Sections 3-3-7 (730 ILCS 5/3-3-7), 5-6-3 (730 ILCS 5/5-6-3), and 5-6-3.1 (730 ILCS 5/5-6-3.1) of the Unified Code of Corrections were amended by Public Act 96-262 to require that a person convicted of a sex offense as defined in the Sex Offender Registration Act shall refrain from accessing or using a social networking website. Section 17-0.5 of the Criminal Code of 2012 (720 ILCS 5/17-0.5) provides that "social networking website" means "an Internet website containing profile web pages of the members of the website that include the names or nicknames of such members, photographs placed on the profile web pages by such members, or any other personal or personally identifying information about such members and links to other profile web pages on social networking websites of friends or associates of such members that can be accessed by other members or visitors to the website. A social networking website provides members of or visitors to such website the ability to leave messages or comments on the profile web page that are visible to all or some visitors to the profile web page and may also include a form of electronic mail for members of the social networking website."

UNIFIED CODE OF CORRECTIONS – TERM OF CONSECUTIVE SENTENCE

For any sentence that combines imprisonment and probation, neither component of the sentence may exceed the maximum term for that component.

In *People v. Fretch*, 2017 IL App (2d) 151107, the Illinois Appellate Court was asked to decide whether the trial court erred when it sentenced the defendant to 360 days of imprisonment with a consecutive 2-year term of probation. Subsection (a) of Section 5-4.5-55 of the Code (730 ILCS 5/5-4.5-55 (West 2014)) provides that for a Class A misdemeanor, the sentence of imprisonment shall be a determinate sentence of less than one year. Subsection (d) of that Section provides that except as provided in Section 5-5-3 or 5-6-2 of the Code, the period of probation or conditional discharge shall not exceed 2 years. The defendant argued that his sentence was not valid under subsection (f) of Section 5-6-2 of the Unified Code of Corrections (730 ILCS 5/5-6-2(f) (West 2014)) which provides that "(t)he court may impose a term of probation that is concurrent or consecutive to a term of imprisonment so long as the maximum term imposed does not exceed the maximum term provided under Article 4.5 of Chapter V or Article 8 of this Chapter (730 ILCS 5/Ch. V Art. 4.5; 730 ILCS 5/Ch. V Art. 8)." The court rejected the defendant's argument, holding that there is nothing in the statutory text that arbitrates between the two possible maximum terms: the maximum term of imprisonment or the maximum term of probation. The court considered subsection (j) of Section 5-6-4 of the Code (730 ILCS 5/5-6-4(j) (West 2014)), which provides that "(w)hen an offender is re-sentenced after revocation of probation that was imposed in combination with a sentence of imprisonment for the same offense, the aggregate of the sentences may not exceed the maximum term authorized under Article 4.5 of Chapter V," and concluded that Sections 5-6-2(f) and 5-6-4(j) simply provide that, for any sentence that combines imprisonment and probation, neither component of the sentence may exceed the maximum authorized (the "maximum term") for that component as specified under Article 4.5 or Article 8 of Chapter V of the Code.

UNIFIED CODE OF CORRECTIONS – RECIDIVISM SENTENCE ENHANCEMENT

Age at the time of conviction determines whether a sentencing enhancement provision applies to individuals over the age of 21 convicted of a Class 1 or Class 2 felony.

In *People v. Smith*, 2016 IL 119659, the Illinois Supreme Court was asked to decide whether the appellate court erred in holding that a defendant convicted of a Class 2 felony when he was 21 and who had previously been convicted of a Class X and Class 1 felony was not eligible for a Class X sentencing enhancement because he was not 21 at the time

he was charged. Subsection (b) of Section 5-4.5-95 of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2010)) provides that if a defendant over 21 is convicted of a Class 1 or Class 2 felony after having been twice convicted of an offense that is classified as a Class 2 or greater felony, then that defendant shall be sentenced as a Class X offender. The State, citing appellate court precedent, argued that the relevant time period for Subsection (b) of Section 5-4.5-95 is the defendant's age at the time of conviction. The defendant argued that he was not eligible for the sentencing enhancement, as he had not reached the age of 21 when he was charged with the Class 2 felony. The court agreed with the State, overruling the appellate court and holding that the defendant was properly sentenced as a Class X offender by the trial court since he was 21 at the time of conviction. The court reasoned that the language of subsection (b) of Section 5-4.5-95 is clear and unambiguous and therefore, the court must follow the statute's plain meaning. The court observed that subsection (b) requires mandatory Class X sentencing when a defendant, over the age of 21, is convicted. The court noted that in other sentencing provisions, the General Assembly specifically included language providing that a court should consider a defendant's age at a time prior to conviction. The court presumed that the exclusion of such language from subsection (b) of Section 5-4.5-95 was an intentional choice made by the General Assembly, and concluded that it would be improper to construe the statute otherwise.

UNIFIED CODE OF CORRECTIONS - BURGLARY; EXCESSIVE SENTENCE

A sentence of 12 years imprisonment for pilfering $44 in quarters from a vending machine on a college campus was excessive.

In *People v. Busse*, 2016 IL App (1st) 142941, the Illinois Appellate Court was asked to decide whether the trial court imposed an excessive sentence in sentencing the defendant to 12 years imprisonment for committing burglary committed in a school, a Class 1 felony, when he stole $44 in quarters from a vending machine on a college campus. Subsection (b) of Section 5-4.5-95 of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2010)) provides that if a defendant over 21 is convicted of a Class 1 or Class 2 felony after having been twice convicted of an offense that is classified as a Class 2 or greater felony, then that defendant shall be sentenced as a Class X offender. Under subsection (a) of Section 5-4.5-25 of the Code (730 ILCS 5/5-4.5-25(a) (West 2012)), the sentencing range for a Class X felony is 6-30 years. The State argued that a "substantial sentence" was warranted because of the defendant’s 28 past convictions, including seven felony convictions, several of which were for burglary or theft from coin-operated machines. The defendant argued that his sentence was excessive given the nonviolent nature of the crime and his nonviolent background and that the trial court did not consider the "nature and circumstances" of his prior convictions. The defendant further argued that

his sentence does not conform with the spirit and purpose of the law. The court agreed with the defendant, holding that 12 years of imprisonment is grossly disproportionate to the offense of stealing $44 in loose change from a vending machine. The court reasoned that one of the purposes of the Illinois sentencing statutes is to prescribe penalties which are proportionate to the seriousness of offenses. The court noted that the defendant did not "break in" to the campus building, he was not armed, college students were threatened or harmed during his theft, and he did not even damage the vending machines. The court found it difficult to conceive of an argument that the defendant deserved 12 years in prison due to the seriousness of his offense, and reduced the defendant's sentence to 6 years. The court urged the General Assembly to consider whether such lengthy and costly sentences are a good use of taxpayer dollars, and to amend the Class X sentencing statute to encompass felons who are violent, or whose crimes escalate in seriousness and harm to the public, without also taking in defendants whose crimes remain petty.

