2019 CASE REPORT

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

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Executive Director: James W. Dodge

Principal Attorneys: Andrea M. Creek, Wayne G. Hedenschoug

Senior Counsel: Nicole H. Truong, John L. Shull

Senior Attorneys: Robert L. Cohen, Konjit T. Gomar, Heather L. Harding

Staff Attorneys: Timothy A. Ernst, Casey P. Fitzgerald, Ronald Freeman, Shannon L. Fruth, Christina M. Graham, Andrew W. Janetzke, Azita Kakvand, Heidi E. Poyer, Richard P. Schaller, Brian M. Sabal, Lauren N. Smith, Sarah M. Smith, Stephen P. Spence

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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 2019 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 2018 to the summer of 2019.

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 rewrite can be found online at http://ilga.gov/commission/lrb/Criminal-Code-Rewrite-Conversion-Tables.pdf

SUMMARIES OF RECENT COURT DECISIONS

FREEDOM OF INFORMATION ACT – DISCLOSURE EXEMPTIONS

Under certain circumstances, a public body may assert an exemption from the disclosure of records held by other public bodies.

In *Kelly v. Village of Kenilworth*, 2019 IL App (1st) 170780, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that a defendant village was permitted to assert an exemption from disclosure of records held by codefendant public bodies under the Freedom of Information Act. Subparagraph (1)(d)(vii) of Section 7 of the Freedom of Information Act (5 ILCS 140/7(1)(d)(vii) (West 2016)) provides that public bodies may assert an exemption to the disclosure of public records to the extent that disclosure would "obstruct an ongoing criminal investigation by the agency that is the recipient of the request." The plaintiff, who was seeking information about an unsolved murder from over 50 years ago, argued that subparagraph (vii) does not allow the defendant "to assert an exemption over the other defendants because the statute only applies where 'the recipient of the request' is conducting ongoing investigations," and the other defendants were not conducting investigations when they received the requests. The defendant, which was conducting an investigation, argued that it may assert an exemption from disclosure of records held by the other defendants, who were not conducting an investigation. The court agreed with the defendant, holding that the defendant could assert an exemption over records held by other defendants in the case. Citing case law, the court reasoned that although the other defendants were not conducting ongoing investigations, the Act "implicitly requires the recipient of a FOIA request to consult with another public body if the recipient (1) denies that the documents sought are exempt or declines to assert an applicable exemption and (2) knows that the agency with which the documents originated would choose to assert the exemption." The court further reasoned that "mere possession of the documents, standing alone, is not determinative of an agency's ability to release documents pursuant to the FOIA if another governmental entity has a substantial interest in asserting an exemption." The court further added that it is not clear that the General Assembly intended to depart from this case law because the amendment adding "the recipient of the request" provision to the statute occurred long after the court's ruling in that case, and the "legislative record is silent as to why this language was added." As such, the court found that the circuit court properly determined that the defendant could assert an exemption over records held by other defendants in the case, despite the fact that those other defendants were not conducting an ongoing investigation at the time they received a Freedom of Information Act request.

ELECTION CODE – POLITICAL COMMITTEE EXPENDITURES

A political committee may not purchase a vehicle for noncampaign activity, and may not make reimbursements for gas and repairs of personal vehicles.

In *Cooke v. Illinois State Board of Elections*, 2019 IL App (4th) 180502, the Illinois Appellate Court was asked to decide whether the Illinois State Board of Elections ("Board") erred when it found that a political committee violated paragraphs (2) and (9) of subsection (a) of Section 9-8.10 of the Election Code (10 ILCS 5/9-8.10 (West 2010)). Paragraph (2) provides, "A political committee shall not make expenditures: . . . [c]learly in excess of the fair market value of the services, materials, facilities, or other things of value received in exchange. . . ." Paragraph (9) prohibits expenditures "[f]or the purchase of or installment payment for a motor vehicle unless the political committee can demonstrate that purchase of a motor vehicle is more cost-effective than leasing a motor vehicle as permitted under this item (9)." Paragraph (9) continues, "A political committee may lease or purchase and insure, maintain, and repair a motor vehicle if the vehicle will be used primarily for campaign purposes or for the performance of governmental duties. A committee shall not make expenditures for use of the vehicle for noncampaign or nongovernmental purposes. Persons using vehicles not purchased or leased by a political committee may be reimbursed for actual mileage for the use of the vehicle for campaign purposes or for the performance of governmental duties. The mileage reimbursements shall be made at a rate not to exceed the standard mileage rate method for computation of business expenses under the Internal Revenue Code."

The plaintiff argued that the plain language of paragraph (2) regulates both the amount of a political committee's expenditure and the purpose for which the expenditure is used. The political committee and the Illinois State Board of Elections argued that paragraph (2) regulates only the amount of an expenditure because ." . . so long as a committee pays market value for a particular item, the purpose for which that item is actually used is irrelevant." The court agreed with the plaintiff, holding that paragraph (2) regulates the amount and the purpose of the expenditure. The court reasoned that the statute prohibits a political committee "from paying market value for a particular item or service and then allowing that item or service to be used for a purpose unrelated to campaign or governmental duties."

As to the violation of paragraph (9), the plaintiff argued that the language prohibits a political committee from making expenditures for gas and repairs for vehicles not owned or leased by the political committee and used primarily for campaign and governmental duty purposes. The political committee argued that the language only prohibits a political committee from making expenditures for a vehicle for noncampaign or nongovernmental purposes. The Illinois State Board of Elections argued that paragraph (9) allows a political committee to make expenditures directly for gas and repairs of a vehicle not owned or leased by the political committee if the vehicle is used for campaign or governmental

function "so long as that reimbursement does not exceed the standard reimbursement rate." The court agreed with the plaintiff, holding that paragraph (9) prohibits an "expenditure to a third party for gas and repairs of vehicles neither owned nor leased by [a political] committee." The court reasoned that a plain reading of paragraph (9) does not authorize what the political committee and State Board of Elections contends. Further, the court argues that the General Assembly covered reimbursements for personal vehicles by authorizing reimbursements for mileage "at a rate not to exceed the standard mileage rate method for computation of business expenses."

ILLINOIS POWER AGENCY ACT – RENEWABLE ENERGY GENERATION FACILITY SUPPORT PROGRAMS

Renewable energy generation facilities located in the service territories of municipal utilities and rural electric cooperatives may participate in certain renewable energy support programs.

In *Commonwealth Edison Company v. Illinois Commerce Comm'n*, 2019 IL App (2d) 180504, the Illinois Appellate Court was asked to decide whether the Illinois Commerce Commission erred in approving the Illinois Power Agency's plan to allow renewable energy generation facilities located in the service territories of municipal electric utilities and rural electric cooperatives to participate in new renewable energy support programs under the Illinois Power Agency Act. Section 1-10 of the Illinois Power Agency Act (20 ILCS 3855/1-10 (West 2016)) defines "community renewable generation project" and "distributed renewable energy generation device" to include electric generating facility projects and devices that are "interconnected at the distribution system level of an electric utility . . . , a municipal utility . . . , or a rural electric cooperative . . . ." The petitioner, Commonwealth Edison, argued that the General Assembly intended to exclude the generation facilities operating in the service areas of municipal utilities and rural electric cooperatives from participating in renewable energy support programs. The respondent, the Illinois Commerce Commission ("Commission"), argued that "generation facilities located in the service territories of municipal utilities and rural electric cooperatives are eligible to participate in the programs." The court agreed with the Commission, holding that the General Assembly intended the renewable energy support programs to apply to generation facilities located in the service territories of municipal utilities and rural electric cooperatives. The court reasoned that, based upon terms defined under Section 1-10 of the Act that refer to municipal utilities and rural electric cooperatives, the General Assembly intended the Illinois Solar for All Program, the Adjustable Block Program, and the Community Renewable Generation Program created under the Act to apply to municipal utilities and rural electric cooperatives. The court, citing case law, further reasoned that "an agency's construction of law may be afforded substantial weight and deference if the

meaning of the terms used in a statute is uncertain, because agencies make informed judgments based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent." As such, the court chose to defer to the Commission's statutory interpretation as the agency with expertise on the matter, and reasoned that if the General Assembly intended to exclude generation facilities located in the service territories of municipal utilities and rural electric cooperatives from the programs, as argued by the petitioner, it would have included "an express statement that such projects are excluded."

PROPERTY TAX CODE – TRUTH IN TAXATION

Taxing districts are not required to hold truth in taxation hearings if their aggregate levies do not exceed 105% of the previous year's levy, and taxing districts are not required to make their revenue estimates publicly available.

In *Mandigo v. Stolman*, 2019 IL App (2d) 180466, the Illinois Appellate Court was asked to decide whether the trial court erred when it granted summary judgment in favor of several taxing districts after the plaintiffs filed a tax objection complaint against the districts seeking refunds of allegedly unlawful portions of their 2016 property taxes. Section 18-56 of the Truth in Taxation Law of the Property Tax Code (35 ILCS 200/18-56 (West 2016)) provides that the purpose of the Truth in Taxation Law is "to require taxing districts to disclose by publication and to hold a public hearing on their intention to adopt an aggregate levy in amounts more than 105% of the amount of property taxes extended . . . upon the final aggregate levy of the preceding year." Additionally, Section 18-60 of that Law (35 ILCS 200/18-60 (West 2016)) requires each taxing district, not less than 20 days prior to the adoption of its aggregate levy, to estimate the amount of money necessary to be raised by taxation for that year upon the taxable property in the district. The plaintiffs argued that certain portions of their 2016 property taxes were unlawful because the taxing districts failed to make their estimates publicly available. The defendant, a county, argued that its budget process, which included presenting the budget estimate at a Committee of the Whole meeting and making the budget estimate available on the county's website, satisfied its Truth in Taxation requirements. Various other taxing districts intervened in the matter, arguing that, since their aggregate levies did not exceed 105% of the previous year's levies, they were not required to give notice or hold a public hearing. The court agreed with the intervenors, holding that the Truth in Taxation Law did not apply to the intervenors because their levies did not exceed the 105% threshold. The court also agreed with the defendants, holding that Section 18-60 does not require taxing districts to make their estimates publicly available because such a provision does not appear in the statute or as part of the legislative history.

PROPERTY TAX CODE – SALE IN ERROR

A tax purchaser is not entitled to a sale in error as a result of a lien from a water reclamation district for unpaid usage fees.

In *In re County Treasurer*, 2019 IL App (2d) 180727, the Illinois Appellate Court was asked to decide whether the trial court erred when it granted the petitioner's motion for a sale in error under Section 22-35 of the Property Tax Code (35 ILCS 200/22-35 (West 2016)) when the property was encumbered by a lien from a water reclamation district for unpaid usage fees. Section 22-35 of the Property Tax Code provides that "an order for the issuance of a tax deed under this Code shall not be entered affecting the title to or interest in any property in which a county, city, village or incorporated town has an interest under the police and welfare power by advancements made from public funds, until the purchaser or assignee makes reimbursement to the county, city, village or incorporated town of the money so advanced or the county, city, village, or town waives its lien on the property for the money so advanced." That Section further provides that the tax purchase may be set aside as a sale in error in such a case. The tax purchaser argued that a municipal corporation, in this case a water reclamation district, is the same as a county, city, village, or incorporated town in that landowners do not have a choice in their sewer providers; as a result, failing to grant a sale in error would result in an absurdity not intended by the General Assembly. The Lake County Treasurer argued that a water reclamation district is a "municipal corporation," which does not fall into any of the categories listed in Section 22-35. The court agreed with the Treasurer, holding that the tax purchaser is not entitled a sale in error as a result of a lien from a water reclamation district. The court reasoned that special districts are not included in the categories listed in Section 22-35. It further reasoned that a sale in error should not be granted because the lien does not stem from an advancement of public funds, as required by the statute.

ILLINOIS PENSION CODE – BENEFIT REDUCTIONS

Changes eliminating the right of current members to contribute to a pension fund and earn service credit for certain leaves of absence and modifying the calculation of salary for pension purposes violated the pension protection clause of the Illinois Constitution.

In *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago*, 2018 IL 122793, the Illinois Supreme Court was asked to decide whether the circuit court erred when it found that the elimination of a member's right to contribute to the pension fund and earn service credit for leaves of absence during which the member is employed by a labor organization was unconstitutional because it violated the pension

protection clause of the Illinois Constitution (ILL. CONST. art. XIII, § 5), but that a change in the calculation of final average salary to exclude salaries paid by the labor organization while on a leave of absence was constitutional. Subsection (c) of Section 8-226 and item (3) of subsection (c) of Section 11-215 of the Illinois Pension Code (40 ILCS 5/8-226(c); 11-215(c)(3) (West 2010)) authorized a member to earn service credit for leaves of absence without pay during which the member is employed by a labor organization if certain requirements are met. Public Act 97-651 limited the applicability of those provisions to leaves of absence occurring before the effective date of the Public Act. Public Act 97-651 added subsection (e) to Section 8-223 and subsection (e) to Section 11-217 of the Code (40 ILCS 5/8-223(e); 40 ILCS 5/11-217(e) (West 2012)), changing the calculation of highest annual salary to exclude salaries paid by an entity other than a governmental employer and specified that it "is a declaration of existing law and shall not be construed as a new enactment."

With regard to the provision eliminating the right to earn service credit for full-time employment with a labor organization, the plaintiff argued that the elimination of that right, as applied to current members, violated the pension protection clause. The defendant argued that although the right to earn that service credit is a benefit within the meaning of the pension protection clause, the right is not protected because the drafters of the pension protection clause did not intend for such a benefit to be protected. The court agreed with the plaintiff, holding that the elimination of the right violated the pension protection clause. The court reasoned that the right to earn service credit for leaves of absence related to employment with a labor organization was a right that existed at the time the pension protection clause was adopted and that "[if] the drafters had intended to prevent any benefit related to service credit in connection with work done for a labor organization while on a leave of absence, they could have so specified . . . [but] they did not."

With regard to the changes to the calculation of final average salary, the plaintiff argued that even if the calculation of final average salary was ambiguous before amendment by Public Act 97-651, "the legislature could not simply declare their amendments to be a 'declaration of existing law' in order to clear up the ambiguity and circumvent the protection of the pension protection clause." The defendant argued that Public Act 97-651 "did not change the meaning of the . . . Code because it always unambiguously required that the salary to be used for calculating the pension was to be the salary attached to the government position . . . from which [the employee] was on leave of absence." The court agreed with the plaintiff, holding that the changes to the calculation of final average salary, as applied to current members, violated the pension protection clause. The court noted that the provisions before amendment by Public Act 97-651 were ambiguous. Accordingly, the court reasoned that "where there is any question as to legislative intent and the clarity of the language, "it must be liberally construed in favor of the rights of the pensioner" and that "[if] the legislature had the power to 'clarify' the intent of an ambiguous pension statute against the rights of the participants, it would essentially negate the protections of the pension clause . . . ."

ILLINOIS PENSION CODE – HEALTH INSURANCE

The Board of Trustees of the Fund may not limit health insurance benefits to annuitants whose last employer was the county.

In *Levin v. Retirement Board of County Employees' & Officers' Annuity & Benefit Fund of Cook County*, 2019 IL App (1st) 181167, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found that the Board of Trustees of the Fund had the authority to impose an additional eligibility requirement for annuitant health insurance benefits. Section 9-239 of the Illinois Pension Code (40 ILCS 5/9-239 (West 2016)) provides that "the Fund may pay, on behalf of each of the Fund's annuitants who chooses to participate in any of the county's health care plans, all or any portion of the total health care premium . . . due from each such annuitant." The Board of Trustees of the Fund adopted a rule, referred to as the "last-employer rule," that specified that "[t]o be eligible for benefits under the Group Health Benefit . . . you must have been last employed with Cook County or the Forest Preserve District." The defendant argued that Section 9-239 "does not require healthcare coverage be provided to annuitants of the Fund or prohibit the Fund from establishing reasonable eligibility requirements . . . ." The plaintiff argued that Section 9-239 contained the only eligibility requirement and "does not allow the Board to impose the 'last-employer' rule as an additional qualification to purchase group health insurance." The court agreed with the plaintiff, holding that the Board of Trustees did not have the authority to implement the last-employer rule. The court reasoned that the use of the word "may" in Section 9-239 refers to the Fund's payment of health care premiums and not to an annuitant's right to participate in the health care plan. Accordingly, the court reasoned, only two eligibility requirements are contained in Section 9-239, that the person be an annuitant and that he or she chooses to participate in the health care plan. A dissenting opinion argued, among other things, that Section 9-239 does not establish any right to purchase group health insurance and that Section 9-239 "only provides the Fund with the authority to subsidize health care premiums." On September 25, 2019, the Illinois Supreme Court granted leave to appeal the decision.