UNIFIED CODE OF CORRECTIONS – JUVENILE DE FACTO LIFE SENTENCE

A 50-year prison sentence imposed upon a defendant who was a juvenile at the time of the offense is a de facto life sentence and unconstitutional under the eighth amendment of the United States Constitution.

In *People v. Buffer*, 2017 IL App (1st) 142931, the Illinois Appellate Court was asked to decide whether the trial court erred when it summarily dismissed the petitioner's *pro se* claim that his 50-year sentence violated his constitutional rights under the Eighth Amendment to the United States Constitution. The Eighth Amendment (U.S. CONST. amend. VIII) provides that "[e]xcessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." The State argued that the petitioner failed to set forth a meritorious claim on an eighth amendment violation because the Supreme Court's holding in *Miller v. Alabama*, 567 U.S. 460 (2012), applied only to mandatory life sentences without the possibility of parole, and not to discretionary sentences in which the trial court was able to consider mitigating evidence and criminal history before imposing a sentence. The petitioner argued that under Sections 5-8-1 and 3-6-3 (730 ILCS 5/5-8-1(a)(1)(a); 730 ILCS 5/5-8-1(a)(1)(d)(iii); 730 ILCS 5/3-6-3 (West 2008)), his sentence was the equivalent of a mandatory life sentence imposed without the exercise of discretion, and violated the Eighth Amendment. The court agreed with the petitioner, holding that the petitioner's sentence was unconstitutional as applied in this case. The court reasoned that although the trial court did exercise discretion in imposing the petitioner's sentence and considered mitigating evidence, the trial court did not take into account specific juvenile sentencing factors required under *Miller* and its progeny. A concurring opinion argued that subdivision (a)(2)(i) of Section 3-6-3 of the Code (730 ILCS 5/3-6-3(a)(2)(i) (West 2008)) by its nature eliminates the opportunity to achieve

parole and for that reason alone is unconstitutional as applied to juvenile offenders. The Illinois Supreme Court granted the State's Petition for Leave to Appeal on November 22, 2017.

SEX OFFENDER REGISTRATION ACT – PROOF OF DOMICILE

Evidence of a sex offender's exact residence or temporary domicile is required to prove the offense of failing to register under the Act.

In *People v. Gomez*, 2017 IL App (1st) 142950, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found the defendant guilty of failing to register as a sex offender under Section 3(a)(1) of the Sex Offender Registration Act (730 ILCS 150/3(a)(1) (West 2012)). Section 3(a)(1) requires a sex offender to register in the municipality in which he or she resides or is temporarily domiciled for a period of time of three or more days. The defendant argued that the State failed to establish his guilt under Section 3(a)(1) because the State did not prove that he resided or was temporarily domiciled in Chicago at the time of his arrest. The State argued that it was not required to prove exactly where the defendant was staying or residing to establish his guilt under Section 3(a)(1). The State further argued that the defendant's residence or temporary domicile could be reasonably inferred from the following evidence: (1) the defendant had failed to register as a sex offender within three days following his release from prison; (2) the defendant had previously tried to register; and (3) there was no record of the defendant registering in any other jurisdiction or state. The court rejected the State's interpretation of Section 3(a)(1) and reversed the defendant's conviction, holding that "a specific location is contemplated by the statute." The court noted that the terms "resided or temporarily domiciled . . . are specifically defined in the law as any place where the defendant stay's for at least three days." The court reasoned that the residency requirement under Section 3(a)(1) would be entirely eliminated and the phrase "resided or temporarily domiciled" would be rendered superfluous if the State were permitted to prove a defendant's residency with only evidence of the defendant's failure to register anywhere. The court further noted that the State would have no way of knowing if a defendant had a duty to register in a specific municipality if the State were not required to prove the municipality in which the defendant resided or temporarily domiciled. Noting that a sex offender's duty to register is "inextricably intertwined" with the municipality where he or she resides or is temporarily domiciled, the court concluded that "proof of a defendant's place of residence or temporary domicile is an essential element of failing to register under Section 3(a)(1)."

SEX OFFENDER REGISTRATION ACT – REGISTRATION REQUIREMENTS AFTER HOSPITALIZATION

The Act does not require a sex offender to re-register at a previously-registered address after returning home following hospitalization.

In *People v. Pearse*, 2017 IL 121072, the Illinois Supreme Court was asked to decide whether a sex offender who has registered his or her home address must re-register that address following an indefinite-term of treatment at a medical facility. Subsection (b) of Section 3 of the Sex Offender Registration Act (730 ILCS 150/3(b) West 2012) requires a sex offender to register within 3 days of establishing a residence or temporary domicile, " regardless of any initial, prior, or other registration." The State argued that the Act required the defendant to re-register at the offender's home address after returning from his hospital stay. The defendant argued that the defendant had already registered at his home address and that the Act does not require re-registration. The court agreed with the defendant, holding that there is no statutory duty to re-register and that the phrase in stating that a sex offender must, regardless of any initial, prior, or other registration register within 3 days of establishing a residence means nothing more than that a defendant must register additional locations where he or she resides for more than 3 days, notwithstanding registration of earlier locations. The court encouraged the General Assembly to review the statutory scheme and revise it for purposes of clarity if the Court's construction is not what it intended.

CODE OF CIVIL PROCEDURE – RESPONDENT IN DISCOVERY

A plaintiff may designate a previously named defendant as a respondent in discovery in a subsequent amended complaint.

In *Westwood Construction Group, Inc. v. Irus Property, LLC*, 2016 IL App (1st) 142490, the Illinois Appellate Court was asked to decide whether the circuit court erred when it dismissed the defendants as respondents in discovery from the plaintiff's amended complaint on the basis that Section 2-402 of the Code of Civil Procedure (735 ILCS 5/2-402 (West 2012)) does not permit a plaintiff to designate a previously named defendant as a respondent in discovery in a subsequent pleading. Under Section 2-402, the "plaintiff in any civil action may designate as respondents in discovery in his or her pleading those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action." The plaintiff argued that nothing in Section 2-402 prohibits a plaintiff from filing an amended complaint which designates a previously dismissed defendant as a respondent in discovery. The defendants, however, accused the plaintiff of using Section 2-402 in bad faith and argued that the purpose of the Section is

to "deter frivolous actions by allowing a plaintiff to discover information before naming an individual or entity as a defendant." The defendants accused the plaintiff of using Section 2-402 "as a 'fishing expedition' against a former defendant who was dismissed from an earlier complaint after [the plaintiff failed] to plead a viable claim." The appellate court agreed with the plaintiff and ordered the circuit court to reinstate the defendants as respondents in discovery. The court reasoned that "a plain reading of Section 2-402 . . . makes clear that [it] may be employed against a former defendant, dismissed without prejudice, as a respondent in discovery." Additionally, the court found that Section 2-402 "contains no limitations as to when or in what sequence a plaintiff may designate a person or entity as a respondent in discovery." The court reasoned that the only limitation is that the plaintiff "believes the designated persons or entities . . . have information essential to the determination of who should properly be named as additional defendants in the case." The court noted that the General Assembly did not explicitly prohibit a plaintiff from designating a previously named defendant as a respondent in discovery in a subsequent pleading, and refused to read such a prohibition into Section 2-402. A dissenting opinion disagreed with this analysis and argued that the court was, in fact, ignoring the plain language of Section 2-402 and permitting the plaintiff to use the Section "precisely backward from the way the legislature intended." In support of its opinion, the dissent argued that the plain language of Section 2-402 "indicates that the legislature envisioned respondents-in-discovery as a wholly separate group from the defendants named in the action" because the Section explicitly "provides that a plaintiff may name as respondents-in-discovery individuals or entities *other than the named defendants*." Concluding that the phrase "other than the named defendants" imposes "an explicit limitation on the plaintiff," the dissent next invoked the legislative history of Section 2-402, noting that the Section was enacted to "provide plaintiff’s attorneys with a means of filing medical malpractice suits without naming everyone in sight as a defendant." In light of this statutory history, the dissent asserted that Section 2-402 "contemplates a linear process, where a respondent-in-discovery might become a defendant, depending on what the plaintiff discovers." The dissent argued that the court’s holding would completely upend this linear process by allowing a named defendant to "evolve" into a respondent-in-discovery in a subsequent complaint, essentially keeping the defendant "on the hook . . . for limited discovery and possible reappearance as a defendant". The dissent warned that such an interpretation of Section 2-402 could lead to an increase in frivolous civil complaints, the very result the General Assembly aimed to eliminate when it first enacted the Section.

CODE OF CIVIL PROCEDURE – HEALING ART MALPRACTICE; ATHLETIC TRAINERS

Allegations that an athletic trainer acted negligently constitute healing art malpractice and require an affidavit that conforms to provisions of the Code governing such types of actions.

In *Williams v. Athletico, Ltd.*, 2017 IL App (1st) 161902, the Illinois Appellate Court, on interlocutory appeal, was asked to decide, among other things, "whether it is necessary for a plaintiff to attach a certificate from a health professional pursuant to Section 2-622 of the Code of Civil Procedure where the complaint alleges negligent conduct by a licensed athletic trainer . . . for failing to address and evaluate a participating athlete for a concussion . . . ." Subsection (a) of Section 2-622 of the Code (735 ILCS 5/2-622(a) (West 2014)) provides that "[i]n any action . . . in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney . . . shall file an affidavit . . ." stating that, among other things, "the affiant has consulted and reviewed the facts of the case with a health professional." The defendant, an athletic trainer, argued that the plaintiff must comply with the requirements of Section 2-622 of the Code because the "claims fall within the ambit of 'healing art malpractice' because the procedures employed by an athletic trainer, a person that receives specialized training and must be licensed to practice in Illinois, are not within the grasp of an ordinary lay juror." The plaintiff argued that the allegations were of ordinary negligence, not healing art malpractice, and that "compliance with Section 2-622 is only required in cases that require expert analysis of a medical condition, treatment procedure, or diagnosis." The court agreed with the defendant, holding that compliance with Section 2-622 of the Code is required with regard to cases involving the negligence of athletic trainers. The court reasoned that negligent actions of the athletic trainers are properly considered healing art malpractice because (i) athletic trainers are required to be licensed under the Illinois Athletic Trainers Practice Act and are subject to discipline through the Department of Financial and Professional Regulation, (ii) the athletic trainer's alleged failure to monitor the plaintiff for symptoms of a concussion involved the exercise of medical judgment, and (iii) the plaintiff would "need to establish that defendants failed to employ the degree of knowledge, skill, and ability that a reasonable athletic trainer would employ under similar circumstances."

CODE OF CIVIL PROCEDURE – RIGHT TO TRIAL BY JURY

Public Act reducing the size of a jury for civil trials from 12 to 6, is unconstitutional.

In *Kakos v. Butler*, 2016 IL 120377, the Illinois Supreme Court was asked to decide whether Public Act 98-1132, which reduced the size of juries in civil trials from 12 to six, was unconstitutional under the Illinois Constitution. Subsection (b) of Section 2-1105 of the Code of Civil Procedure, as amended by Public Act 98-1132, (735 ILCS 5/2-1105(b) (West 2014)) provides, "All jury cases shall be tried by a jury of six. The plaintiff argued that the statute was valid because Section 13 of Article I of the Illinois Constitution (ILL. CONST. art. I, § 13), granting the right to a trial by jury, does not specifically entitle a person a to 12 person jury, and "the predecessors to Section 2-1105(b) and Illinois Supreme Court Rule 285 that were in effect when the 1970 Constitution was drafted" both allowed juries of six under specified circumstances. The defendant argued that the statute "violates the right of trial by jury as protected by the Illinois Constitution." The court agreed with the defendant, holding that the Act is facially unconstitutional. The court reasoned that the language of the Illinois Constitution ("The right of trial by jury as heretofore enjoyed shall remain inviolate") indicated that the drafters intended to refer to the common law right to a 12-person jury. The court concluded that a jury of 12 people "was an essential element of the right of trial by jury enjoyed at the time the 1970 [Illinois] Constitution was drafted" and so "jury size is an element of the right that has been preserved and protected in the constitution."

CODE OF CIVIL PROCEDURE – COMPLAINTS FOR ADMINISTRATIVE REVIEW

A separate complaint for administrative review is required for each final administrative decision.

In *Finko v. City of Chicago*, 2016 IL App (1st) 152888, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied a petition to consolidate two parking tickets for administrative review. Section 3-103 of the Administrative Review Law of the Code of Civil Procedure (735 ILCS 5/3-103 (West 2014)) provides that an action to review a final administrative decision is initiated by filing a complaint within 35 days of a decision. The petitioner argued he substantially complied with Section 3-103 by listing both tickets on the complaint for administrative review and attaching copies of the administrative law judge orders for each ticket. The respondent argued that the petitioner only filed a single complaint for both tickets and therefore did not comply with administrative review law. The court agreed with the respondent, holding that Section 3-103 required the petitioner to file a separate complaint for each ticket. The court reasoned

that a plain reading of Section 3-103 does not indicate a complaint may be filed to review multiple final administrative decisions and, strictly construed, Section 3-103 requires a party to file a complaint for each final administrative decision the party wants to appeal. The court noted that although the petitioner was left with little recourse, Section 3-103 makes no exception for a reasonable mistake in good faith, and stated that the General Assembly, and not the court, was the proper body to enact changes to Section 3-103.