ILLINOIS PENSION CODE – RETROACTIVE REPEAL OF BENEFITS

The retroactive repeal of a provision authorizing certain teachers to purchase service credit for past employment with a teachers' union violates the Illinois Constitution.

In *Piccioli v. Board of Trustees of the Teachers' Retirement System*, 2019 IL 122905, the Illinois Supreme Court was asked to decide whether the circuit court erred when it found that Public Act 97-651, which removed a provision added by Public Act 94-1111 that authorized certain teachers to establish service credit for prior service as

employees of a teachers union, did not violate the pension protection clause of the Illinois Constitution (ILL. CONST. art. XIII, § 5). Section 16-106 of the Illinois Pension Code (40 ILCS 5/16-106 (West 2006)), before amendment by Public Act 97-651, provided that a person who is an officer or employee of a statewide teacher organization or officer of a national teacher organization who is certified under the law governing certification of teachers may establish service credit "if he or she (i) is certified as a teacher on or before the effective date . . . , (ii) applies in writing to the system within 6 months after the effective date . . . , and (iii) pays [a specified contribution] to the system." Public Act 97-651 removed that provision and provided that the Public Act "hereby repeals and declares void ab initio the last paragraph of Section 16-106 of the Illinois Pension Code as contained in Public Act 94-1111 as that paragraph furnishes no vested rights because it violates multiple provisions of the 1970 Illinois Constitution . . . ." The plaintiff argued that the retroactive repeal of the provision violated the pension protection clause of the Illinois Constitution. The defendant argued that the provision added by Public Act 94-1111 was not protected under the pension protection clause because that provision violated the special legislation clause of the Illinois Constitution (ILL. CONST. art. IV, § 13) due to the arbitrary cutoff date for qualifying for the benefit. The court agreed with the plaintiff, holding that the retroactive repeal of the provision violated the pension protection clause. The court reasoned that "the inclusion of a cutoff date in a statute, especially a statute that confers benefits or establishes a government program reliant on public funding, is entirely rational" and that "the legislature reasonably could have chosen to impose a cutoff date for the purpose of budgetary responsibility and preservation of the State's pension funds." A dissenting opinion argued that although fiscal responsibility would be a valid reason for the cutoff date, the legislative history of the provision did not indicate that the General Assembly was concerned with the cost and that when a "classification is based simply upon the fortuity of falling on the early side of a moment in time, it is arbitrary and not rationally related to a legitimate government interest."

FIRE PROTECTION DISTRICT ACT – PRIVATE RIGHTS OF ACTION

A private company may not sue a fire protection district premised on enforcing competition in the alarm-system market.

In *Alarm Detection Systems, Inc. v. Orland Fire Protection District, et al.*, 929 F.3d 865 (2019), the United States Seventh Circuit Court of Appeals was asked to decide whether the Fire Protection District Act allows for a private right of action against a fire protection district. The Act provides for the creation of fire protection districts and regulates a district's authority to purchase equipment, adopt safety codes and protocols, employ firefighters, and to collect needed revenue for operation. Section 1 of the Act provides that the Act's purpose is "to promote and protect the health, safety, welfare and

convenience of the public . . . ." (70 ILCS 705/1). The plaintiff, fire alarm company Alarm Detection Systems, Inc. ("ADS"), sued the defendant, the Orland Fire Protection District ("District"), after the District signed an exclusive contract with another fire alarm company to supply equipment to businesses required to install fire alarms that would directly contact the District if the alarm was triggered. ADS argued that the Act implies a private right to sue a fire protection district. The District argued that the Act does not imply that ADS may sue the District for its claims. The court agreed with the District, holding that the Act does not imply a private right of action for ADS. The court reasoned that nowhere in the Act is "evidence of a concern for competition, let alone care for the commercial welfare of competing alarm-system providers." Additionally, while the Act's stated intent is to protect public residents from fire-related damage or harm, the Act does not express an intent to protect commercial businesses or competition. The court limited its holding to the Act's not providing a private right of action premised on enforcing competition in the alarm-system market, and the court did not foreclose on other implied rights of action.

EMERGENCY MEDICAL SERVICES (EMS) SYSTEMS ACT – CIVIL IMMUNITY

Ambulance services are not immune from civil liability for negligent acts or omissions that occur while the ambulance is en route to pick up a patient for nonemergency transport.

In *Hernandez v. Lifeline Ambulance, LLC*, 2019 IL App (1st) 180696, the Illinois Appellate Court was asked to decide whether an ambulance service is immune from liability for injuries allegedly incurred by the plaintiff due to the negligence of the defendant and occurring while the defendant was on the way to pick up a patient for a nonemergency. Subsection (a) of Section 3.150 of the Emergency Medical Services (EMS) Systems Act (210 ILCS 50/3.150(a) (West 2016)) provides that ambulance services are immune from civil liability for negligent acts or omissions when providing nonemergency medical services in the course of conducting their duties. Section 3.10 of the Act (210 ILCS 50/3.10(g) (West 2016)) defines "nonemergency medical services" to include "transportation of [nonemergency] patients to or from health care facilities . . . ." The plaintiff argued that because the ambulance in question had not yet picked up the patient, but was instead on its way to do so, there was no transportation at the time of the incident and therefore the defendant's actions were not entitled to immunity as a nonemergency medical service. The defendant argued that "nonemergency medical services" include operation of the ambulance while in transit to pick up a patient. The court agreed with the plaintiff, holding that immunity does not extend to an ambulance driver's negligence before the driver has procured the patient. The court reasoned that the plain language of the Act unambiguously states that transportation of the patient is a prerequisite for immunity as a

nonemergency medical service. The dissenting opinion argued that because the General Assembly did not specifically exclude driving an ambulance to pick up a patient as a nonemergency medical service, the Act should be read to include that activity under immunity from civil liability. On May 22, 2019, the Illinois Supreme Court granted the Defendant's Petition for Leave to Appeal.

ILLINOIS INSURANCE CODE – UNFAIR AND DECEPTIVE TRADE PRACTICES

An insurance company is not protected from suit by the filed rate doctrine, and actions alleging unfair and deceptive business practice actions are not subject to the primary jurisdiction doctrine.

In *Corbin v. Allstate Corporation*, 2019 IL App (5th) 170296, the Illinois Appellate Court was asked to decide: (1) whether the plaintiff's claims concerning automobile insurance rates are barred by the filed rate doctrine; and (2) whether the Department of Insurance has primary jurisdiction to determine if the defendant's conduct constitutes unfair and deceptive trade practice. The plaintiffs sought to bring a case alleging that the defendant engaged in deceptive and unfair business practices, and was unjustly enriched by charging longtime, loyal customers higher auto insurance premiums than other customers based on undisclosed, non-risk-based factors. The defendant auto insurer argued that the case should be dismissed under the filed rate doctrine, which provides that any rate filed by a regulated entity that is approved by the governing authority is *per se* reasonable and may not be challenged in judicial proceedings. The defendant argued that because it had filed its rates with the Department of Insurance, it was immune from lawsuits challenging its rates. The plaintiff argued that because the rules implementing the Illinois Insurance Code (215 ILCS 5/ (West 2016)) require only the filing, and not subsequent approval of rates, the filed rate doctrine does not afford the defendant protection. The court agreed with the plaintiffs, holding that the filed rate doctrine is not applicable. The court reasoned that under the current statutory scheme, auto insurance rates that are filed by an insurance company are not subject to regulatory approval by the Department of Insurance. The court concluded that because the defendant's "private passenger automobile insurance rates were not set, approved, or disapproved by the Department of Insurance," the filed rate doctrine does not bar the plaintiff's claim.

The defendant also argued that the case should be remanded to administrative proceedings under the Department of Insurance in keeping with the common law doctrine of primary jurisdiction. This doctrine provides that even though the circuit court has jurisdiction over a matter, the court should . . . stay the judicial proceedings and allow an administrative agency to decide an issue when the agency has specialized or technical expertise that would help resolve an issue. In support of its argument, the defendant noted

that Section 429 of the Illinois Insurance Code (215 ILCS 5/ (West 2016)) grants broad investigative authority to the Director of Insurance to determine whether unfair business practices have occurred. The plaintiffs argued that because they were challenging a business practice not specifically listed among types of offenses the Director of Insurance is authorized to investigate and enforce under Section 424 of the Illinois Insurance Code (215 ILCS 5/424), the doctrine of primary jurisdiction did not apply. The court held that in this case, the doctrine of primary jurisdiction did not apply. The court reasoned that the Director does not have primary or exclusive enforcement authority with respect to deceptive practices by insurance companies. The court further reasoned that because "the allegations of unfair and deceptive business practices and unjust enrichment come within the experience and conventional competence of the Illinois courts," jurisdiction properly lies with the court. The court concluded that the primary jurisdiction doctrine does not bar the court from deciding the plaintiff's unfair or deceptive trade practices claim.

A dissenting opinion argued that while the General Assembly has not given the Department of Insurance "explicit authority to approve or disapprove the rates charged, either prior or subsequent to the filing of the rates," and the "Director has not been given any administrative authority to set, approve, or disapprove" those rates, the General Assembly has given the Department "the power to disapprove rates based on unfair or deceptive acts or practices by those engaged in the business of insurance." The dissenting opinion further argued that because the Department has the power to disapprove insurance rates for unfair or deceptive practices in setting those rates, the filed rate doctrine applies to bar the plaintiffs' claims. Furthermore, the dissent argued that the powers granted by the General Assembly to the Department concerning unfair and deceptive practices amount to "concurrent jurisdiction to determine what constitutes a deceptive act or practice," and the primary jurisdiction doctrine should apply.

MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE – EXPERT TESTIMONY

The State must present expert testimony regarding known drug interactions between multiple prescriptions in a petition to administer psychotropic medication without a recipient's consent.

In *In re H.P.*, 2019 IL App (5th) 150302, the Illinois Appellate Court was asked to decide whether the trial court erred in its interpretation of the statutory burden of "clear and convincing evidence" when it did not require the State to present expert testimony addressing known drug interactions in order to prove that the benefits of involuntary treatment with psychotropic medication outweigh the risk of harm. Subsection (a-5)(4) of Section 2-107.1 of the Mental Health and Developmental Disabilities Code (405 ILCS 5/2-107.1(a-5)(4) (West 2014)) provides, "Psychotropic medication and electroconvulsive

therapy may be administered to the recipient if and only if it has been determined by clear and convincing evidence that [specified] factors are present." Subdivision (a-5)(4)(D) provides that one of the factors that the State bears the burden of proving by clear and convincing evidence is "[t]hat the benefits of treatment outweigh the harm." The statute does not specify any type of evidence that the State is required to present to satisfy this burden. The State maintained that it had met its burden of proof by presenting evidence that the plaintiff suffered from schizoaffective disorder, and expert testimony concerning the risks and benefits of each proposed medication. The respondent argued that the evidence presented by the State was insufficient to support a finding that the benefits of proposed treatment outweighed its risk of harm, because the State's expert witness did not specifically testify regarding the risk of harm posed by possible drug interactions between simultaneously prescribed medications. The court agreed with the respondent, holding that expert testimony regarding known drug interactions is necessary in order to determine whether the benefits of a proposed treatment outweigh the harm. The court reasoned that Illinois courts have consistently interpreted the clear and convincing burden of the statute to require that the State present expert testimony describing the expected benefits and possible side effects of each medication requested in a petition, and in this case, the statutory term "harm" is not limited to adverse side effects from individual medications, but also includes detrimental interactions between multiple prescribed medications.

ENVIRONMENTAL PROTECTION ACT – CCDD TESTING AND CERTIFICATION REQUIREMENTS

The Pollution Control Board may adopt rules that differ from those proposed by the Environmental Protection Agency.

In *County of Will v. Pollution Control Board*, 2019 IL 122798, the Illinois Supreme Court was asked to decide whether the Pollution Control Board's decision to adopt rules requiring "front-end," but not "back-end," groundwater testing requirements for clean construction or demolition debris was arbitrary and capricious. Subsection (f) of Section 22.51, and paragraph (1) of subsection (d) of Section 22.51a of the Environmental Protection Act (415 ILCS 5/22.51(f); 415 ILCS 5/22.51a(d)(1) (West 2016)) require the Environmental Protection Agency to propose to the Pollution Control Board, and the Board to adopt, rules for the use of clean construction or demolition debris and uncontaminated soil at fill operations. The State and Will County argued that the Board's refusal to adopt "back-end" groundwater testing requirements was arbitrary because: (1) the Board considered factors not elucidated in the Act, such as whether the materials at issue were "waste;" (2) did not address relevant parts of the problem the Act was meant to curb, such as increased groundwater protection using groundwater testing; and (3) ran counter to the evidence presented to the Board by, among other persons and entities, the Agency. The

Board argued that the rules it adopted, though differing from those proposed by the Agency, were within the scope of the legislative mandate presented by the Act, and therefore were not arbitrary and capricious. The court agreed with Board, holding that the Board's adopted rules were not arbitrary and capricious. The court reasoned that the Board's orders reiterated issues brought up by the State, did not ignore relevant facts, and were based upon review of the entire record. The court noted that the General Assembly may require the Board to adopt the Agency's proposed rules. However, a dissenting opinion argued that because the Board was to adopt rules for "corrective action," without limit to the scope of that action, the Board's rules failed to meet the mandate required by the plain meaning of the Act because they were not as robust as those proposed by the Agency.

FIREARM OWNERS IDENTIFICATION CARD ACT – APPEAL OF DENIAL

The circuit court lacks subject matter jurisdiction to hear certain appeals for FOID Card denials.

In *Sykes v. Schmitz*, 2019 IL App (1st) 180458, the Illinois Appellate Court was asked to decide whether the trial court had subject matter jurisdiction over the appeal of a denial of a firearm owners identification ("FOID") card under the Firearm Owners Identification Card Act, when the denial was based off of the commission of possession of a controlled substance, a Class 4 felony violation of the Illinois Controlled Substances Act. Subsection (a) of Section 10 of the Firearm Owners Identification Card Act (430 ILCS 65/10(a) (West 2014)) provides that a person whose FOID Card application is denied may appeal to the Director of State Police unless the denial was based upon, among other things, "any violation of the Illinois Controlled Substances Act, the Methamphetamine Control and Community Protection Act, or the Cannabis Control Act that is classified as a Class 2 or greater felony . . . in which case the aggrieved party may petition the circuit court." The plaintiff argued that the petition should have been made to the Director because the phrase "classified as a Class 2 or greater felony" modifies all three of the Acts preceding the phrase. Because the plaintiff's violation did not violate all three Acts, his petition should have been sent to the Director. The Director argued that the circuit court was the proper place to file the petition because the language requiring the circuit court to receive petitions for denials based on a violation of a "Class 2 or greater felony" only refers to violations of the Cannabis Control Act. Because the plaintiff's denial was based on a Class 4 felony violation of the Illinois Controlled Substances Act, it was "any violation" of that Act and therefore within the exception. The court held that the phrase "Class 2 or greater felony" refers to "any violation," and therefore a petition to appeal a FOID Card denial based on a violation of any of the relevant statutes may only properly be submitted to the circuit court if the violation was a Class 2 or greater felony. The court reasoned that because only a violation of a statute, and not the statute itself, can be "classified" as a felony, the General

Assembly must have intended for the phrase "classified as a Class 2 or greater felony" to refer back to "any violation." The court noted that if the General Assembly had intended a result other than what the court arrived at, it could have drafted the statute in a way to make its meaning clear.