CODE OF CIVIL PROCEDURE – WRONGFUL DEATH; STATUTE OF LIMITATIONS

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

In *Moon v. Rhode*, 2016 IL 119572, the Illinois Supreme Court was asked to decide whether the Appellate court erred in affirming the circuit court's dismissal on statute of limitations grounds. Subsection (a) of Section 13-212 of the Code of Civil Procedure (735 ILCS 5/13-212(a) (West 2012)) provides that "no action for damages for injury or death . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than [two] years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first . . . ." In addition, Section 2 of the Wrongful Death Act (740 ILCS 180/2 (West 2010)) provides that actions "shall be commenced within 2 years after the death of such person." The plaintiff, citing case law, argued that the common law discovery rule, which requires that the suit be brought within two years from the time plaintiff knew or should have known of the negligent conduct, applies to wrongful death cases based on medical malpractice. The defendant argued that the limitations period begins on the date of the decedent's death because there is nothing in the statute suggesting that the discovery rule applies. The court agreed with the plaintiff, holding that the discovery rule applies. The court reasoned that it has already interpreted the meaning of "injury" within the same sentence of Section 13-212 to conclude that the statute of limitations begins to run when a person knows or reasonably should know of his injury, and also knows or reasonably should know that the injury was wrongfully caused. The court noted that the same interpretation should be given to the word "death" in that sentence, and that no reason exists to interpret "death" in a different manner than "injury". Lastly, the court stated that it believed its holding is consistent with 38 years of Illinois appellate authority and the intent of the General Assembly because the General Assembly has amended Section 13-212 of the Code multiple times over the past 38 years and has not amended it in a way that would offer a different interpretation from the court's repeated construction of the statute.

ILLINOIS MORTGAGE FORECLOSURE LAW – FILING DEADLINE FOR MOTION TO QUASH SERVICE

The 60-day filing deadline for a motion to quash service of process is not tolled when a dismissal for want of prosecution is in effect.

In *Bank of New York Mellon v. Laskowski*, 2017 IL App (3d) 140566, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied the defendant's motion to quash service of process as untimely under subsection (a) of Section 15-1505.6 of the Illinois Mortgage Foreclosure Law of the Code of Civil Procedure (735 ILCS 5/15-1505.6(a) (West 2012)). Subsection (a) provides that "[i]n any residential foreclosure action, the deadline for filing a motion to dismiss the entire proceeding or to quash service of process that objects to the court's jurisdiction over the person, unless extended by the court for good cause shown, is 60 days after the earlier of these events: (i) the date that the moving party filed an appearance; or (ii) the date that the moving party participated in a hearing without filing an appearance." The defendant argued that a dismissal for want of prosecution entered on the date the defendant filed an initial appearance stayed the deadline for filing a motion to quash under Section 15-1505.6. The plaintiff argued that the trial court's finding of untimeliness was proper. The appellate court ultimately rejected the defendant's interpretation of Section 15-1505.6 and affirmed the trial court's decision. The court reasoned that the plain language of the statute does not provide an exception that tolls the 60-day time period. A dissenting opinion argued that "the plain terms of the statute and fundamental principles of fairness and common sense suggest that [the 60-day time period] should only run where there exists a *pending action*." In support of its opinion, the dissent noted that the Illinois Supreme Court, while interpreting a different statute, held that "the time that elapses between the voluntary dismissal of a plaintiff's complaint and its refiling . . . may not be considered by a court when ruling on a motion to dismiss for failure to exercise reasonable diligence to obtain service on a defendant . . . because there is no reason to serve a defendant with process . . . if an action is dismissed." *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207 (2007). Invoking the rationale in *Case*, the dissent argued that the court "cannot count the time that passed while the case was dismissed for want of prosecution, because during that time period, there was no pending case" and, as a result, no need for the defendant to file a motion to quash service until after the trial court reinstated the plaintiff's case and granted the defendant leave to file a *second* appearance. The Illinois Supreme Court granted the defendant's Petition for Leave to Appeal on May 24, 2017.

WHISTLEBLOWER ACT – DISCLOSURE

Disclosure of improper conduct to the wrongdoer in a manner that does not otherwise make the conduct known or public does not constitute whistleblowing activity.

In *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, the Illinois Appellate Court was asked to decide whether the circuit court erred when it granted the defendant's motion to dismiss a claim under subsection (b) of Section 15 of the Whistleblower Act (740 ILCS 174/15(b) (West 2014)). Subsection (b) of Section 15 of the Whistleblower Act provides that 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 alleged that he made such a disclosure when he notified the city manager that the city manager's private use of public resources was improper; the plaintiff argued that he reasonably believed that the information "concerned violations of the Illinois Constitution, as well as state laws, rules, and ethics regulations" and that the notification was made to a government agency. The defendant argued that the claims failed to allege whistleblowing activity because the plaintiff didn't report the conduct to the city manager's superior or the public. The court agreed with the defendant, holding that the plaintiff failed to state a cause of action under the Whistleblower Act. In doing so, the court distinguished the case from *Brame v. City of North Chicago*, 2011 IL App (2d) 100760, which involved a police lieutenant who reported criminal conduct by the police chief to the mayor. In *Brame*, the court found that the Whistleblower Act applies even if the government or law enforcement agency is also the employer. Nevertheless, the court in *Sweeney* found that the facts alleged in *Sweeney* are different from the facts alleged in *Brame* because the plaintiff did not report the city manager's conduct to the city manager's superior. In addition, the court noted the plaintiff's allegation that "the city manager knew or should have known" that his conduct was improper because the city manager was a member of the Illinois Law Enforcement Training and Standards Board. The court then applied the dictionary definition of "disclose" to the statutory language. The court found that the term "disclose" means "to expose to view" or "to make known or public." The court held that "simply having a conversation with the wrongdoer about the impropriety of his or her actions is not exposing the alleged improper activity, making it known, or reporting the wrongful conduct." Furthermore, the court found that its conclusion is consistent with the purpose of the Whistleblower Act, which is to protect employees who report illegal activities carried out by their employer or who call attention to those illegal activities by failing to participate.

ILLINOIS FALSE CLAIMS ACT – PUBLIC DISCLOSURE

For the purposes of the public disclosure provisions of the Act, the term "State" includes units of local government, but only the unit of local government allegedly being defrauded.

In *Lyons Township ex rel. Kielczynski v. Village of Indian Head Park*, 2017 IL App (1st) 161574, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found that the relator's claims under the Illinois False Claims Act (740 ILCS 175/1 *et seq.* (West 2014)) were barred by the Act's public disclosure provision. The relator filed a two-count complaint under the Illinois False Claims Act, alleging that the Village of Indian Head Park overbilled Lyons Township for policing services and failed to remit collections from traffic fines to the Township in violation of its contract with the Township. Section 4 of the Illinois False Claims Act (740 ILCS 175/4 (West 2014)), which contains the public disclosure provision of the Act, provides that the "court shall dismiss an action or claim under this Section . . . if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . in a State legislative, State Auditor General, or other State report, hearing, audit, or investigation . . . unless the Action is brought by the Attorney General or the person bringing the action is an original source of the information." Section 2 of the Illinois False Claims Act (740 ILCS 175/2 (West 2014)) defines the term "State" as "the State of Illinois; any agency of State government; the system of State colleges and universities, any school district, community college district, county, municipality, municipal corporation, unit of local government, and any combination of the above under an intergovernmental agreement that includes provisions for a governing body of the agency created by the agreement." The defendant argued, and the circuit court agreed, that the relator's claims were barred by the public disclosure provision of the Illinois False Claims Act because the claims were based on records obtained by the relator from the Village of Indian Head Park under the Freedom of Information Act, and the term "State" is defined broadly in the Act as "any State or local government actor." The relator argued that the documents produced by the Village in response to his Freedom of Information Act request do not qualify as "State records" because the records were not produced by the entity on whose behalf the lawsuit was raised. The appellate court agreed with the relator, holding that, in the context of the public disclosure provision of the Illinois False Claims Act, "State" means the unit of local government allegedly being defrauded. The court reasoned that the purpose of the Illinois False Claims Act is to "provide *qui tam* actions for citizens to *reveal* fraud against the government, not to protect a government entity engaging in fraud." It further reasoned that the purpose of the public disclosure bar is to "strike a balance between encouraging private persons to root out fraud while stifling parasitic lawsuits."

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – WRITTEN MISREPRESENTATIONS

Written misrepresentations are not immune from liability under the Act.

In *Lyons Township ex rel. Kielczynski v. Village of Indian Head Park*, 2017 IL App (1st) 161574, the Illinois Appellate Court was asked to decide whether the circuit court erred in finding that the relator's claims were barred by Section 2-106 of the Local Governmental and Governmental Employees Tort Immunity Act. (745 ILCS 10/2-106 (West 2014)). Section 2-106 provides that a local public entity "is not liable for an injury caused by an oral promise or misrepresentation of its employee." The township argued that the Tort Immunity Act does not apply to the case because the case was based on a contract between the Township and the Village; in the alternative, it argued that the Village's written misrepresentations are not immune from liability under the Act because the statute immunizes only oral misrepresentations. The court agreed with the Township, and, after applying commonly understood principles of grammar and usage, found that the term "oral" in Section 2-106 modifies both "promise" and "misrepresentation."

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – RECREATIONAL ACCESS ROADS

Local public entities are not immune from actions related to the condition of access roads in developed and non-primitive areas.

In *Cohen v. Chicago Park District*, 2016 IL App (1st) 152889, the Illinois Appellate Court was asked to decide whether Subsection (a) of Section 3-107 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-107(a) (West 2012)) applies to the Chicago Park District's Lakefront Trail. Subsection (a) of Section 3-107 of the Act provides that "a local public entity is not liable for any injury caused by a condition of "[a]ny road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway." The plaintiff argued that "primitive" modifies "camping," "recreational," and "scenic" and, therefore, grants immunity only for "primitive" camping, recreational, and scenic areas. The defendant argued "primitive" only applies to "camping" and not to "recreational" or "scenic" areas. The court agreed with the plaintiff, holding that subsection (a) of Section 3-107 of the Act is ambiguous as it could be interpreted as both parties argue. The court reasoned that because subsection (b) of Section 3-107 of the Act has consistently been held to apply to access roads to undeveloped and primitive areas, it "is logical to infer that the legislature likewise intended Section 3-107(a) to apply only to primitive recreational and

primitive scenic areas where it listed recreational and scenic areas in the same sentence as "primitive" camping areas." The court additionally reasoned that it "makes sense that the legislature would relieve a public entity from maintaining access roads to primitive scenic recreational areas because maintaining those roads would defeat the purpose of the primitive property, *i.e*., its enjoyment in its natural state." On March 29, 2017, the Illinois Supreme Court granted the defendant's Petition for Leave to Appeal.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – STATUTE OF LIMITATIONS

For the purposes of determining the limitations period, plaintiff's claim for intentional infliction of emotional distress did not accrue until his conviction was overturned or set aside.

In *Smith v. Burge*, 222 F.Supp.3d 669, the United States District Court for the Northern District of Illinois was asked to decide, in part, whether the plaintiff's intentional infliction of emotional distress claim was timely filed under the one-year limitations period set forth in Section 8-101 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8-101). The plaintiff argued that his complaint was timely filed under the standard set forth by the United States Supreme Court in *Heck v. Humphrey*, 512 U.S. 477, (1994), which holds that if a claim impugns the validity of a criminal conviction, that claim does not accrue until the plaintiff's conviction is overturned or otherwise set aside. The defendant argued that *Heck* does not apply to the plaintiff's claim, and urged the court to rely instead on *Bridewell v. Eberle*, 730 F.3d 672. The court agreed with the plaintiff, and distinguished *Bridewell* from this case because the plaintiffs in *Bridewell* were never convicted of the crimes for which they were placed in custody. The court held that the intentional infliction of emotional distress claim was based on allegations that the defendants procured his prosecution, conviction, and imprisonment by means of a coerced and false confession. Accordingly, the court concluded that the plaintiff's claim did not accrue until his conviction was overturned or set aside.

LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – PROPERTY DAMAGE STATUTE OF LIMITATIONS

The one-year statute of limitations under the Act does not apply to an action against a municipality for wrongful demolition of real property against a municipality.

In *Madison v. City of Chicago*, 2017 IL App (1st) 160195, the Illinois Appellate Court was asked to decide whether the trial court erred when it applied the one-year statute

of limitations period under the Local Governmental and Governmental Employees Tort Immunity Act, instead of the 5-year statute of limitations under the Code of Civil Procedure, to a claim for wrongful demolition of real property. Subsection (a) of Section 8-101 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/8-101(a) (West 2010)) provides, "No civil action . . . may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued." Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (West 2010)) provides that actions "to recover damages for an injury done to property, real or personal, . . . shall be commenced within 5 years next after the cause of action accrued." The plaintiff argued that the five-year general limitation in the Code of Civil Procedure applies because subsection (e) of Section 2-101 of the Act (745 ILCS 10/2-101(e) (West 2010)) exempts actions in which the Illinois Municipal Code provides liability for injury caused by wrongful demolition. The defendant City of Chicago argued that it is not exempted under the provisions of the Act and that the one-year limitation applied. The court agreed with the plaintiff, holding that Section 2-101 of the Act exempts the plaintiff's claim from the Act and that the five-year general statute of limitation in the Code of Civil Procedure applies. The court reasoned that "the broad language the legislature chose [in Section 2-101 of the Act] suggests that its intent was to ensure that 'nothing' in the Act—including the Act's shorter limitations period—could 'affect' . . . claims" such as the plaintiff's. However, the court found that plaintiff's unlawful taking or inverse condemnation, negligence, and conversions claims did fall within the one-year limitations period of the Act.