ILLINOIS VEHICLE CODE – ATTORNEY'S FEES

A towing service is not subject to certain provisions regarding the recovery of attorney's fees in actions involving the unlawful removal of vehicles.

In *Lopez v. Rendered Services, Inc.*, 2019 IL App (1st) 181869, the Illinois Appellate Court was asked to decide whether a prevailing party in an action premised on the unlawful removal of a vehicle could collect attorney's fees from a towing company. The plaintiff argued that the fee-shifting provision found in subsection (f)(10) of Section 4-203(f)(10) of the Illinois Vehicle Code (625 ILCS 5/4-203(f)(10)) allowed for enforcement against an "authorized person," which includes a towing service. The defendant's argument is twofold: (i) that Chapter 18a (625 ILCS 5/18a), rather than Chapter 4, of the Code governs the award of attorney fees; and (ii) even if the fee-shifting provision in Chapter 4 were applicable, it only permits the award of attorney fees against the property owner who initiated the towing, not the company that performed the towing service. The court agreed with the defendant's second argument, and thus did not rule on the first. The court reasoned that subsection (f)(10) of Section 4-203 provides that "when an authorized person improperly causes a motor vehicle to be removed, such person shall be liable" and that "authorized person" is defined as "the owner or lessor of privately owned real property within this State, or any person authorized by such owner or lessor [to] cause any motor vehicle . . . to be removed" and therefore does not apply to the towing service.

ILLINOIS VEHICLE CODE – LANE CHANGES

Continuing along the right side of a lane as the lane widens into two lanes is not a lane change for which a turn signal is required.

In *People v. Bowden*, 2019 IL App (3d) 170654, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found that a police officer's belief that the defendant had changed lanes without signaling was objectively unreasonable. Subsection (d) of Section 11-804 of the Illinois Vehicle Code (625 ILCS 5/11-804(d) (West 2016)) provides that "the turn signal device . . . must be used to indicate an intention to . . . change lanes." The defendant argued that travelling along the right fog line of the road as the lane widens into two lanes was not a lane change for which a turn signal is required.

The State argued that it was not objectively unreasonable for the police officer to believe that a lane change had occurred because the statute is ambiguous about whether a turn signal is required when a lane splits into two lanes. The court agreed with the plaintiff, holding that a lane change had not occurred and, therefore, the police officer's belief that the defendant violated subsection (d) of Section 11-804 of the Code was objectively unreasonable. The court reasoned that subsection (d) of Section 11-804 of the Code is not ambiguous in its requirement that a turn signal is required when changing lanes, but that the determination of whether a lane change had occurred is a factual determination. The court found that a lane change had not occurred because the defendant had continued following the right-side fog line, and the dashed road markings had not yet divided the lanes into two lanes. A dissenting opinion argued that a lane change had occurred because the defendant had to cross over the white dashed lane to stay in the right lane.

JUVENILE COURT ACT OF 1987 – PLACEMENT OF MINORS

A court does not need to make a new determination of unfitness to modify the placement of a child.

In *In re C.L.*, 2018 IL App (1st) 180577, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied a request for private guardianship because ordering private guardianship would require an additional finding that the guardian was unable to care for the minor. Subsection (1) of Section 2-27 of the Juvenile Court Act of 1987 (705 ILCS 405/2-27(1) (West 2014)) provides that "[i]f the court determines and puts in writing the factual basis supporting the determination of whether the parents, guardian, or legal custodian of a minor adjudged a ward of the court are unfit or are unable, for some reason other than financial circumstances alone, to care for, protect, train or discipline the minor or are unwilling to do so, and that the health, safety, and best interest of the minor will be jeopardized if the minor remains in the custody of his or her parents, guardian or custodian, the court may at this hearing and at any later point" determine suitable placement of the minor as specified under the Act. The respondent-appellant argued that "the plain language of the statute indicates that the trial court makes an individual finding regarding fitness, ability, or willingness during the dispositional hearing and that finding is sufficient to grant the trial court authority to order placement in private guardianship 'at any later point' during the case, provided that it is in the minor's best interest." The respondent-appellee argued that "the trial court's interpretation of the statute was correct" and that the evidence supported a return home permanency goal. The court agreed with the respondent-appellant, holding that "the [trial] court misapplied the statute" by erroneously focusing "on parental fitness in relation to changing the permanency goal or closing the case to private guardianship." The court reasoned that "a court may rely on its initial determination during the dispositional hearing to later modify placement of the

minor without once again finding the parent, guardian, or custodian unfit or unable to care for the minor."

JUVENILE COURT ACT OF 1987 – INTERROGATION OF MINORS

Statutory requirements for the interrogation of minors apply only to an official or employee who has as his or her primary duties the protection of the public interest and the enforcement of the law.

In *In re Jose A.*, 2018 IL App (2d) 180170, the Illinois Appellate Court was asked to decide whether a high school dean is a public official or employee required to conform to statutory requirements for the custodial interrogation of minors. Subsection (a-5) of Section 5-401.5 of the Juvenile Court Act of 1987 (705 ILCS 405/5-401.5(a-5) (West 2016)) provides that a minor's statement is presumed to be inadmissible when obtained prior to a "public official or employee" performing specified procedures. The defendant argued that a dean of a public high school is a public employee within the unambiguous plain meaning of the statute. The State argued that because the plain language is broad enough to require any public employee, regardless of the nature of his or her employment, to conform to statutory juvenile criminal procedures, "public official or employee" should be read to include only public officials or employees who are similar to law enforcement officers, State's Attorneys, or juvenile officers. The court agreed with the State, holding that the Act's statutory requirements extend not to any public official or employee, but only to "an elected or appointed government official or an employee who works for a government agency and who has as his or her primary duties the protection of the public interest and the enforcement of the law." The court reasoned that to apply the plain meaning of the Act would be absurd, requiring strict statutory adherence by people employed by the State but who have no connection to the enforcement of law.

CRIMINAL CODE OF 2012 – FIREARM ENHANCEMENT

A dissenting opinion argues that the mandatory 25-years-to-life firearm enhancement is unconstitutionally vague.

In *People v. Felton*, 2019 IL App (3d) 150595, the Illinois Appellate Court was asked to determine if the mandatory 25-years-to-life firearm enhancement under Section 8-4(c)(1)(D) of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)(D) (West 2012)) is unconstitutionally vague. Section 8-4(c)(1)(D) provides that "an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to

another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." The defendant argued that the mandatory 25-years-to-life firearm enhancement under Criminal Code is unconstitutionally vague "because it provides the sentencing court with vast discretion to impose a sentence within a broad range of penalties without providing any factors or criteria that would guide that exercise of discretion." The State argued from case law that the statutory framework was constitutional. The court agreed with the State, finding that the Criminal Code provides "sufficiently definite" sentencing standards and is therefore not unconstitutionally vague. A dissenting opinion disagreed with the court's analysis and argued that the firearm enhancement sentence under the Criminal Code "does not explicitly provide *any* standards or criteria that might guide the sentencing court [when enhancing a defendant's sentence] within the broad range of 25 years to life" (emphasis in original). The dissent also rejected the court's assumption that "the sliding scale of injuries used to trigger the enhancement, must also be used to fashion the enhancement," reasoning that "the enhancement statute itself provides no suggestions, either explicit or implicit, that those injuries are intended to guide the sentencing court's discretion." Additionally, the dissent argued that "the notion that this list of potential injuries is a sliding scale or spectrum of harms finds no support in case law or in common sense," because it is not clear how a sentencing court is to rank, in terms of severity, the injuries listed under the Criminal Code. The dissent also noted that the lack of sentencing guidance under the Criminal Code is in stark contrast to the numerous aggravating and mitigating factors listed under a similar mandatory firearm enhancement for first degree murder under Section 5-8-1(a)(1)(d)(iii) of the United Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012)). The dissent asserted that "the dearth of sentencing guidance found in [the Criminal Code] increases the potential that a sentencing court might resort to [the Unified Code of Corrections'] statutory lists of aggravating and mitigating factors when fashioning the enhancement [under the Criminal Code]." The dissent argued that, absent the General Assembly expressly providing otherwise, such a tactic might "constitute an improper double enhancement . . . [if] those factors were already considered when the court imposed the base sentence." As such, the dissent argued that until the General Assembly "clarified what the enhancement should be based on, Section 8-4(c)(1)(D) is unconstitutionally vague."

CRIMINAL CODE OF 2012 – SENTENCING ENHANCEMENTS

Sentence enhancements for attempted murder cannot be applied cumulatively.

In *People v. Holley*, 2019 IL App (1st) 161326, the Illinois Appellate Court was asked to determine whether the trial court erred when it imposed two 25-year firearm enhancements under Section 8-4(c)(1) of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)

(West 2010)) upon a defendant for the attempted murder of two police officers. Item (A) of Section 8-4(c)(1) provides that an attempt to commit first degree murder of a peace officer in the course of performing his or her official duties is a Class X felony for which the sentence shall be a term of imprisonment of not less than 20 years and not more than 80 years. Item (D) of that Section provides a 25-year sentence enhancement for an attempt to commit first degree murder during which the person "personally discharged a firearm that proximately caused great bodily harm . . . or death to another person." The trial court had sentenced the defendant under Section 8-4(c)(1)(A) to two consecutive 25-year terms for attempted murder and added a 25-year firearm enhancement from Section 8-4(c)(1)(D) to each term. The defendant argued that the trial court misconstrued the sentencing guidelines under Section 8-4(c)(1) because items (A) through (E) of the statute create "five independent crimes, each with its own sentencing scheme." Accordingly, the defendant asserted that the trial court could only sentence him to either a sentence within the heightened sentencing range under Section 8-4(c)(1)(A) or a 25-year enhancement sentence under Section 8-4(c)(1)(D), but not both. The State, citing case law, argued that the General Assembly intended that items (A) through (D) of Section 8-4(c)(1) be applied cumulatively. The State noted that (i) there is no punctuation that separates paragraph (c)(1) from paragraph (c)(1)(A); (ii) a semicolon follows paragraph (c)(1)(A); and (iii) the word "and" is used to separate subparts (D) and (E). The court rejected the State's argument and split with the authorities cited by the State, holding that a plain reading of Section 8-4(c)(1) clearly indicates that the General Assembly intended for subparts (A) through (E) to be "alternative sentencing options . . . that must be read disjunctively." The court reasoned that "the overall structure of Section 8-4(c)(1) is a more obvious indication of the legislature's intent than the lack of punctuation between Sections 8-4(c)(1) and 8-4(c)(1)(A), the semicolons between subparts, or the use of an "and" [between subparts (D) and (E)]." Although the court acknowledged that Section 8-4(c)(1)'s "punctuation and conjunction placement may be confusing," the court nevertheless found that the overall structure of the statute clearly "lays out a sentence for attempted murder and then offers five discrete deviations from that sentence [in subparts (A) through (E)]." Accordingly, the court determined that "[n]othing in that structure or the statutory language suggests that [a] sentencing court is to apply more than one of these deviations in a particular case." Noting that any statutory ambiguity must be construed in favor of the defendant under the rule of lenity, the court modified the trial court's sentencing order by removing the two 25-year firearm enhancements from the defendant's attempted murder sentence.

CRIMINAL CODE OF 2012 – SEX OFFENDER IN A PUBLIC PARK

In a misdemeanor offense of being a sex offender in a public park case, the court is not required to consider the exemption provided to the felony version of the offense.

In *People v. Legoo*, 2019 IL App (3d) 160667, the Illinois Appellate Court was asked to determine whether the trial court erred when it refused to consider the exemption for the felony offense of being a sex offender in a public park under subsection (a-10) of Section 11-9.3 of the Criminal Code of 2012 (720 ILCS 5/11-9.3(a-10) (West 2016)) and found the defendant guilty of the misdemeanor offense of being a sex offender in a public park under subsection (b) of Section 11-9.4-1 of the Code (720 ILCS 5/11-9.4-1(b) (West 2016)). Subsection (b) of Section 11-9.4-1 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." Subsection (a-10) of Section 11-9.3 provides that "[i]t is unlawful for a child sex offender to knowingly be present on any real property comprising any public park when persons under the age of 18 are present . . . unless the offender is a parent or guardian of a person under 18 years of age present in the building or on the grounds." The defendant argued that his conviction under Section 11-9.4-1(b) was improper because the exemption under Section 11-9.3(a-10) for parents or guardians of persons under the age of 18 should have been read into Section 11-9.4-1(b). The State provided no argument on appeal. The court upheld the defendant's conviction, holding that the trial court made no error when it refused to read the exemption under Section 11-9.3(a-10) into Section 11-9.4-1(b). The court reasoned that "there are clear differences" between the two statutes. The court noted that Section 11-9.4-1(b) criminalizes a sex offender's "mere presence in public parks;" whereas, Section 11-9.3(a-10) "criminalizes particular conduct–being a child sex offender in a park *and* approaching, contacting, and communicating with minors." (Emphasis in original.) Accordingly, the court found that "while [the] statutory scheme may not be the cleanest means of achieving its desired end, there is no reason to read the exception from Section 11-9.3(a-10) into Section 11-9.4-1(b)."

CRIMINAL CODE OF 2012 – STALKING BY THREATS

The stalking statute's failure to require a threat of an act of unlawful violence makes it an overbroad prohibition on free speech.

In *People v. Morocho*, 2019 IL App (1st) 153232, the Illinois Appellate Court was asked to decide whether the part of the stalking statute that prohibits threatening a specific person with lawful or unlawful action that causes emotional distress is unconstitutionally overbroad in violation of the free speech clause of the First Amendment to the United States

Constitution. (U.S. CONST. amend I) Paragraph (2) of subsection (a) of Section 12-7.3 of the Criminal Code of 2012 (720 ILCS 5/12-7.3(a)(2) (West 2014)) provides that a "person commits stalking when he or she knowingly engages in a course of conduct [two or more times] directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to...suffer other emotional distress." The State argued that an exemption for exercise of free speech that is otherwise lawful under paragraph (2) of subsection (d) of Section 12-7.3 serves as a bar to unwarranted prosecutions and, therefore, the court should not rule paragraph (2) of subsection (a) unconstitutional except on a case-by-case basis. The court disagreed with the State, holding subsection (a)(2) unconstitutional for offenses when a person threatens a specific person two or more times and he or she knows or should know the threats would cause a reasonable person to suffer emotional distress. The court reasoned that subsection (a)(2) "clearly lacks any requirement that a person threaten 'an act of unlawful violence' " and it "fails to limit the threatened action to that of violence." The court further reasoned that subsection (a)(2) "reaches a vast number of circumstances that limit speech far beyond the generally understood meaning of stalking."

CRIMINAL CODE OF 2012 – THREATS TO PUBLIC OFFICIALS

An accusation of corrupt or criminal conduct on the part of a public official does not constitute a threat of violence for purposes of the intimidation statute.

In *People v. Smith*, 2019 IL App (4th) 160641, the Illinois Appellate Court was asked to decide whether the trial court erred when it admitted a voicemail message accusing a judge of corruption as evidence of threatening a public official. Section 12-9(a) of the Criminal Code of 2012 (720 ILCS 5/12-9(a) (West 2018)) provides that a person commits the crime of threatening a public official when: "(1) that person knowingly delivers or conveys, directly or indirectly, to a public official . . . by any means a communication: (i) containing a threat that would place the public official . . . or a member of his immediate family in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint; . . . and (2) the threat was conveyed because of the performance or nonperformance of some public duty . . . because of hostility of the person making the threat toward the status or position of the public official . . . or because of any other factor related to the official's public existence." In a civil matter preceding this criminal case, a county judge considered a series of *mandamus* petitions brought by this defendant and directed at various government officials, found that the petitions amounted to an abuse of the court process, and dismissed the petitions with prejudice. The next day, that judge received a voicemail message at his office that accused him of perjury and corruption. The caller did not identify himself, but a detective testified in the criminal case that the telephone number used to leave the message at issue was the same number provided by the

defendant in an interview. On appeal, the defendant argued that the voicemail message alone did not constitute sufficient evidence to uphold the defendant's conviction of threatening a public official. The defendant argued the message was protected by the First Amendment because it did not contain a "true threat" of violence, defined as a statement where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003). The State argued there was no question that the voicemail was knowingly made, and that the defendant's threatening intent was clear from the context of the statement. The court reversed the conviction of threatening a public official, holding that the voicemail was not sufficient to establish the crime. The court reasoned that the language of the voicemail message was ambiguous, but did communicate the defendant's belief that the recipient judge was corrupt. However, because the defendant did not state or imply that he intended to engage in physical violence, there was no "true threat," and therefore no basis for any rational fact finder to conclude the State had proved the elements of the crime beyond a reasonable doubt. The court affirmed the defendant's convictions of direct criminal contempt of court. A dissenting opinion argued that a speaker need not intend to actually carry out a threat of violence for that threat to constitute a "true threat." The dissent further argued that even if there is no explicit threat, proof that the speaker intends a communication to be a violent threat in a context that would place a reasonable person in reasonable apprehension of immediate bodily harm can constitute sufficient evidence of intimidation.