INCOME WITHHOLDING FOR SUPPORT ACT – ATTORNEY'S FEES

Attorney's fees incurred in obtaining a child support order are not considered child support under the Act.

In *In re Marriage of Zolen*, 2016 IL App (1st) 16-0387-U, the Illinois Appellate Court was asked to determine whether an employer is required, under the Income Withholding for Support Act, to withhold money to pay attorney's fees incurred in obtaining a child support. Section 20 of the Act (750 ILCS 28/20 (West 2014)) provides that "every order for support . . . shall require an income withholding notice to be prepared and served upon any payor of the obligor . . . if the obligor becomes delinquent in paying the order for support." Section 15 (750 ILCS 28/15 (West 2014)) defines "order of support" as "any order of the court which provides for periodic payment of funds for the support of a child or maintenance of a spouse." The plaintiff argued that attorney fees are "in the nature of support," and, as a matter of public policy, attorney's fees incurred in obtaining an order for support are "support" for purposes of the Act "because attorneys assist families

in obtaining support [making attorney] services essential to [families] actually receiving child support." Additionally, the plaintiff argued that since Illinois courts have acknowledged that the support of children is a compelling State interest, "attorney's fees incurred in obtaining orders of support should be given the benefits of the Act in order to incentivize attorneys to assist families in this manner." The defendant argued that under the plain meaning of the language of the Act, attorney's fees are not for the support of a child and therefore an employer is not authorized to withhold an employee's income to pay off the employee's outstanding attorney's fees. The court ultimately agreed with the defendant, holding that the Act "dictates that ["support of a child"] refers to expenses directly associated with a child's livelihood." The court further noted that there was nothing in the language of the Act to suggest extending the meaning of "support of a child" to include attorney's fees. As to the plaintiff's policy arguments, the court observed that "the legislature is in a better position than the court to resolve such policy questions."

ILLINOIS DOMESTIC VIOLENCE ACT OF 1986 – PRIVILEGED COMMUNICATIONS

The advocate-victim privilege is not limited to communications related to domestic violence.

In *People v. Sevedo*, 2017 IL App (1st) 152541, the Illinois Appellate Court was asked to decide whether the trial court erred in denying a domestic violence advocacy center's motion to quash a subpoena for documents generated in connection with report of threatening statements made by a defendant indicted with threatening a public official. Paragraph (3) of subsection (a) of Section 227 of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/227(a)(3) (West 2014)) defines "confidential communication" as "any communication between an alleged victim of domestic violence and a domestic violence advocate or counselor in the course of providing information, counseling, or advocacy." "Confidential communication" includes "all records kept by the advocate or counselor or by the domestic violence program in the course of providing services to an alleged victim concerning the alleged victim and services provided." Subsection (b) of that Section provides that "[n]o domestic violence advocate or counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal case or proceeding or in any legislative or administrative proceeding without the written consent of the domestic violence victim except . . . in cases where failure to disclose is likely to result in an imminent risk of serious bodily harm or death of the victim or another person." The State argued that the advocacy center should be compelled to turn over the documents because they pertain to a statement made in public and not in a privileged context. The State further argued that the statement did not pertain to domestic violence, but rather to a detective's testimony at the defendant's armed burglary trial. The advocacy center argued that the trial

court erred in denying its motion to quash the subpoena because the documents sought concerned a statement the victim made "to her domestic violence advocate while the advocate was attending [victim's] armed robbery trial in accordance with the advocate's job to provide information, counseling, or advocacy." The court agreed with the advocacy center, holding that the "documents were protected by domestic violence advocate-victim privilege." The court reasoned that, based on the plain language of the statute, the General Assembly intended the privilege to extend to "any communication beyond the topic of domestic violence, even statements unrelated to the information, counseling, or advocacy being provided to the victim." The General Assembly could have limited the scope of the privilege from "any communication . . . in the course of providing information, counseling, or advocacy" to "communications related to domestic violence and the services provided to the victim" but did not.

CONDOMINIUM PROPERTY ACT – AMENDMENT TO DECLARATION

A condominium association may not impose requirements for amending a condominium declaration that are more restrictive than the requirements set forth under the Act.

In *Siena At Old Orchard Condominium Association v. Siena At Old Orchard, LLC*, 2017 IL App (1st) 151846, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that a provision of the parties' condominium declaration was invalid because the provision imposed restrictions on amending the declaration that conflicted with the amendment process required under subsection (a) of Section 27 of the Condominium Property Act (765 ILCS 605/27(a) (West 2010)). Subsection (a) provides the procedure for amending the condominium instruments. In the instant case, the parties' condominium declaration contained a provision that prohibited the plaintiff, for a twenty-year period, from amending the declaration without the defendant's "express prior written consent." The defendant argued that the declaration's consent requirement was permissible because the language of Section 27(a) "is intended merely to distinguish between amendments to the declaration, which are subject to a heightened threshold . . . and amendments to bylaws and rules passed by an association's board, which may be amended with fewer votes." Based on this distinction, the defendant asserted that Section 27(a) does not prohibit a condominium association from imposing additional requirements for amending a declaration. The appellate court ultimately upheld the circuit court's decision, holding that the plain language of Section 27(a) indicates that the General Assembly intended for that Section to provide the "only method" for amending a condominium declaration. In support of its holding, the court noted that Section 27(a) provides that, "[i]f there is any unit owner other than the developer, the condominium instruments shall be amended *only as follows.*" The court interpreted this language to mean that "additional restrictions to the amendment process are not permitted." The court also rejected the defendant's assertion that Section 27(a) requires a heightened threshold for amendments to

a declaration. Instead, the court found that Section 27(a) only *"permits"* a heightened threshold because it requires that an amendment receive " ‘the affirmative vote of 2/3 of those voting or upon the majority specified by the condominium instruments,’ up to a three-quarters requirement, meaning that a simple majority could be sufficient if the condominium instrument so provides." The court furthermore opined that "had the legislature intended simply to impose a heightened threshold for amending a declaration without also prohibiting the imposition of more severe restrictions, it could have provided so specifically [as] it did . . . several times in the Act." Instead, the court found that the General Assembly "imposed a default threshold of a two-thirds affirmative vote, as well as an absolute ceiling of a three-quarters vote, and stated [in Section 27(a)] that a declaration ‘shall be amended *only’* through this vote." The court concluded that the General Assembly "specifically selected a [voting] range that it felt appropriate and limited the restrictions for amendment to that range." As such, the court held that the consent requirement under the parties’ declaration was an "alternate, more severe, [restriction]" than what Section 27(a) allows and therefore void.

ILLINOIS TRADE SECRETS ACT – ATTORNEY FEES

Unlike California, "bad faith" in under the Illinois Act need not include a showing of objective speciousness.

In *Conxall Corp. v. Iconn Systems, LLC*, 2016 IL App (1st) 140158, the Illinois Appellate Court was asked to decide whether the trial court abused its discretion by denying the defendant's motion for attorney fees under the Illinois Trade Secrets Act. Section 5 of the Illinois Trade Secrets Act (765 ILCS 1065/5 (West 2012)) provides that "if . . . a claim of misappropriation is made in bad faith . . . the court may award reasonable attorney's fees to the prevailing party." The Act does not define the term "bad faith." The defendant argued, and one member of the court agreed, that "bad faith" should be determined using the test set forth by the California Court of Appeals in *Sasco v. Rosendin Electric, Inc.*, 207 Cal. App. 4th 837 (2012); that case involved an interpretation of a similar fee provision in California's trade secret statute. Under the *Sasco* test, a finding of bad faith requires a finding that the plaintiff's claim was both objectively specious and made with subjective bad faith. By a two to one majority, the court rejected that approach as it relates to the Illinois Trade Secrets Act. In doing so, the majority reasoned that the plain language of the fee provision in the Illinois Trade Secrets Act includes only the term "bad faith" and does not include the term "objective speciousness." The majority in *Conxall* noted that the *Sasco* court relied on a drafter's comment to the fee provision in the Uniform Trade Secrets Act when it included objective speciousness as part of the standard. Since that comment was adopted in California but was not adopted by the Illinois legislature, the court reasoned that the Illinois statute should be interpreted to allow fees upon a showing of bad faith "as that term is commonly understood in this state." In determining how bad faith "is

commonly understood in this state," the court looked to case law setting forth a test for determining bad faith in the context of awarding attorney's fees under subsection (c) of Section 10a the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/10a(c) (West 2004)). The court vacated the order denying the defendant's motion for attorney's fees and remanded to the trail court for a determination of whether the defendant has made a sufficient showing of bad faith on the part of the plaintiff.

HEALTH CARE SERVICES LIEN ACT – BILLING REQUIREMENTS

A health care provider is not required to bill an injured person's health insurance before pursuing a lien under the Act.

In *Barry v. St. Mary's Hospital Decatur*, 2016 IL App (4th) 150961, the Illinois Appellate Court was asked to decide whether the circuit court erred in granting the defendant hospital's motion to dismiss when the defendant hospital had placed liens on the plaintiff's personal injury settlement before billing the plaintiff's health insurance. Subsection (a) of Section 10 of the Health Care Services Lien Act (770 ILCS 23/10(a) (West 2012)) provides that a health care provider that renders treatment to an injured person shall have a lien upon all claims or causes of action of the injured person for the provider's reasonable charges up to the date of payment of damages to the injured person. The plaintiff argued that a provider must bill an injured person's health insurance before pursuing a lien and that the lack of a subrogation clause in the agreement between his provider and insurer made his situation distinct from precedent. The defendant argued that it is appropriate for a health care provider to file a lien instead of billing health insurance for treatment of an injured person. The court agreed with defendant, holding that under the Act, a health care provider can file a lien as opposed to first billing health insurance. The court reasoned that the plain language of the Act clearly permitted the defendant hospital to place a lien for the amount of the plaintiff's medical bills on his claims and causes of action. The court stated that the lack of a subrogation clause was "of no import," as the language of the Act does not require such a clause. Furthermore, the court noted that the General Assembly could have added language to the Act to require a provider to first bill an injured party's health insurance, but chose not to do so.

LIMITED LIABILITY COMPANY ACT – PROPER ACTIONS AGAINST INDIVIDUAL MEMBERS OF A LIMITED LIABILITY COMPANY

Provisions allowing one member of an LLC to sue other members of the LLC do not extend to a deceased member's estate.

In *Daniel v. Ripoli*, 2016 IL App (1st) 122607-U, the Illinois Appellate Court was asked to decide if the circuit court erred when it held that under Section 10-10(a) of the Limited Liability Company Act (805 ILCS 180/10-10(a) (West 2012)), the defendants were not personally liable in their capacity as members of a limited liability company (LLC) for breach of contract and the amount of LLC distributions owed to the estate of a deceased member. Section 10-10(a) provides that with certain exceptions, "the debts, obligations, and liabilities of a limited liability company . . . are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." The plaintiffs were co-executors of the estate of a deceased member of the LLC, and argued that the circuit court erroneously relied on Section 10-10(a) when it granted the defendants' post-judgment motion, because Section 15-20(a) (805 ILCS 180/15-20(a) (West 2012)) of the Act permits a member of an LLC to "maintain an action against . . . another member for legal or equitable relief . . . to enforce . . . the member's rights under the operating agreement . . . the member's rights under the Act . . . and any right and interests of the member including rights and interests arising independently of the member's relationship to the company." The appellate court ultimately affirmed the circuit court's decision, holding that the plaintiffs did not have a proper claim under Section 15-20(a) because the plain language of that Section explicitly provides that only a member of an LLC can maintain an action against another member. In support of its holding, the court noted that the plaintiffs "cited to no authority" allowing a member's representative, agent, or estate to maintain an action against individual members of an LLC. Additionally, the court noted that under Section 35-45(8) (805 ILCS 180/35-45(8)), a member who is an individual becomes dissociated from the LLC upon the member's death. Since the breach of contract claims filed against the defendants were brought by the plaintiffs as co-executors of the deceased member's estate, the court concluded that the plaintiffs could not properly maintain an action under Section 15-20(a) and obtain a judgment against the defendants.

AUTOMATIC TELEPHONE DIALERS ACT – ESTABLISHED BUSINESS

Calls made to persons who have a prior business relationship with a company do not have to fall within a specified period of time after the last contact with the customer.

In *United States v. Dish Network, LLC*, 2017 WL 2427297, the United States District Court for the Central District of Illinois was asked to decide whether the defendant violated the Automatic Telephone Dialers Act when it placed calls through an autodialer to certain Illinois telephone numbers and caused a prerecorded message to be played without the customer's consent. Subsection (b) of Section 30 of the Automatic Telephone Dialers Act (815 ILCS 305/30) provides that "[it] is a violation of this Act to play a prerecorded message placed by an autodialer without the consent of the called party." However, paragraph (2) of subsection (a) of Section 20 of that Act (815 ILCS 305/20(a)(2)) creates an exception for "calls made to any person with whom the telephone solicitor has a prior or existing business relationship." The defendant argued that sales scripts submitted as evidence show that intended recipients were customers of the defendant. The court agreed with the defendant, finding that the defendant's conduct falls within the exception provided in Section 20. The court reasoned that the term "existing business relationship" is not defined under the Act, and the plain language of the statute does not require the call to have been made within any specified period of time after the last transaction with the customer. However, the court noted that language in a similar rule by the Federal Communications Commission does require the call to have been made within 18 months of the last purchase date.