CRIMINAL CODE OF 2012 – TATTOOING THE BODY OF A MINOR

The State is not required to prove, as an element of the offense of tattooing the body of a minor, that a defendant is not licensed to practice medicine.

In *People v. Maples*, 2018 IL App (2d) 160577, the Illinois Appellate Court was asked to determine whether the State was required to prove that the defendant did not have a medical license when he performed a tattoo service on a 17-year-old girl in order to show that the defendant committed the offense of tattooing the body of a minor under Section 12C-35(a) of the Criminal Code of 2012 (720 ILCS 5/12C-35(a) West 2014)). Section 12C-35(a) provides that "a person, other than a person licensed to practice medicine in all its branches, commits tattooing the body of a minor when he or she knowingly or recklessly tattoos or offers to tattoo a person under the age of 18." The defendant argued that the trial court erred when it found him guilty of tattooing the body of a minor because Section 12C-35(a) requires the State to prove, as an element of the offense, that he was not licensed to practice medicine at the time he provided the tattoo service. The State argued that the language under Section 12C-35(a) exempting persons licensed to practice medicine is "more of an affirmative defense." Consequently, the burden of proof regarding whether the

defendant had a medical license rests with the defendant, not the State. The appellate court agreed with the State and upheld the trial court's decision, finding that the State was not required to prove that the defendant was not licensed to practice medicine in order to show that he violated Section 12C-35(a). The court reasoned that case law has long established that the State is only required to "allege and prove that the defendant is not within the exceptions [to a criminal act if] the legislature intended the exceptions to be *descriptive* of the offense." (Emphasis added.) In contrast, those exceptions that simply "withdraw, or except, certain persons or acts from the operation of the statute" need not be disproved because "[such] exceptions are generally matters of defense." The court found that the exception language under Section 12C-35(a) was not descriptive of the offense, because it "categorially withdraws from liability certain persons (those licensed to practice medicine)." By withdrawing such persons from liability, the court found that "the legislature unequivocally intended to create an exception to, as opposed to a description of, the offense." Furthermore, the court noted that "the offense of tattooing a minor is generally a criminal act that does not depend on the inapplicability of the exception for a person licensed to practice medicine. Accordingly, the exception does not bear on the elements of the offense and thus need not be disproved by the State."

CRIMINAL CODE OF 2012 – BURGLARY BY ENTERING WITHOUT AUTHORITY

In burglary cases, the limited authority doctrine applies even if the defendant was found not guilty of retail theft.

In *People v. Johnson*, 2019 IL 123318, the Illinois Supreme Court was asked to decide whether the appellate court erred when it overturned a defendant's conviction of burglary by unauthorized entry on the grounds of insufficient evidence. Section 19-1(a) of the Criminal Code of 2012 provides that "[a] person commits burglary when without authority he or she knowingly enters or without authority remains within a building, . . . or any part thereof, with intent to commit therein a felony or theft." (720 ILCS 5/19-1(a) (West 2018)). The defendant argued that because he entered the store during normal business hours, stayed in areas open to the public, and was later acquitted of retail theft (720 ILCS 5/16-25(a)(1)(West 2018)), the State failed to prove the "without authority" element of the burglary statute. The State argued that the defendant should be held liable under the limited authority doctrine, which provides that intent to commit theft at the time of entry nullifies a lawful authority to enter a public place of business, because the defendant's behavior before, during, and after entering the store established an intent to commit theft. The appellate court found that the limited authority doctrine did not apply to this case and overturned the conviction, reasoning that the passage of the retail theft statute was intended to alter the long-standing judicial interpretation of the burglary statute and

limited authority doctrine. The Illinois Supreme Court disagreed with the appellate court, reinstating the conviction and holding that the facts of the case contained sufficient evidence to support the "without authority" element of the burglary conviction. The court reasoned that because the record established that the defendant entered the store with the intent to shoplift, the limited authority doctrine clearly applied in this case. The court noted that burglary has different elements than theft and is not dependent on actual theft. A dissenting opinion argued that because the General Assembly expressed the intent that the retail theft statute govern shoplifting, a person who enters a store during normal business hours and shoplifts from areas that are open to the public has not committed burglary.

CRIMINAL CODE OF 2012 – LESSER-INCLUDED OFFENSE – HOME INVASION

Under the one-act-one-crime rule, the court may not impose a conviction and sentence for criminal sexual assault committed after the defendant committed home invasion for which he was convicted and sentenced.

In *People v. Skaggs*, 2019 IL App (4th) 160335, the Illinois Appellate Court was asked to decide whether criminal sexual assault is a lesser-included offense of home invasion. The defendant was convicted of two counts of criminal sexual assault and one count of home invasion and sentenced to consecutive prison terms of 10 years for home invasion and 40 years on each count of criminal sexual assault. Paragraph (6) of subsection (a) of Section 12-11 (later renumbered as Section 19-6 of the Criminal Code of 2012 (720 ILCS 5/19-6(a)(6)) provides, "A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present . . . and commits, against any person or persons within that dwelling place, criminal sexual assault." The State argued that criminal sexual assault was not a lesser-included offense of home invasion. The defendant argued that one of his convictions for criminal sexual assault should be vacated as it is a lesser-included offense of home invasion. The court agreed with the defendant, holding that it did not find that the sentencing scheme for criminal sexual assault provides a clear legislative intent of separate punishments and that one of the defendant's criminal sexual assault convictions is a lesser-included offense of home invasion and the conviction and the sentence must be vacated under the one-act, one-crime rule. The court reasoned that the Illinois Supreme Court has long held the predicate offense for another crime is a lesser-included offense of the other crime. The court reasoned that one cannot commit home invasion charged under paragraph (6) of subsection (a) of Section 19-6 without committing all of the elements of one of the listed sex offenses. Under the statute, the court concluded, all of the elements of the sex offense are included within

the home invasion statute, and the sex offense contains no elements not included in the home invasion statute.

CRIMINAL CODE OF 2012 – PUBLIC CARRY OF STUN GUNS AND TASERS

The ban on stun guns and tasers violates the Second Amendment to the United States Constitution.

In *People v. Webb*, 2019 IL 122951, the Illinois Supreme Court was asked to decide whether the unlawful use of weapons statute banning carrying stun guns and tasers violates the Second Amendment to the United States Constitution. Subparagraph (4) of subsection (a) of Section 24-1 of the Criminal Code of 2012 (720 ILCS 5/24-1(a)(4) (West 2016)) provides that a "person commits the offense of unlawful use of weapons when he knowingly: . . . (4) Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm . . . . " The defendants argued subparagraph (4) operated as a complete ban on the carriage of stun guns and tasers in public and was, therefore, unconstitutional under the Second Amendment. The State argued that subparagraph (4) does not impose a ban but merely regulates stun guns and tasers in a constitutionally permissible manner. The court agreed with the defendants, holding that the statute imposes a complete ban on public carriage of stun guns and facially violates the Second Amendment. The court reasoned that a person cannot be issued a concealed carry license for a stun gun or taser and, therefore, subparagraph (4) acts has a categorical ban on stun guns and tasers.

CRIMINAL CODE OF 2012 – UNLAWFUL POSSESSION OF A WEAPON

The term "bludgeon" includes a collapsible metal baton.

In *People v. Starks*, 2019 IL App (2d) 160871, the Illinois Appellate Court was asked to decide whether the trial court erred in finding that a collapsible metal baton constituted a "bludgeon" for purposes of the statute governing the unlawful use of weapons by felons. Subsection (a)(1) of Section 24-1 of the Criminal Code of 2012 (720 ILCS 5/24-1 (West 2016)) provides, "A person commits the offense of unlawful use of weapons when he knowingly sells, manufactures, purchases, possesses or carries any bludgeon . . . . " The State argued that the defendant's baton was similar in character to the other weapons listed in Section 24-1 and urged the court to adopt a definition of the term "bludgeon" that includes heavy clubs or sticks, commonly weighted in one end by metal. The defendant

argued that a collapsible baton was not a club, but was more similar in character to a nightstick, citing the court's decision in *People v. Fink*, 419 N.E.2d 86 (1980) that a nightstick did not fall within the broad definition of "bludgeon." The court agreed with the State, holding that the defendant's collapsible baton was a "bludgeon" within the meaning of that statute. Although courts have been reluctant to adopt a broad definition of the term "bludgeon," the court reasoned that the defendant's collapsible baton was not a simple nightstick, distinguishing it from its decision in *Fink*. The court reasoned that because the defendant's collapsible baton was weighted and thicker at one end, it fell within the definition of the term "bludgeon." The court further noted that the General Assembly enacted Section 24-1 in order to keep dangerous weapons out of the hands of convicted felons in any situation, whether it be in the privacy of their own home or a public place. The court reasoned that strictly construing the term "bludgeon" to exclude the defendant's collapsible baton would run contrary to the purpose for which Section 24-1 was enacted and lead to an absurd result.

CRIMINAL CODE OF 2012 – POSSESSION OF A DEFACED FIREARM

A person does not need to be aware that a firearm's identification markings are defaced to be convicted of possession of a defaced firearm.

In *People v. Lee*, 2019 IL App (1st) 162563, the Illinois Appellate Court was asked to decide whether the State needed to prove that the defendant knew the firearm in his possession had been defaced. Subsection (b) of Section 24-5 of the Criminal Code of 2012 (720 ILCS 5/24-5(b) (West 2016)) provides that a "person who possesses any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated commits a Class 3 felony." The defendant argued that he should have been acquitted because the State failed to prove that the defendant knew the identification markings were defaced on the firearm he possessed. The State argued that the statute and case law only require that a defendant knowingly possess a firearm when the firearm's identification marks are defaced. The court agreed with the State, holding that the State was not required to prove that the defendant knew the firearm he possessed was defaced. The court reasoned that case law examining this issue continuously has found that the chief evil the General Assembly sought to prevent was the possession of a weapon with defaced identification markings and that mere possession of a defaced weapon is the evil sought to be remedied by this offense. The court noted that had the General Assembly intended to impose such a knowledge requirement, they have had ample opportunity to amend the provisions to require knowledge of the defaced identification markings. A concurring opinion argued that because the General Assembly has not clearly indicated that knowledge of defacement is not required, the court should begin inferring a knowledge requirement, despite past case law.

CRIMINAL CODE OF 2012 – UNAUTHORIZED VIDEO RECORDING

The prohibition on the nonconsensual video recording of another person in a restroom applies to a defendant's own residence if the victim shares that residence.

In *People v. Maillet*, 2019 IL App (2d) 161114, the Illinois Appellate Court was asked to decide whether two convictions for nonconsensual video recordings of another person should be reversed. Section 26-4(a) of the Criminal Code of 2012 provides, "It is unlawful for any person to knowingly make a video record or transmit live video of another person without that person's consent in a restroom, tanning bed, tanning salon, locker room, changing room, or hotel bedroom." (720 ILCS 5/26-4(a) (West 2012)). Subsection (a-5) of Section 26-4 provides, "It is unlawful for any person to knowingly make a video record or transmit live video of another person in that other person's residence without that person's consent." (720 ILCS 5/26-4(a-5) (West 2012)). On appeal, the defendant argued that the phrase "that other person's residence" should not apply to video recordings made in a defendant's own residence, because in this case, the victim resided in the defendant's home. The State argued that the plain meaning of the statute is to provide the same privacy protection regardless of whether that person lives in the same residence as the person who makes the video recording. The court agreed with the State's interpretation, and refused to read "that other person's residence" as excluding the defendant's home. The court held that the plain language of the statute unambiguously refers only to the victim's residence, and because the language at issue is clear and unambiguous, the rule of lenity does not apply in this case. The court found that the situation of a defendant and victim living in the same residence was not addressed by the statute. However, the court noted that the General Assembly could have included language to exclude the defendant's residence from Section 26-4, as it did in the stalking statute (720 ILCS 5/12-7.3(c)(7) (West 2012)), but it did not. Therefore, the court concluded that the General Assembly's intent was to protect a person's heightened expectation of privacy in his or her own home, regardless of the residence of the person who made the recording.

CRIMINAL CODE OF 2012 – ESCAPE FROM CUSTODY

Peace officers take a person into lawful custody when they announce his arrest and physically restrain him.

In *People v. Garza*, 2019 IL App (4th) 170165, the Illinois Appellate Court was asked to decide whether the trial court erred in determining that a defendant was in lawful custody, an element of the offense of escape when he ran from peace officers before being handcuffed. Subsection (a) of Section 31-6 of the Criminal Code of 2012 (720 ILCS 5/31-6 (West 2014)) provides, "A person in the lawful custody of a peace officer for the alleged

commission of a felony . . . and who intentionally escapes from custody commits a Class 2 felony." The State argued that the defendant was in lawful custody at the time of his escape because peace officers established sufficient control over the defendant when they informed him he was under arrest, escorted him through his residence while remaining in close proximity, and physically escorted him to the door while holding his arm. The defendant argued that the State failed to establish sufficient control over him because the officers had not yet handcuffed him at the time he ran away from them. The court agreed with the State, holding that the defendant was in lawful custody when he ran from the officers. The court reasoned that because the officers did more than inform the defendant he was under arrest, including physically restraining him, they established sufficient control over the defendant before he ran away from the officers. The court noted that because the General Assembly has not defined the term "lawful custody" in the statute, for purposes of interpreting the escape statute, courts have focused on the amount of control an officer has over the defendant. The court also noted that the reason the defendant had not already been handcuffed by the officers at the time he ran away from them was because the officers allowed him to get dressed and say goodbye to his family before being taken outside.

ILLINOIS CONTROLLED SUBSTANCES ACT – IMMIGRATION

The identity of a particular controlled substance in a conviction under the Act is irrelevant for immigration court purposes.

In *Najera-Rodriguez v. Barr*, 926 F.3d 343 (2019), the United States Court of Appeals was asked to decide whether the Board of Immigration Appeals erred when affirmed the removal of a lawful permanent resident of the United States after he was convicted of unlawful possession of a controlled substance (Xanax) under Section 402 of the Illinois Controlled Substances Act (720 ILCS 570/402). Section 402 of the Illinois Controlled Substances Act provides that "it is unlawful for any person knowingly to possess a controlled or counterfeit substance or controlled substance analog." Subsection (c) of that Section contains a "catch-all" reference to controlled substances, which includes some substances that are not considered controlled substances under federal law. It is, therefore, possible to violate Section 402 without committing a drug offense that would trigger removal under federal immigration law. Because Illinois law is broader than the federal analog, it cannot serve as a predicate offense for removal unless the Illinois law is "divisible." A statute is divisible when it "defines distinct crimes with different *elements*, not just different *means* for committing the same crime." If the statute is divisible, then the reviewing court may use a "modified categorical approach" to examine the record to determine which alternative crime formed the basis for the defendant's conviction. The government argued that Section 402 is divisible. In doing so, it pointed to the statute's

preamble, which provides that "[a] violation of this Act with respect to each of the controlled substances listed herein constitutes a single and separate violation of the Act." The petitioner argued that the statute is not divisible, because the particular controlled substance is not an element of the crime, but rather an alternative means of committing the crime. The court agreed with the petitioner, finding that subsection (c) of Section 402 is not divisible. The court reasoned that, although the controlled substances listed in subsection (a) of Section 402 may trigger different penalties for different substances, the general language of subsection (c) gives no indication that possession of one substance versus another would call for an enhanced penalty or any other differential treatment. Furthermore, state court cases have not treated the identity of the particular controlled substance as an element.