EMPLOYEE CREDIT PRIVACY ACT – DESCRIPTION OF ISSUE

An employer may not discriminate based on credit history to fill a sales associate position in which the employee receives store credit card applications containing confidential information.

In *Ohle v. Neiman Marcus*, 2016 IL App (1st) 141994, the Illinois Appellate Court was asked to decide whether the trial court erred in dismissing a discrimination action in which the defendant rescinded an offer of employment to the plaintiff as a sales associate based on her credit history. Paragraph (5) of subsection (b) of Section 10 of the Employee Credit Privacy Act (820 ILCS 70/10(b)(5) (West 2012)) provides that an employer is exempt from the prohibition of discriminating against an individual based on the individual's credit history or credit report if the position in which the individual is seeking employment "involves access to personal or confidential information, financial information, trade secrets, or State or national security information." The plaintiff argued that a sales associate employed by the defendant does not have access to personal or

confidential customer information because the sales associates "merely receive the credit card applications" and turns over the information "to managers or employees [the defendant] trusts with the information." The defendant argued "that an associate's mere receipt of a credit card application amounts to 'access' to confidential information." The court agreed with the plaintiff, holding that "the sales associate position did not give employees 'access' to confidential customer information within the meaning of the Act." The court reasoned that if the term "access" was given such a broad definition so as to include sales associate positions who merely accept credit cards applications, it would defeat the legislative intent evident in the Act.

ILLINOIS WAGE PAYMENT AND COLLECTION ACT – SEPARATED EMPLOYEE FINAL COMPENSATION

A separated employee is not entitled to payment of final compensation beyond the next regularly scheduled payday following his or her separation from the employer.

In *Miranda v. MB Real Estate Services, LLC*, 2016 IL App (1st) 152971-U, the Illinois Appellate Court was asked to decide whether the trial court erred when it dismissed the plaintiff's claim that certain payments owed to him constituted "final compensation" within the meaning of the Illinois Wage Payment and Collection Act (Wage Act), and the defendant's refusal to make payments violated that Act. Section 2 of the Illinois Wage Payment and Collection Act (820 ILCS 115/2 (West 2014)) provides that "[p]ayments to separated employees shall be termed 'final compensation' and shall be defined as wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the 2 parties." Section 5 of the Illinois Wage Payment and Collection Act (820 ILCS 115/5 (West 2014)) provides that "[e]very employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for such employee." The plaintiff argued that the agreed to monthly payments from the defendant for the period after 2007 were owed as "final compensation" under the Wage Act, and the defendant's refusal to make those payments to him was a violation of the Wage Act. The plaintiff further argued that he should be able to opt out of the deadline set in Section 5 of the Wage Act because of a contractual agreement providing for payments after 2007. The defendant argued that the payments alleged to be owed by the plaintiff did not constitute "final compensation," and therefore the plaintiff was not owed any payments after 2007. The court agreed with the defendant, holding that any payments for the period after 2007 were not owed to the plaintiff as "final compensation". The court reasoned that Sections 2 and 5 of the Wage Act read together require an employer to pay "final compensation" to a separated employee upon separation, but must pay that compensation

in full no "later than the next regularly scheduled payday." The court further reasoned that "if any such compensation cannot be determined as of the next regularly scheduled payday after termination, it is not final compensation under the Wage Act" and is not owed as such by the defendant. Although the plaintiff argued that the court's interpretation based upon case law "impermissibly narrows the protection of the Wage Act" as intended by the General Assembly, the court refused to allow for an opt out of the Section 5 deadline because no such opt out provision is provided for within the language of Section 5, even with the existence of a payment agreement. The court stated the fact that the statute as interpreted by the court appears to penalize employees who agree to post-separation deferred compensation payments" is an issue for the General Assembly to address.

PUBLIC SAFETY EMPLOYEE BENEFITS ACT – CATASTROPHIC INJURY

A disease that qualifies for an occupational disease disability pension under the Downstate Firefighter Article of the Illinois Pension Code is not a catastrophic injury for the purposes of the Act.

In *Bremer v. City of Rockford*, 2016 IL 119889, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that a disease that qualifies for an occupational disease disability pension ("ODD pension") under Section 4-110.1 of the Illinois Pension Code (40 ILCS 5/4-110.1 (West 2008)) qualifies as a catastrophic injury for the purposes of subsection (a) of Section 10 of the Public Safety Employee Benefits Act (820 ILCS 320/10(a) (West 2008)). Subsection (a) of Section 10 of the Act provides that certain public safety employees who suffer a "catastrophic injury" are entitled to have the entirety of their health care premiums paid for by their employer. Section 4-110.1 of the Illinois Pension Code provides an ODD pension for active firefighters found to be unable to perform their duties "by reason of heart disease, stroke, tuberculosis, or any disease of the lungs or respiratory tract, resulting from service as a firefighter." The plaintiff argued that under Illinois Supreme Court precedent, an injury that results in a line-of-duty disability pension ("LDD pension") under Section 4-110 of the Code (40 ILCS 5/4-110 (West 2008)) is a catastrophic injury for the purposes of the Act, and that an ODD pension is a type of LDD pension because the injury necessarily results from service as a firefighter. The defendant argued that an injury that results in an ODD pension is not necessarily a catastrophic injury under the Act because the requirements for a LDD pension are different from the requirements for an ODD pension. The court agreed with the defendant, holding that "the definition of 'catastrophic injury' is limited to those injuries resulting in a [LDD] pension." The court reasoned that, although an injury resulting in a LDD pension qualifies as a "catastrophic injury," the eligibility requirements for an ODD pension are different from the eligibility requirements for a LDD pension and that "nothing in the legislative history indicates an intent to expand the definition of 'catastrophic injury' to include other

types of disability pensions awarded under other sections of the . . . Code." One justice concurred in part and dissented in part. The justice agreed that "the phrase 'catastrophic injury' in the . . . Act is not synonymous with a disease resulting in the award of an [ODD pension]," but dissented with the majority's dismissal of the case. The concurrence argued that "there is nothing in the plain language of [the Act] stating that the trial court cannot make an independent determination on the 'catastrophic injury' requirement . . . or that the only way to establish a catastrophic injury is through the [Board of Trustees of the Fund's] award of a [LDD] pension."

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