ILLINOIS CONTROLLED SUBSTANCE ACT – LOCALITY ENHANCEMENT

The court may impose an enhanced penalty for delivering controlled substances near a church without a showing that the church is "used primarily for religious worship."

In *People v. Newton,* 2018 IL 122958, the Illinois Supreme Court was asked to decide whether the appellate court erred when it upheld the defendant's penalty enhancement for delivering controlled substances within 1,000 feet of a church. Subsection (b) of Section 407 of the Illinois Controlled Substances Act (720 ILCS 570/407(b) (West 2014)) enhances the penalty for delivery of less than one gram of cocaine, of which the defendant was convicted, from a Class 2 to a Class 1 felony when the violation occurs “within 1,000 feet of the real property comprising any church, synagogue, or other building, structure, or place used primarily for religious worship.” The defendant argued from case law that the statute required particularized evidence that a church is "used primarily for religious worship." The court rejected the defendant's argument, reasoning that "a 'church' is, by definition, already recognized in its ordinary and popular meaning as a place primarily used for religious worship" and that requiring the State to prove that each church was used primarily for religious worship is "redundant." The dissent, however, opined that the majority's implicit argument that the primarily religious nature of a building could be determined from its appearance or "traditional characteristics" was "simply not reasonable," as such a structure could be repurposed or abandoned.

CODE OF CRIMINAL PROCEDURE OF 1963 – GUILTY PLEA ADMONISHMENT

Statutory explanations of the consequences of a guilty plea are only required at the time of arraignment, and are directory, not mandatory, if the guilty plea is entered after arraignment.

In *People v. Burge*, 2019 IL App (4th) 170399, the Illinois Appellate Court was asked to decide whether an admonishment that was given to a defendant after arraignment without specific consequences of the defendant's guilty plea required the trial court to allow her motion to withdraw the guilty plea. Subsection (c) of Section 113-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-4 (West 2016)) provides that a defendant's guilty plea "shall not be accepted until the court shall have fully explained . . . as a consequence of a conviction or a plea of guilty [that] there may be an impact upon the defendant's ability to . . . retain or obtain employment." The State argued that the defendant's admonishment was sufficient because the language at issue was merely directory to the trial court. The defendant argued that the language was mandatory, and therefore the trial court committed reversible error in failing to specifically inform her that her guilty plea may hinder her ability to obtain or retain employment. The court agreed with State, holding that the statute (1) need only be adhered to when a defendant pleads guilty at arraignment; and (2) after arraignment, the statute is directory and therefore no consequence flowed from the trial court's failure to include the explanation. On the first point, the court reasoned that case law regarding earlier versions of the statute ruled that pleas after arraignment are covered solely by the Illinois Supreme Court Rules, so the additional explanation is merely allowable, not mandatory. On the second point, the court reasoned that because the General Assembly "did not explicitly dictate a particular consequence for a trial court's failure to comply" with the relevant provisions, so the trial court was not required to allow the defendant's motion to withdraw her guilty plea. However, a concurring opinion disagreed with the court, arguing that the Section, as amended, was so specific as to impose obligations on a trial court before entering any guilty plea, whether entered at or after an arraignment. Further, the concurring opinion argued that language directing that a court "shall not" accept a guilty in the absence of the admonishments effectively required a mandatory reading of the explanations.

CODE OF CRIMINAL PROCEDURE OF 1963 – RIGHT TO CONFRONTATION

The hearsay admission into evidence of a victim's interview at a child advocacy center is permissible even if the victim testifies at trial that she cannot recall the alleged criminal conduct.

In *People v. Smith*, 2019 IL App (3d) 160631, the defendant appealed his convictions for predatory criminal sexual assault of a child and aggravated kidnapping, arguing that Section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2014)) violated his right to confrontation under the Fifth Amendment of United States Constitution (U.S. CONST. amend V) and Section 8 of Article I of the Illinois Constitution (ILL. CONST. art. I, §8). Section 115-10 creates a hearsay exemption to allow admission of contemporaneous statements by an alleged victim and the testimony of permitted witnesses describing claimed sexual assault or abuse. The defendant argued that the admission of the child victim's interview, which was recorded at a child advocacy center, was unconstitutional because the victim testified at trial that she could not remember the portion of the incident involving the alleged criminal conduct. The defendant cited *People v. Kitch*, 239 Ill. 2d 452 (2011) for the proposition that the victim's direct testimony must be sufficient to establish every element of the charges against the defendant to allow sufficient cross-examination under the confrontation clause. The Illinois Appellate Court disagreed with the defendant and held that, because the declarant in this case appeared for cross-examination and willingly answered all of the questions, she was not "unavailable" for the purposes of the confrontation clause. A concurring opinion argued that the General Assembly should take steps to ensure that the details and accuracy of accusations are tested at the initial stages of the investigation to allow the defendant to "mount a thorough and meaningful defense."

CODE OF CRIMINAL PROCEDURE OF 1963 – DESTRUCTION OF EVIDENCE

A showing that a law enforcement agency, acting in good faith, destroyed evidence that is reasonably likely to contain forensic evidence does not by itself constitute grounds for a new trial.

In *People v. Grant*, 2019 IL App (3d) 160758, the Illinois Appellate Court was asked to decide whether the destruction of evidence by a law enforcement agency was grounds for a new trial or reversal of a conviction, and whether the destruction of evidence violated due process. Subsection (a) of Section 116-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-4(a) (West 2016)) requires a law enforcement agency to preserve physical evidence "that is reasonably likely to contain forensic evidence." Section 116-4 further requires a law enforcement agency to retain the evidence until the completion of a defendant's sentence and term of mandatory supervised release, but does not provide a

remedy for law enforcement's failure to preserve the evidence in accordance with the Section. The defendant argued, on motion, that a new trial or a reversal of conviction was warranted because the plaintiff, as a law enforcement agency, failed in its duty to preserve evidence. The State argued that the defendant's motion should be denied because the destruction of evidence was not done in bad faith. The court agreed with the State, holding that a new trial or reversal of a conviction was properly denied and that there are no arguable errors to be considered on appeal. The court reasoned that while the law enforcement agency violated the provisions of Section 116-4 by destroying the evidence, because subsection (a) of Section 116-4 does not specify a remedy for the failure to preserve evidence, the provision should be viewed as directory and not a mandatory requirement. Furthermore, the court reasoned that a new trial would be redundant because there would be no new evidence to introduce at the trial, and though the law enforcement agency destroyed the evidence in question, such actions were not done in bad faith because the evidence was destroyed as a matter of policy.

The dissenting opinion, citing case law, reasoned that while the absence of a remedy under subsection (a) of Section 116-4 tends to indicate that the provisions of the statute are directory, rather than mandatory, there is an exception to that general principle when a law enforcement agency's "failure to follow the procedure will 'generally' injure the right the procedure was designed to protect. Specifically, the dissenting opinion points out that Section 116-3 of the Code (725 ILCS 5/116-3 (West 2016)) provides for the post-trial testing of untested forensic evidence, while Section 116-4 is meant to ensure that such forensic evidence remains available to be tested. Given that Section 116-4 appears to fit the exception, the dissenting opinion would order the parties to prepare arguments outlining the mandatory/directory dichotomy in consideration of the exception. The dissenting opinion posited that such analysis would encourage the Generally Assembly to clarify and resolve whether the statute is mandatory or directory.

CODE OF CRIMINAL PROCEDURE OF 1963 – POST-CONVICTION PETITIONS: MENTALLY ILL *PRO SE* PETITIONERS

Mentally ill pro se petitioners who are unable to state a meritorious post-conviction claim in an original or amended petition nonetheless waive future claims not raised in the original or amended petition.

In *People v. Allen*, 2019 IL App (1st) 162985, the Illinois Appellate Court was asked to decide whether the Code of Criminal Procedure of 1963 keeps severely mentally ill *pro se* individuals from progressing past the initial stage of the post-conviction process. Section 122-3 of the Code (725 ILCS 5/122-3) provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." Counsel for the petitioner argued that the petitioner was so mentally ill that he was unable

to advance past the first post-conviction stage without legal counsel because he could not present an arguably meritorious claim that was not based on an indisputably meritless legal theory or a fanciful factual allegation. Therefore, the petitioner argued, he was denied his constitutional right to due process of law. The court acknowledged the "fundamental fairness" of appointing counsel for *pro se* individuals who are mentally ill to the point of being incapable of articulating a valid post-conviction claim. However, the court stated that it was barred from granting that relief by the Code's clear and unambiguous language stating that the petitioner had waived his claim to denial of due process by failing to raise it in his original or amended post-conviction petition.

UNIFIED CODE OF CORRECTIONS – JUVENILE SENTENCING

A prison sentence of 40 years or less imposed on a juvenile offender does not constitute a de facto life sentence.

In *People v. Buffer*, 2019 IL 122327, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred when it vacated a 50-year prison sentence imposed on the defendant for a crime committed when the defendant was 16 years of age on the basis that the sentence was a *de facto* life sentence in violation of the Eighth Amendment to the United States Constitution (U.S. CONST. amend. VIII). The defendant argued that his 50-year prison sentence was a *de facto* life sentence in violation of *People v. Reyes*, 2016 IL 119271, which prohibited mandatory *de facto* life sentences imposed on juveniles. The State argued that the 50-year prison sentence was not a *de facto* life sentence because the sentence is "not unsurvivable." the court agreed with the defendant, holding that the 50-year sentence was a *de facto* life sentence and that "a prison sentence of 40 years or less imposed on a juvenile offender does not constitute a *de facto* life sentence." The court reasoned that after the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460 (2012), the General Assembly enacted Section 5-4.5-105 of the Unified Code of Corrections (730 ILCS 5/5-4.5-105 (West 2016)), which, among other changes, established a minimum sentence of 40 years imprisonment for juveniles convicted of first degree murder, indicating that "the legislature evidently believed that this 40-year floor for juvenile offenders who commit egregious crimes complies with the requirements of *Miller*." The court further reasoned that the General Assembly is the best entity to make that determination and that "a prison sentence of 40 years or less imposed on a juvenile offender provides some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." A concurring opinion argued that the determination of whether a sentence is a *de facto* life sentence should be based on a life expectancy calculation and, therefore, "any sentence imposed on a minor that would result in the minor's earliest release from prison when he or she is 55 years old or more would be a *de facto* life sentence."

UNIFIED CODE OF CORRECTIONS – LENGTHY SENTENCES FOR MINORS

While upholding a juvenile's term-of-years sentence that may constitute a de facto life sentence, the court urged the General Assembly to use societal and policy considerations to legislate factors that may be used to determine appropriate term-of-years sentences for juveniles.

In *People v. Pearson*, 2018 IL App (1st) 142819, the Illinois Appellate Court was asked to decide whether a term-of-years sentence for a convicted juvenile felon can be lessened because it may constitute a *de facto* life sentence violative of the Eighth Amendment to the United States Constitution and Section 11 of Article I of the Illinois Constitution (U.S. CONST. Amend. VIII; ILL. CONST. art. I, § 11). The defendant argued that because he was a juvenile at the time of the criminal conduct, yet would not be eligible for release from prison until aged at least 55, his sentence was a *de facto* sentence of life imprisonment. Moreover, taking into account statistical life expectancy, if and when the defendant would be released he would be unable to reenter society as a mature rehabilitated individual. The court declined to make such a determination, stating that relevant factors ." . . in determining what constitutes an appropriate juvenile sentence in light of the unique attributes of youth . . ." are . . . societal and policy considerations . . . ," and therefore constitute issues that must be legislated by the General Assembly.

UNIFIED CODE OF CORRECTIONS – SENTENCING JUVENILE DEFENDANTS

The mandatory imposition of a defendant's entire sentence without sentence credit is unconstitutional as applied to juvenile defendants.

In *People v. Othman*, 2019 IL App (1st) 150823, the Illinois Appellate Court was asked to decide whether the 55-year sentence for first degree murder, including a 25-year weapons enhancement, imposed on the 17-year old defendant was unconstitutional. Subparagraph (i) of paragraph (2) of subsection (a) of Section 3-6-3 of the Unified Code of Corrections ("Truth in Sentencing Act") (730 ILCS 5/3-6-3 (a)(2)(i) (West 2006)) provides that the Department of Corrections shall prescribe rules and regulations for awarding and revoking sentence credit for persons committed to the Department and that "the rules and regulations on sentence credit shall provide . . . a prisoner who is serving a term of imprisonment for first degree murder . . . shall receive no sentence credit and shall serve the entire sentence imposed by the court." The defendant argued, among other arguments, that his sentence was unconstitutional because the sentencing scheme, including the Truth in Sentencing Act, prevents him from ever showing that he is rehabilitated. The court agreed with the defendant, holding that the Truth in Sentencing

Act's requirement that a juvenile defendant serve his or her entire sentence violates the Eighth Amendment to the United States Constitution's (U.S. CONST. Amend. VIII) prohibition of cruel and unusual punishment. The court reasoned that the Truth in Sentencing Act, as applied to the defendant and "similarly situated juvenile offenders tried as adults, is unconstitutional because every major case on the issue of juvenile sentencing strongly condemns sentencing policies that prevent a juvenile from seeking to demonstrate rehabilitation and parole at some point during his prison sentence." The court quoted the United States Supreme Court in providing that states may resolve such issues by "permitting juvenile homicide offenders to be considered for parole." A partial concurrence was filed that argued that the court should not have addressed the constitutionality of the defendant's sentence and the Truth in Sentencing Act because doing so was unnecessary to resolving the case.

UNIFIED CODE OF CORRECTIONS – SENTENCING CREDIT

An inmate serving consecutive sentences for a Class X felony and a non-Class X felony is eligible for enhanced programming credit against the sentence for the non-Class X felony.

In *People v. Washington*, 2019 IL App (1st) 172372, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied the defendant enhanced programming credit against his sentence for second degree murder when the defendant had also been convicted of a Class X felony. Subsection (a)(4) of Section 3-6-3 of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(4) (West 2016)) provides, "The rules and regulations shall also provide that the sentence credit accumulated and retained under [specified provisions] by any inmate during specific periods of time in which such inmate is engaged full-time in . . . educational programs. . . shall be multiplied by a factor of . . . 1.50 for program participation. Sentence credit, subject to the same offense limits and multiplier provided in this paragraph, may be provided to an inmate who was held in pre-trial detention prior to his or her current commitment to the Department of Corrections and successfully completed . . . educational program. . . provided by the county department of corrections or county jail." The subsection also provides, "[N]o inmate shall be eligible for the additional sentence credit under paragraph (4) . . . if convicted of . . . a Class X felony." The State argued that because Section 3-6-3(a)(4) denies programming credit to a defendant convicted of a Class X felony, the defendant can never be eligible for additional credit because he will always count as an inmate convicted of a Class X felony under Section 3-3-3(a)(4). The defendant argued that Section 5-8-4 permits the Department of Corrections to award different credits against separate parts of consecutive sentences. The court agreed with the defendant, holding that the defendant was entitled to enhanced programming credit against his sentence for second degree murder. The court reasoned that

the statute was ambiguous, noting that the phrase "an inmate convicted of a Class X felony" could refer to any incarcerated person with a Class X felony on his record, an inmate serving a sentence for a Class X felony, or an inmate who is serving a Class X offense and a sentence for a non-Class X offense. The court found no mention of consecutive sentences in the transcripts of the General Assembly's debates on the bill. Due to the lack of legislative history, the court turned to the rule of lenity, which provides that ambiguous criminal statutes will generally be construed in the defendant's favor. Since the General Assembly did not prohibit the Department of Corrections from awarding inmates enhanced programming credit against the part of a consecutive sentence that punishes the inmate for a crime not specifically listed as cause for denying credit, the court awarded credit against the defendant's second degree murder conviction.

UNIFIED CODE OF CORRECTIONS – MANDATORY SUPERVISED RELEASE TERM

Mandatory supervised release housing conditions are unconstitutional as applied to indigent sex offenders.

In *Murphy v. Raoul*, 380 F. Supp. 3d 731 (2019), the United States District Court for the Northern District of Illinois was asked to decide whether indefinite incarceration of homeless indigent sex offenders created an impermissible classification based on wealth, which indefinitely deprived the offenders of their liberty as a result of their incapacity to pay, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (U.S. CONST. Amend. XIV). The plaintiffs were indigent homeless sex offenders who were subject to additional incarceration after their release dates because the Illinois Department of Corrections could not find appropriate places for them to live on mandatory supervised release. The Prisoner Review Board sets the conditions for mandatory supervised release and determines whether a violation of those conditions warrants revocation of mandatory supervised release. Even if the Prisoner Review Board approves an individual for mandatory supervised release, the Illinois Department of Corrections will not extricate that person unless and until he or she satisfies certain conditions, including securing a qualifying host site based on a variety of statutes and regulations that restrict where sex offenders may live while on mandatory supervised release. A parole agent must approve the placement. Subsection (d) of Section 5-8-1 of the Unified Code of Corrections (730 ILCS 5/5-8-1) provides that for defendants who commit (specified sex offenses), the term of mandatory supervised release shall range from a minimum of 3 years to a maximum of the natural life of the defendant. The plaintiffs argued that Illinois's statutory scheme violates: (1) substantive due process; (2) equal protection; (3) procedural due process; and (4) the Eighth Amendment (U.S. CONST. Amend. VIII). The plaintiffs argued that the defendants are denying them equal protection of the law

because, but for their indigency, the plaintiffs would be able to pay for their own housing and serve their mandatory supervised release term in their community. The defendant argued that they are not requiring the plaintiffs to pay for anything (like a fine) to secure their release. The defendants argued that the Illinois Department of Corrections' requirement that sex offenders have a stable host site is rationally related to protecting the public, especially children. The court agreed with the plaintiffs, holding that the host site requirement is unconstitutional under the specific facts of the case. The court reasoned that the General Assembly thought it best to rehabilitate sex offenders by reintegrating them, like other convicted felons, into the community after prison. The Constitution entitles them to the same conditional liberty that all other releasees receive. Because the defendants' current application of the host site requirement allows indefinite detention of the plaintiffs, the court concluded that it breaches the promises enshrined in the Bill of Rights.

UNIFIED CODE OF CORRECTIONS – REVOCATION OF FINE

In determining whether to waive or modify certain fines, the court is not permitted to investigate the court is not permitted to consider whether a defendant had been diligent in his efforts to pay.

In *People v. Barajas*, 2018 IL App (3d) 160433, the Appellate Court was asked to decide whether the defendant, who, in 2002, was convicted of driving an uninsured motor vehicle and driving a motor vehicle when his registration was suspended, should have his fines revoked because he was unable to pay the fines amounting to $2,151 due to serving a 5-year prison sentence on unrelated charges and earned only $10 per month. Section 5-9-2 of the Unified Code of Corrections (730 ILCS 5/5-9-2 (West 2016)) provides that the court, upon good cause shown, may revoke the fine or the unpaid portion or may modify the method of payment. The trial court found that, although the defendant showed good cause with regard to one fine, he had not been diligent with the other two fines over the preceding 14 years and failed to establish good cause with these fines. The defendant argued that the trial court erred in expanding the good cause standard beyond inability to pay or hardship to include prior diligence as shown by the portion of the fines he had or had not previously paid. The appellate court agreed with the defendant, holding that the trial court abused its discretion in considering the defendant's prior diligence in payment of the fines. The court reasoned that the term "good cause shown" is ambiguous and the legislative history of Public Act 77-2097, which enacted Section 5-9-2, and Public Act 87-396, which amended it, provided no clarification of the good cause standard. Since there was lack of legislative history on the statute, the court relied on the commentary from the Illinois Council on Diagnosis and Evaluation of Criminal Defendants. The Council commentary on Section 5-9-2 states that the Section is designed to mitigate a fine on a showing of inability to pay or a hardship and a showing of good cause is tantamount to

showing an inability to pay or a hardship that prevents the defendant from paying his or her fines.

CODE OF CIVIL PROCEDURE – PHYSICIAN-PATIENT PRIVILEGE

A patient must put his or her own medical condition at issue in a civil case in order to waive the physician-patient privilege.

In *Palm v. Holocker*, 2018 IL 123152, the Illinois Supreme Court was asked to decide whether a defendant's attorney could refuse to provide the defendant's medical records using the physician-patient privilege in a negligence case arising out of the defendant hitting the pedestrian plaintiff. Item (4) of Section 8-802 of the Code of Civil Procedure (735 ILCS 5/8-802(4) (West 2016)) provides that "[n]o physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only . . . (4) in all actions brought by or against the patient . . . wherein the patient's physical or mental condition is an issue . . . . " The plaintiff argued that Section 8-802 merely requires that the patient's physical condition be "an issue" and it does not say that only the patient may put his or her medical condition at issue. The defendant argued that, in a civil case, the exception applies only when a party puts his or her own physical condition at issue by an affirmative pleading. The court agreed with the defendant, holding that a plaintiff may not waive a defendant's privilege by putting the defendant's medical condition at issue. The court reasoned that courts have been consistent in holding that, in civil cases, only the patient may put his or her own medical condition at issue (and the General Assembly has not modified the Section following these decisions). The court further reasoned that the plaintiff's interpretation would render the privilege virtually meaningless. However, the court acknowledged "the confusing wording of the statute" and called upon the General Assembly to amend item (4) of Section 8-802 in order to make its intentions clear.

CODE OF CIVIL PROCEDURE – LANDLORD DUTY TO MITIGATE DAMAGES

A landlord's duty to mitigate damages may be waived contractually.

In *Takiff Properties Group Ltd. #2 v. GTI Life, Inc.*, 2018 IL App (1st) 171477, the Illinois Appellate Court was asked to decide whether the trial court erred when it found that the lease contractually waived a landlord's obligation to mitigate damages. Section 9-213.1 of the Code of Civil Procedure (735 ILCS 5/9-213.1 (West 2014)) provides that "a

landlord or his or her agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee. The tenant argued that the landlord failed to present evidence of mitigation, the landlord waived its right to assert the contractual provision excusing it from reletting the premises, and the parties could not have contracted away the defendant's statutory duty to mitigate damages. The landlord argued that the tenant contractually waived the landlord's duty to mitigate. The court agreed with the landlord, holding that Section 9-213.1 extends "to tenants the same common law affirmative defense previously available to every other litigant," and in this case, the "tenant contractually waived that affirmative defense." The court reasoned that "the statute does not clearly indicate whether the legislature intended to eliminate contracting parties' ability to excuse a landlord from attempting to mitigate damages" and there was no reason why the contractual waiver should not be enforced.

CODE OF CIVIL PROCEDURE – JUDGMENT LIENS

A contingent future interest as a tenant by the entirety is not exempt from a judgment lien.

In *In re Jaffe*, 932 F.3d 602 (2019), the United States Court of Appeals for the Seventh Circuit was asked to decide whether the district court erred when it held that a judgment lien on a residence, held by the defendant as a tenant by the entirety when the judgment lien was entered, was exempt from attachment after the tenancy by the entirety terminated due to the death of the defendant's wife. Section 12-112 of the Code of Civil Procedure (735 ILCS 5/12-112 (West 2016)) provides that "[a]ny real property . . . held in tenancy by the entirety shall not be liable to be sold upon judgment entered . . . against only one of the tenants . . . ." The plaintiff argued that the judgment lien attached to the defendant's contingent future interest in the property as a tenant by the entirety, not the defendant's tenancy interest, and was not exempt because the tenancy by the entirety terminated upon the death of the defendant's wife. The defendant argued that the judgment lien attached only to his tenancy interest in the property, which was exempt from judgment. The court agreed with the plaintiff, holding that Illinois law does not exempt contingent future interest from the attachment of judgment liens. The court reasoned that Section 12-112 creates a narrow exception for tenancy interests "without mentioning the contingent future interests explicitly created by the Illinois legislature." The court noted that when the General Assembly "wanted to exempt particular interests from the attachment of judgment liens, it had no problem in doing so."

CODE OF CIVIL PROCEDURE – WAGES SUBJECT TO COLLECTION

Accrued vacation pay is not exempt from debt collection for purposes of federal bankruptcy proceedings.

In *Burciaga v. Moglia*, 602 B.R. 675 (2019), the United States District Court for the Northern District of Illinois was asked to decide whether the federal bankruptcy court erred in finding that accrued vacation pay is not exempt under state law from bankruptcy proceedings. Section 12-803 of the Code of Civil Procedure (735 ILCS 5/12-803 (West 2016)) provides, "The wages, salary, commissions and bonuses subject to collection under a deduction order, for any work week shall be . . . 15% of such gross amount paid for that week." The debtor argued that since Section 12-803 provided an exemption to his unpaid wages from other types of process, it was also intended to exempt the property from bankruptcy proceedings. The trustee argued that the General Assembly did not identify a bankruptcy exemption with reasonable certainty as required by the United States Appellate Court's decision in *Matter of Geise*, 992 F.2d 651 (7th Cir. 1993). The court agreed with the trustee, holding that that accrued vacation pay was not exempt from bankruptcy proceedings under Section 12-803. The court reasoned that the General Assembly had not spoken with sufficient clarity that it intended for the wage exemption to apply to bankruptcy proceedings. The court noted that although bankruptcy filings, collection judgments, and deduction orders are all legal remedies to manage debt, they are not so similar that an exemption in one should automatically be applicable to the other. The court cited bankruptcy exemptions for personal property (735 ILCS 5/12-1001), retirement plans (735 ILCS 5/12-1006), and homesteads (735 ILCS 5/12-901) as examples where the General Assembly used language that unequivocally protected the identified property against any and all debt collection mechanisms. It did not find broad enough language in Section 12-803 to determine that the General Assembly wished to create such an exemption. The court went on to note that if the General Assembly intended Section 12-803 to apply during bankruptcy proceedings, it would need to resolve a contradiction in the language of the statute. Bankruptcy exemptions are usually assessed as of the date of the bankruptcy filing, but Section 12-803 only protects owed wages, raising the inference that once paid, they are no longer subject to protection. The court suggested that if the General Assembly intended for Section 12-803 to apply to bankruptcy proceedings, it should use the "traceable to" language it uses in other instances to clarify that an exemption's protections are to continue even after the asset has changed hands or form.

CODE OF CIVIL PROCEDURE – GARNISHMENT OF WAGES

The court may not adjust wage deductions in response to economic hardship.

In *National Collegiate Student Loan Trust 2004-1 v. Ogunbiyi*, 2018 IL App (1st) 170861, the Illinois Appellate Court was asked to decide whether the trial court had discretion to alter the amount to be garnished from the defendant's wages. Section 12-803 of the Code of Civil Procedure (735 ILCS 5/12-803 (West 2016)) provides requirements for the collection of wages subject to collection under a deduction order. Prior to 2007, Section 12-803 specified that the "maximum wages" subject to collection under a deduction order could not exceed 15% of an employee's gross pay. Public Act 95-611 removed the word "maximum" from that provision in 2007. The plaintiff argued that Section 12-803 required the deduction of 15% of the defendant's gross pay, regardless of economic hardship, and that the trial court did not have discretion to alter or lessen the amount to be garnished from the defendant's wages. The defendant argued that the trial court had the discretion to alter the garnishment of wages and that such alteration was proper because the 15% deduction would cause her economic hardship. The court agreed with the plaintiff, holding that "the wage deduction provisions of the [Code] leave the circuit court no discretion to deny a request for a wage deduction order on grounds of extreme hardship." Through analysis of both legislative history and how courts in other jurisdictions have interpreted similar statutes, the court reasoned that by removing the word "maximum" from Section 12-803, the General Assembly showed its intent to deny judicial discretion to enter a wage deduction order in an amount less than the 15% required by Section 12-803. Despite its holding in favor of the plaintiff, the court commended the trial court on its efforts to account for economic hardship and specifically implored the General Assembly to amend Section 12-803 to allow for judicial discretion to modify a wage deduction order.

CODE OF CIVIL PROCEDURE – STATUTE OF LIMITATIONS

A cause of action against an insurance producer for failure to provide the level of coverage requested accrues when the policyholder receives the policy and not the date the insurer denies coverage.

In *American Family Mutual Insurance Company v. Krop*, 2018 IL 122556, the Illinois Supreme Court was asked to decide when a cause of action accrues for an insurer failing to provide the amount of coverage requested. Section 13-214.4 of the Code of Civil Procedure (735 ILCS 5/13-214.4 (West 2014)) provides, "All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale,

placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within two years of the date the cause of action accrues." The plaintiffs argued that, using the discovery rule, the two-year period began when the insurer denied the plaintiffs' claim to cover a tort action. The defendant insurer argued that the two-year period began when the plaintiffs received their policy from the insurer because the plaintiffs had an obligation to read their policy and discover the deficiency. The court agreed with the defendant, holding that the plaintiffs' cause of action accrued when they had the opportunity to read their policy. The court characterized the plaintiffs' cause of action as a tort arising out of a contract, so "the cause of action ordinarily accrues at the time of the breach of contract, not when a party sustains damages." The court reasoned that the plaintiffs' alleged damages began "as soon as the plaintiff should discover some injury [when the defendant insurer provided the plaintiffs with a deficient policy], even if the full extent of the injury is not evident."

A dissenting opinion argued that the plaintiffs' cause of action should have been characterized as an ordinary negligence action, in which case the cause of action would have accrued when the plaintiffs knew that an injury occurred (when the defendant insurer denied the plaintiffs' claim). Until that point, there was no loss to the plaintiffs for which an action could be brought. The dissenting opinion points out that the General Assembly has established the public policy that "insurance producers . . . have a duty of ordinary care and that liability rests in negligence principles, allowing recovery in tort" because of subsection (d) of Section 2-2201 of the Code (735 ILCS 5/2-2201 (West 2014)), which states ". . . the provisions of this Section do not limit or release an insurance producer, registered firm, or limited insurance representative from liability for negligence concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance."

BIOMETRIC INFORMATION PRIVACY ACT – RIGHT OF ACTION

A plaintiff need not plead or prove actual damages to support a private right of action.

In *Rosenbach v. Six Flags Entertainment Corporation*, 2019 IL 123186, the Illinois Supreme Court was asked to determine whether the appellate court erred when, in answering certified questions, it reversed the trial court's holding and decided that the plaintiff was not an "aggrieved person" under Section 20(1) of the Biometric Information Privacy Act (the Act) (740 ILCS 14/20(1) (West 2016)) because the plaintiff failed to allege an actual injury or adverse effect beyond a violation of Section 15(b) of the Act (740 ILCS 14/15(b) (West 2016)). Section 15(b) provides that no "private entity may collect . . . or otherwise obtain a person's . . . biometric information, unless it first: (1) informs the subject or the subject's legally authorized representative in writing that . . . biometric

information is being collected or stored; (2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which . . . biometric information is being collected, stored, and used; and (3) receives written release executed by the subject of the . . . biometric information or the subject's legally authorized representative." Section 20(1) provides that "[a]ny person aggrieved by a violation of this Act shall have a right of action [and is entitled to recover damages]." The plaintiff argued that the appellate court's decision was improper because its interpretation of "aggrieved person" under Section 20(1) is inconsistent with the Act's purpose. The defendant argued that the appellate court's decision was proper because "an individual must have sustained some actual injury or harm, apart from the statutory violation itself, in order to sue under the Act."

The Illinois Supreme Court rejected the appellate court's and the defendant's interpretation of Section 20(1), reversing the appellate court's decision and finding that a violation of Section 15, in itself, is sufficient to support a private right of action under the Act. The court reasoned that if the General Assembly had intended to limit recovery under the Act to persons who sustained some actual damage, beyond violation of a right conferred under the Act, the General Assembly would have clearly expressed that intention in the statute itself. However, the court found that Section 20(1) "provides simply that [a]ny person aggrieved by a violation of the Act shall have a right of action." Additionally, the court noted that the Act "does not contain its own definition of what it means to be 'aggrieved' by a violation of the law," thereby requiring the court to "assume the legislature intended for it to have its popularly understood meaning." The court cited cases where it previously held that, absent a specific definition stating otherwise, "aggrieved" means "having a substantial grievance; a denial of some personal or property right." As a result, "sustaining [actual] damages is not necessary to qualify as 'aggrieved'. Rather, a person is . . . aggrieved, in the legal sense, when a legal right is invaded by the act complained of *or* [the person's] pecuniary interest is directly affected by the decree or judgment." (Emphasis in original). After applying the popularly understood definition of aggrieved to Section 20(1), the court found that "through the Act, the General Assembly has codified that individuals possess a right to privacy in and control over their . . . biometric information." Additionally, the court found that "the duties imposed on private entities by Section 15 of the Act . . . define the contours of that statutory right." Therefore, any violation of Section 15's requirements "constitute an invasion, impairment, or denial of the statutory rights of any person whose biometric information is subject to the breach." The court refused to "read into the statute conditions or limitations the legislature did not express," reasoning that such a reading would be "inconsistent with the objective and purposes the legislature sought to achieve" through the Act. Accordingly, the court held that the plaintiff was clearly aggrieved within the meaning of Section 20 and therefore entitled to seek recovery under that provision without needing to plead or prove any additional or actual damages.

DRUG DEALER LIABILITY ACT – DRUG DEALER LIABILITY

A provision allowing recovery from a defendant who did not proximately cause the plaintiff's damages fails the rational basis test and violates substantive due process.

In *Wingert v. Hradisky*, 2019 IL 123201, the Illinois Supreme Court was asked to decide whether provisions of the Drug Dealer Liability Act permitting persons affected by illegal drug use to recover from persons knowingly participating in the illegal drug market were unconstitutional. Paragraph (2) of subsection (b) of Section 25 of the Drug Dealer Liability Act (740 ILCS 57/25(b)(2) (West 2016)) provides that a plaintiff may seek damages from a "person who knowingly participated in the illegal drug market if: (A) the place of illegal drug activity by the individual drug user is within the illegal drug market target community of the defendant; (B) the defendant's participation in the illegal drug market was connected with the same type of illegal drug used by the individual drug user; and (C) the defendant participated in the illegal drug market at any time during the individual drug user's period of illegal drug use." The plaintiff argued that the provision does not arbitrarily presume that a person who participates in the illegal drug market caused the plaintiff's injuries, as held by the trial court, and is not unconstitutional. The defendant argued that the provision "creates an unconstitutional presumption of causation and that imposing liability under such circumstances . . . violates due process." The court agreed with the defendant, holding that paragraph (2) of subsection (b) of Section 25 of the Act is facially unconstitutional under the Fourteenth Amendment to the United States Constitution (U.S. CONST. amend. XIV). In examining the defendant's substantive due process claim, the court found that the proper measure for the claim is the rational basis test, in which the "statute will be upheld so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable." The court reasoned that the provision in question is both arbitrary and unreasonable in that it "allows a plaintiff to recover substantial civil damages from a defendant who not only was not the proximate cause of the plaintiff's damages, but who also has no relationship with or connection to the identified illegal drug user," and would even allow recovery of damages when "it is known with perfect certainty that the named defendant did not contribute to the drug use." Justice Burke, concurring in part and dissenting in part, agreed with the majority opinion, but would have also held paragraph (1) of subsection (b) of Section 25 of the Act unconstitutional. Specifically, that paragraph provides the Act provides that a plaintiff may seek damages from a "person who knowingly distributed, or knowingly participated in the chain of distribution of, an illegal drug that was actually used by the individual drug user." This opinion reasoned that paragraph (1) "is equally as arbitrary and oppressive" as paragraph (2), "and equally as unconstitutional" because it does not require the plaintiff to prove that the "defendant's conduct was a cause-in-fact of any injury to any person."

Justice Theis, concurring in part and dissenting in part, disagreed with both the majority opinion and the opinion of Justice Burke, and would have held that neither paragraph (2) nor paragraph (1) of subsection (b) of Section 25 of the Act is unconstitutional. This opinion reasoned that the General Assembly fully "considered the role of dealers in sustaining the illegal drug market," and that the means employed by the General Assembly to address the State's interest in dealing with "the significant and costly impact of the illegal drug market" was rationally related to that interest.

GENDER VIOLENCE ACT – GENDER VIOLENCE LIABILITY

A legal entity, such as a corporation, can be subject to civil liability under the Act.

In *Gasic v. Marquette Management, Inc.*, 2019 IL App (3d) 170756, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that an entity cannot "be considered a 'person' committing acts 'personally' for purposes of liability under the Gender Violence Act." Section 10 of the Gender Violence Act (740 ILCS 82/10 (West 2016)) provides that any "person who has been subjected to gender-related violence . . . may bring a civil action for damages, injunctive relief, or other appropriate relief against a person or persons perpetrating that gender-related violence." Section 1.05 of the Statute on Statutes (5 ILCS 70/1.05 (West 2016)) provides that the terms "'person' or 'persons' may extend and be applied to bodies politic and corporate as well as individuals." The plaintiff argued that the term "person" as used in the Gender Violence Act includes individuals, corporations, and political bodies, and that the defendant, as a corporation, can be held liable for a violation under the Act. The defendant argued that "person" as used in the Act does not include corporations, and it cannot be held liable for a violation under the Act. The court agreed with the plaintiff, reversing the circuit court and holding that "under some circumstances, a legal entity, such as a corporation, can act 'personally' for purposes of giving rise to civil liability under the Act." The court reasoned that because the Gender Violence Act does not define "person," the provisions of the Statute on Statutes shall be applied in construing the statute "unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute." Finding no such conflict, the court applied the Statute on Statutes provision, which provides that "person" includes corporations, and determined that a corporation could be held liable under the Gender Violence Act.

The dissenting opinion argued that the context of the Act clearly demonstrated "that artificial entities cannot personally perpetuate gender-related violence." Specifically, the dissenting opinion pointed out that Section 10 of the Act "explicitly refers to a 'person who has been subjected to gender-related violence'," which indicates that the statute was intended to apply to "human beings who are susceptible to physical violence." Indicating that Section 10 also refers to "a 'person' or 'persons' perpetuating . . . gender-related

violence," the dissenting opinion, citing case law, further reasoned that courts generally "assign the same meaning to identical words in different parts of the same statute absent clear legislative intent to the contrary." As such, the fact that the statute appears to apply to "human beings who are susceptible to physical violence," also means that a "person" for purposes of liability under the statute also refers to a human being and not an artificial entity, such as a corporation, because artificial entities "lack the capacity to intend and the literal ability to 'personally' perpetuate violence, gender related or otherwise."

JOINT TORTFEASOR CONTRIBUTION ACT – ANIMALS RUNNING AT LARGE

A third-party plaintiff may seek contribution from a third-party defendant, even if the third-party defendant cannot be held liable for the underlying tort.

In *Raab v. Frank*, 2019 IL App (2d) 171040, the Illinois Appellate Court was asked to decide whether the trial court erred when it granted summary judgment in favor of the third-party defendants in a contribution action. Section 2 of the Joint Tortfeasor Contribution Act (740 ILCS 100/2 (West 2010)) provides that "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." Section 3 of that Act (740 ILCS 100/3 (West 2010)) provides that the "pro rata share of each tortfeasor shall be determined in accordance with his relative culpability." In other words, each tortfeasor's contribution is based on his or her liability to the injured party. At the same time, the Domestic Animals Running At Large Act (510 ILCS 55/1 (West 2010)) provides that the owner of a domestic animal running at large is strictly liable for damages caused by that animal unless the owner can prove that he exercised due care in restraining the animal and was unaware that the animal had escaped. In *Heyen v. Willis*, 94 Ill. App 2d 290 (1968), the Illinois Appellate Court held that only the animal's owner could be liable under the Domestic Animals Running At Large Act for injuries caused by the animal. The third-party plaintiff argued that the trial court incorrectly determined that he could not bring a contribution claim against the third-party defendants. The third-party defendants argued that they were not liable for any contribution owed to the third-party plaintiff. The court agreed with the third-party plaintiff, holding that the third-party plaintiff may seek contribution from the third-party defendants under the Joint Tortfeasor Contribution Act. The court pointed out that although the Joint Tortfeasor Contribution Act suggests that the third-party plaintiff has a right to contribution from the third-party defendants for damages, the Domestic Animals Running at Large Act suggests that the third-party plaintiff must bear all of those losses himself. The court resolved this apparent conflict by looking to *Doyle v. Rhodes*, 101 Ill.2d 1 (1984), in which the Illinois Supreme Court held that immunity granted under the

Workers' Compensation Act does not provide the third-party defendant with immunity under the Joint Tortfeasor Contribution Act. The court extended that reasoning to this case, and held that the fact that the third-party plaintiff would be barred from pursuing an action against the third-party defendants under the Domestic Animals Running at Large Act has no bearing on the third-party plaintiff's ability to seek contribution. Accordingly, the court reversed the trial court's judgment granting summary judgment to the third-party defendants on that count and remanded the matter to the trial court for additional proceedings.

MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CONFIDENTIALITY ACT – UNAUTHORIZED RELEASE OF RECORDS

A person may maintain a cause of action for a technical violation of the procedural requirements of the Act.

In *Garton v. Pfeifer*, 2019 IL App (1st) 180872, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found that the plaintiff was not aggrieved under the Mental Health and Developmental Disabilities Confidentiality Act (the Act) because the mental health records that were provided without following the procedures for serving a subpoena for those records did not result in an adverse ruling and were sealed and not read by the judge. Subsection (d) of Section 10 of the Act (740 ILCS 110/10 (d) (West 2014)) specifies the procedures required to serve a subpoena seeking to obtain access to certain mental health records. Section 15 of the Act (740 ILCS 110/15 (West 2014)) provides that "[a]ny person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief." The defendants argued that a technical violation of the Act alone did not constitute being aggrieved under the Act, that there was no evidence that anybody saw the mental health records that the circuit court sealed and refused to review, and that the records did not result in an adverse judgment. The plaintiff argued that the violation was sufficient to be aggrieved under the Act. The court agreed with the plaintiff, holding that a person may be aggrieved by a violation of the Act's procedural requirements. The court reasoned that because the Act does not define the word "aggrieved," the General Assembly intended the word to have its popularly understood meaning, which is "suffering from an infringement or denial of legal rights." Therefore, the court concluded that the defendants' failure to comply with the Act was a violation of the plaintiff's legal rights.

ILLINOIS FALSE CLAIMS ACT – DEFINITION OF STATE

If both parties in a false claims action meet the definition of "State," the definition applies to the governmental entity that has allegedly been defrauded.

In *State v. Board of Trustees of Illinois Eastern Community College*, 2019 IL App (5th) 180333, the Appellate Court was asked to decide whether the Circuit Court erred when it declined to apply the definition of the "State" to the defendant and dismiss the case. Paragraph (1) of subsection (a) of Section 3 of the Illinois False Claims Act (740 ILCS 175/3(a)(1) (West 2014)) provides that "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval is liable to the State for a civil penalty." Subsection (a) of Section 2 of the Illinois False Claims Act (740 ILCS 175/2(a) (West 2014)) provides that ""State" means the State of Illinois; any agency of the 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 plaintiff argued that the plaintiff, the State of Illinois, and the defendant, a community college district, were two separate entities. The defendant argued that the statutory definition of "State" meant that the defendant and the plaintiff were the same entity and a controversy between parties that are the same entity is not a justiciable matter. The court agreed with the plaintiff, holding that "any entity included in the False Claim Act's broad definition of the "State" may be a "person" liable to another such entity unless the two entities are so closely intertwined that they are, in essence, a single entity." The court reasoned that the legislature did not intend for the definition of "State" to "defeat jurisdiction over controversies that are, in substance, justiciable matters between parties with adverse legal interests," and that "the broad statutory definition of the "State" is intended to apply to the governmental entity that has allegedly been defrauded."

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – GUARDIAN *AD LITEM*

The court urged the General Assembly to ensure that the statutes use the term "guardian ad litem" consistently.

In *Nichols v. Fahrenkamp*, 2019 IL 123990, the Illinois Supreme Court was asked to decide whether the appellate court erred when it determined that quasi-judicial immunity does not extend to guardians *ad litem*. Paragraph (2) of subsection (a) of Section 506 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/506(a)(2) (West 2016)) provides that in a proceeding "involving the support, custody, visitation, allocation of

parental responsibilities, education, parentage, property interest, or general welfare of a minor or a dependent child, the court may . . . appoint an attorney to serve" as a guardian *ad litem* who "shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child." Subsection (b) of Section 11-10.1 of the Probate Act of 1975 (755 ILCS 5/11-10.1(b) (West 2016)) provides that in a proceeding "for the appointment of a standby guardian or a guardian the court may appoint a guardian *ad litem* to represent the minor in the proceeding." The plaintiff argued that the guardian *ad litem* was not appointed under the Illinois Marriage and Dissolution of Marriage Act because the case did not involve any dissolution of marriage or custody dispute, but rather the case involved the distribution of a minor's assets, which means that the guardian *ad litem* was appointed under the Probate Act of 1975. The defendant argued that the role of guardian *ad litem* in this case was based on the Illinois Marriage and Dissolution of Marriage Act because the court that appointed the guardian *ad litem* relied on the Act's inherent authority. The court agreed with the defendant, holding that "guardians *ad litem* who submit recommendations to the court on a child's best interest are protected by quasi-judicial immunity." The court reasoned that the role of the guardian *ad litem* in this case corresponded to a guardian *ad litem* under the Illinois Marriage and Dissolution of Marriage Act. The court further urged the General Assembly to review the Illinois Marriage and Dissolution of Marriage Act and the Probate Act of 1975 "to ensure that those statutes use the phrase "guardian *ad litem*" consistently."

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – ATTORNEY'S FEES

A written agreement between the party and the attorney is required before a party's former attorney may recover attorney fees.

In *In re Marriage of Pavlovich*, 2019 IL App (1st) 180783, the Appellate Court was asked to decide whether the Circuit Court erred when it denied a petition for attorney's fees, holding that such fees could not be recovered absent a written agreement between the attorney and the client. Paragraph (2) of subsection (c) of Section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508(c)(2) (West 2016)) provides that in a final hearing for attorney's fees and costs against an attorney's own client "no final hearing is permitted unless the counsel and the client had entered into a written engagement agreement at the time the client retained the counsel . . . and the agreement meets the requirements of subsection (f)." Subsection (f) of Section 508 provides that "a written engagement agreement have appended to it a statement of the client's rights and responsibilities." Paragraph (3) of subsection (c) of Section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508(c)(3) (West 2016)) provides, "*Quantum meruit* principles shall govern any award for legal services performed that is not based on

the terms of the written engagement agreement." The respondent argued that her former law firm was not entitled to recover fees "because it could not demonstrate that there was a written contract between [the respondent's former law firm] and respondent that contained a statement of the client's rights and responsibilities." The respondent's former law firm argued that "it was seeking recovery of its fees under *quantum meruit*." The court agreed with the respondent, holding that the language "clearly requires the existence of a written contract before an attorney may recover fees . . . even if sought based on a theory of *quantum meruit*." The court reasoned that "a written agreement between the party and the attorney is required before a party's former attorney will be permitted to recover attorney fees." However, the court also stated that "in situations where there exists a written contract between the attorney and client, Section 508 eliminates the need for a separate suit for fees. Because of the language chosen by the legislature, however, where a written contract does not exist, Section 508 does not eliminate the need for a separate proceeding at all. Rather, an independent action for a common law claim of quantum meruit is an attorney's only recourse under such circumstances. We do not know whether the legislature intended such a result."

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – MODIFICATION OF CHILD SUPPORT

A court may consider the income of an obligor's spouse in calculating child support, but may not enter a modification order based upon the contingency of the obligor legally separating from his or her current spouse.

In *In re Marriage of Rushing*, 2018 IL App (5th) 170146, the Illinois Appellate Court was asked to decide whether the circuit court improperly calculated child support by reducing child support from the father because he and his spouse were separated. Paragraph (1) of subsection (a) of Section 510 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/510(a)(1) (West 2016)) provides that "[a]n order for child support may be modified . . . upon a showing of a substantial change in circumstances." The appellee argued the circuit court should have considered both the appellant's and his spouse's net income in the determination of child support. The appellant argued that child support could be reduced by considering only the appellant's income in the future if he and his spouse were legally separated. The court agreed with the appellee, holding that the circuit court abused its discretion when it entered the order reducing the appellant's child support after he and his spouse no longer resided together. The court reasoned that the decision to reduce child support "based upon some finding by another court at some future date" was an abuse of discretion. A dissenting opinion argued that whether the spouse's "net income could be included in the court's support calculation under the guidelines is a matter involving

statutory interpretation and is based on the language of the statute; it not a matter involving the exercise of the lower court's discretion."

ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – CIVIL UNION

A person who was a party to a civil union with the deceased parent of a child lacks standing to bring a claim for visitation.

In *Sharpe v. Westmoreland*, 2019 IL App (5th) 170321, the Illinois Appellate Court was asked to decide the following certified question on interlocutory appeal: whether a partner to a civil union can be classified as a step-parent for the purpose of requesting visitation under the Illinois Marriage and Dissolution of Marriage Act. Section 602.9 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602.9 (West 2016)) includes step-parents in the list of appropriate nonparents who may bring a petition requesting visitation with a child; however, that Section does not specifically include civil union partners. The intervenor-appellee, who was the civil union partner of the child's father at the time of the father's death, argued that the intent of the Illinois Religious Freedom Protection and Civil Union Act (750 ILCS 75/1 *et seq*. (West 2016)) was to allow partners joined in a civil union to enjoy the same benefits and rights as married spouses. The respondent-appellant, who is the child's mother, argued that the omission of civil union partners in the definition of step-parent in the Illinois Marriage and Dissolution of Marriage Act reflects a legislative intent not to include civil union partners in the category of nonparents who may seek visitation. The court agreed with the appellant, holding that a partner to a civil union does not have standing to bring a claim for visitation or parental responsibilities. The court reasoned that parents "have a fundamental constitutionally protected interest to make decisions concerning the care, custody, and control of their children." Furthermore, recent amendments to the Illinois Marriage and Dissolution of Marriage Act did not contain references to civil union partners when defining the term "step-parent." Accordingly, the court concluded that the restrictive provisions of the Illinois Marriage and Dissolution of Marriage Act should be narrowly defined and applied. In doing so, the court also noted the General Assembly may amend the statutory definition of step-parent to expand the categories of persons who may bring a claim for visitation.

INCOME WITHHOLDING FOR SUPPORT ACT – DUTIES OF PAYOR

The penalty for failure to withhold income for support by an employer applies only to each knowing violation.

In *In re Marriage of Hundley*, 2019 IL App (4th) 180380, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that a penalty for failure to withhold income applies only to knowing violations. Subsection (a) of Section 35 of the Income Withholding for Support Act (750 ILCS 28/35(a) (West 2014)) provides that "[i]f the payor knowingly fails to withhold the amount designated in the income withholding notice or to pay any amount withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor, then the payor shall pay a penalty of $100 for each day that the amount designated in the income withholding notice (whether or not withheld by the payor) is not paid to the State Disbursement Unit after the period of 7 business days has expired." Subsection (a) further provides that a "finding of a payor's nonperformance within the time required under this Act must be documented by a certified mail return receipt or a sheriff's or private process server's proof of service showing the date the income withholding notice was served on the payor. For purposes of this Act, a withheld amount shall be considered paid by a payor on the date it is mailed by the payor, or on the date . . . delivery of the amount has been initiated by the payor." The plaintiff argued that the statute "unambiguously requires a penalty beginning on the date any withholding under the initial withholding notice is not paid" regardless of intent. The defendant argued that the "finding of a knowing violation was against the manifest weight of the evidence" because compliance with the withholding notice was always intended, and the failure to do so was an honest mistake. The defendant further contended that the Act is supposed to punish only "those who purposely disregard a court's support order." The court agreed with the defendant, holding that the "penalty applies only to knowing violations." The court noted that the penalty provision in Section 35(a) is subject to more than one interpretation: the statute can be read to mandate a penalty for each missed payment as long as any one violation was knowingly committed, or it can be read as requiring a penalty only for each knowing violation. Because of this ambiguity, the court concluded that the act should be strictly construed. The court concluded that the statute intends "to punish only those employers who knowingly fail to comply with the Act."

PROBATE ACT OF 1975 – SLAYER STATUTE

A person found not guilty by reason of insanity is not subject to the slayer statute.

In *In re Estate of Ivy*, 2019 IL App (1st) 181691, the Illinois Appellate Court was asked to decide whether the circuit court erred when it determined that a not guilty by reason of insanity verdict did not give rise to an irrebuttable presumption of having intentionally caused death. Section 2-6 of the Probate Act of 1975 (755 ILCS 5/2-6 (West 2012)), also known as the Slayer Statute, provides that "A person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death . . . A person convicted of first degree murder or second degree murder of the decedent is conclusively presumed to have caused the death intentionally and unjustifiably . . . ." The plaintiff argued that because the defendant was cognizant when the defendant killed the decedent, and that the defendant committed an act that has the natural tendency to destroy another's life, the defendant should be barred from inheriting under the Probate Act of 1975. The defendant argued that because the defendant believed that the decedent was not the decedent, but rather a demon, the statute should not apply. The defendant further argued that the presumption of intent to kill "presumes that all persons are sane" and the defendant's insanity was adjudicated by the criminal court. The court agreed with the defendant, holding that a verdict of not guilty by reason of insanity did not give rise to a presumption of having intentionally caused death. The court reasoned that "the Slayer Statute expressly provides for a conclusive presumption having intentionally and unjustifiably caused death in only two instances – where a person is (1) convicted of first degree murder or (2) convicted of second degree murder," and that "If the intention of the legislature was to have a [finding of not guilty by reason of insanity] conclusively bar an individual from receiving from the decedent, it has not stated so."

CONVEYANCES ACT – AFTER-ACQUIRED TITLE

A deed in trust is a valid conveyance for purposes of the Act.

In *Trust Company of Illinois v. Kenny*, 2019 IL App (1st) 172913, the Illinois Appellate Court was asked to decide whether the trial court erred when it applied the after-acquired title doctrine and denied the defendant's motion for summary judgment in a quiet title action concerning a deed in trust executed in 1981. Section 7 of the Conveyances Act (765 ILCS 5/7 (West 2016)) provides that "[i]f any person shall sell and convey to another, by deed or conveyance, purporting to convey an estate in fee simple absolute, in any tract of land or real estate, lying and being in this state, not then being possessed of the legal estate or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the

land or real estate so sold and conveyed, it shall be taken and held to be in trust and for the use of the grantee or vendee; and the conveyance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest, at the time of said sale or conveyance." The defendant argued that the court incorrectly applied the after-acquired title doctrine in this case because a deed in trust is not a sale or conveyance. The plaintiffs conceded that the deed in trust was not a sale, but they nevertheless argued that the execution of the deed in trust constituted a conveyance. The plaintiffs also argued that Section 7 of the Conveyances Act requires only a sale or a conveyance. The court found that the plain language of the statute is ambiguous because the statute uses the conjunction "and" between "sale" and "conveyance," but then switches to the disjunctive "or" later in the same Section. The court ultimately held that the Conveyances Act applies broadly when there is *either* a sale *or* a conveyance. In doing so, the court reasoned that the after-acquired title doctrine had previously been found to apply to a mortgage transaction, which is a conveyance but not a sale. The court then determined that the 1981 deed in trust was a valid conveyance for purposes of the Conveyances Act because a land trust "is a device through which legal and equitable interest is conveyed or transferred to a trustee."

BUSINESS CORPORATION ACT OF 1983 – CORPORATE DIRECTOR INSPECTION OF RECORDS

A corporate director has a presumptive right to inspect corporate records without first demonstrating a "proper purpose."

In *Munroe-Diamond v. Munroe*, 2019 IL App (1st) 172966, the Illinois Appellate Court was asked to decide whether a corporate director has the unqualified right to examine corporate records or whether that right requires a "proper purpose" for such inspection of records. Section 7.75 of the Business Corporation Act of 1983 (805 ILCS 5/7.75 (West 2016)) provides for a shareholder's right to inspect corporate records, "but only for a proper purpose." The plaintiffs, as corporate directors, argued that they have an absolute and unqualified right to inspect corporate records and that any limitation to access the records is denying access. The defendants argued that because they allowed the plaintiffs access to some of the records, it cannot be asserted that access to inspect corporate records was denied. The court mostly agreed with the plaintiffs, holding that the plaintiffs, as corporate directors, had a right to inspect corporate records, but that the right to inspect corporate records was not unqualified in that the defendants could restrict access to such records only upon showing that the plaintiffs' "purpose for inspection was improper." The court reasoned that while Section 7.75 of the Act provided for a shareholder's right to inspect corporate records, there is "no corresponding legislative provision for corporate directors" in Illinois. Without a statutory provision put in place by the General Assembly, the court examined common law to make the determination as to a corporate director's right to

inspect corporate records. Specifically, in *Stone v. Kellogg*, 62 Ill. App. 444 (1895), the Illinois Appellate Court held that a corporate director "had the right to inspect corporate books and records." The Illinois Supreme Court later affirmed the Illinois Appellate Court's decision in *Kellogg* and added that a corporate director has the right of inspection, unless a reason can be given to deny the right of inspection. So, the court reasoned, absent any statutory instruction, corporate directors have a presumptive right, based upon common law, to inspect corporate records, unless an opposing party carries the "burden of proving that their purpose for inspection is improper."

CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT – VOLUNTARY PAYMENT DOCTRINE

The voluntary payment doctrine may act as a bar to recovery under the Act.

In *McIntosh v. Walgreens Boots Alliance, Inc.*, 2019 IL 123626, the Illinois Supreme Court was asked to decide whether the voluntary payment doctrine applied to an alleged violation of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/) ("Act") in which a retailer unlawfully collected a tax on sales exempted from the tax. The circuit court dismissed the claim against the retailer on the basis of the voluntary payment doctrine, which provides that money voluntarily paid under a claim of right to the payment with full knowledge of the facts cannot be recovered on the ground that the claim for payment was illegal. The appellate court reversed, holding that voluntary payment doctrine did not apply because the claim pleaded that the collection of the tax was a deceptive act under the Act, consistent with the plaintiff's argument that a fraud exception applies to the doctrine and that all actions under the Act fall within that exception. The Illinois Supreme Court, reversing the appellate court, held that the voluntary payment doctrine does apply and that the plaintiff's claim is therefore barred. The court reasoned that nothing in the language of the Act reflects a legislative intent to alter the voluntary payment doctrine. The court further held that, to avoid application of the doctrine, the plaintiff must show not only that the claim to the payment was unlawful but also that the payment itself was not voluntary and that the payment was made under the influence of some compulsion. A dissenting opinion argued that application of the voluntary payment doctrine to claims brought under the Consumer Fraud and Deceptive Business Practices Act "is in direct conflict with the public policy underlying that Act" and "undermines the legislature's intent in enacting the consumer protection statute." The dissent argued, "Use of the doctrine thus poses a threat to the effectiveness of the Consumer Fraud [and Deceptive Business Practices] Act."

CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT – KNOWING VIOLATION

A plaintiff is not required to present evidence or allege sufficient facts that the defendant knew of certain requirements and intentionally disregarded those requirements.

In *Bell v. Ring*, 2018 IL App (3d) 170649, the Illinois Appellate Court was asked to determine whether the trial court erred when it held that the defendant, an automotive repair shop operator, knowingly violated Section 15 of the Automotive Repair Act (815 ILCS 306/15 (West 2016)) and Section 2Z of the Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act") (815 ILCS 505/2Z (West 2016)) when he failed to provide the plaintiff with a written cost estimate prior to completing repairs on the plaintiff's truck. Section 15 of the Automotive Repair Act provides that "[e]very motor vehicle repair facility shall either (i) give to each consumer a written estimated price for labor and parts for a specific repair . . . or (ii) give to each consumer a written price limit for each specific repair." Section 2Z of the Consumer Fraud Act provides that "[a]ny person who knowingly violates the Automotive Repair Act commits [an actionable consumer fraud violation]." The defendant argued that the trial court's ruling was improper because the courts in *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153 (2009) and *Wendorf v. Landers*, 755 F.Supp.2d 972 (N.D. Ill. 2010) both held that a plaintiff must present evidence or allege sufficient facts that the defendant intentionally violated the underlying statute upon which the plaintiff rests his or her consumer fraud claim in order to satisfy the knowing violation requirement under Section 2Z of the Consumer Fraud Act. Applying the rationale in *Kunkel* and *Wendorf*, the defendant asserted that his failure to provide the plaintiff with a cost estimate did not prove that he knowingly and intentionally violated the Automotive Repair Act's cost estimate requirement, because he was unaware of the cost estimate requirement and had told the plaintiff, prior to conducting any repairs on the plaintiff's truck, that he was "too busy" to provide a cost estimate for those repairs. The defendant further asserted that the plaintiff effectively waived the Automotive Repair Act's cost estimate requirement when the plaintiff insisted that the defendant repair his truck after the defendant informed him that he was unable to provide a cost estimate. The plaintiff disputed the defendant's claim the he asked the defendant to repair his truck after learning he would not receive a cost estimate and argued that even if the defendant was unaware of the Automotive Repair Act's cost estimate requirement, the defendant's interpretation of the Consumer Fraud Act's knowing violation requirement "ignores the longstanding legal principle that ignorance or mistake of the law is no defense to a violation of the law." The appellate court agreed with the plaintiff and upheld the trial court's ruling, finding that the evidence presented at trial was sufficient to satisfy the Consumer Fraud Act's knowing violation requirement. The court reasoned that the defendant did not "inadvertently fail" to provide the cost estimate but rather "knowingly and intentionally elected not to provide an estimate because he was "too busy" and never sought to obtain a

written waiver for the estimate requirement." The court also disagreed with the finding in *Kunkel* and *Wendorf* that "a defendant must know the underlying statute and specifically intend to violate it to satisfy the Consumer Fraud Act's "knowing" requirement." The court found such an interpretation of the knowing violation requirement to be "contrary to the fundamental legal principle that a person's lack of knowledge or mistake of law is generally not a defense to a violation of law."

A dissenting opinion argued that the court's interpretation of the Consumer Fraud Act's knowing violation requirement had the deleterious effect of making "unintentional violations of the [Automotive] Repair Act actionable under the Consumer Fraud Act so long as the conduct at issue (here, the failure to provide an estimate) was performed intentionally." In the dissent's view, such a broad application "rendered the Consumer Fraud Act's explicit requirement of a *knowing violation* meaningless and superfluous." (Emphasis in original.) The dissent further argued that the court's interpretation was "particularly inappropriate . . . because the legislature declined to provide a private right of action in the [Automotive] Repair Act and expressly conditioned the availability of a remedy under the Consumer Fraud Act upon proof that the defendant "knowingly violate[d]" the [Automotive] Repair Act."

EIGHTH AMENDMENT TO THE U.S. CONSTITUTION – CIVIL FORFEITURES

The excessive fines clause of the Eighth Amendment to the United States Constitution is applicable to the states' civil forfeiture laws.

In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the United States Supreme Court was asked to decide whether the Indiana Supreme Court erred when it held that the excessive fines clause of the Eighth Amendment to the United States Constitution (U.S. CONST. amend. VIII) is inapplicable to state civil forfeiture laws. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Indiana obtained an *in rem* forfeiture, in a separate civil action, of a criminal defendant's $42,000 SUV that he purchased with insurance money after his mother's death. The defendant, who was subject to a $10,000 fine in the criminal matter, argued that forfeiture of the vehicle is unconstitutionally excessive in violation of the Eighth Amendment. Indiana argued that the excessive fines clause did not apply because application of the Amendment to civil *in rem* forfeitures is neither fundamental nor deeply rooted. The Court agreed with the defendant, holding that the excessive fines clause of the Eighth Amendment is applicable to the states under the due process clause of the Fourteenth Amendment (U.S. CONST. amend. XIV). The Court reasoned that "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming" and that "[p]rotection against excessive punitive economic

sanctions secured by the Clause is . . . both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"

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