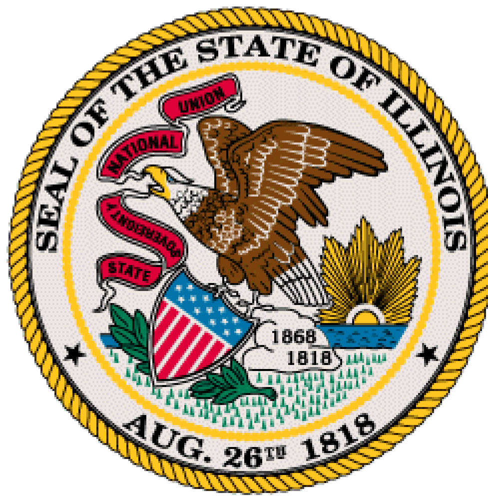
# 2022 CASE REPORT

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**December 2022**

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State of Illinois
**LEGISLATIVE REFERENCE BUREAU**
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December 2022

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 that affect the interpretation of the Illinois Constitution or statutes," 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.

Respectfully submitted,

James D. Stivers
Executive Director

## INTRODUCTION

This 2022 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 2021 through the summer of 2022.

## QUICK GUIDE TO RECENT COURT DECISIONS

**Freedom of Information Act** A public body may redact information that is exempt from disclosure even though the public body may have previously released the information to satisfy other statutory obligations. M*ancini Law Group P.C. v. Schaumburg Police Department* ........ 8

**Freedom of Information Act** A plaintiff in the Fourth Appellate District who is provided documents after the filing of a lawsuit is entitled to attorney's fees as a prevailing plaintiff. *Martinez v. City of Springfield* ........ 8

**Election Code** The Code is preempted by the National Voter Registration Act to the extent that it prohibits the photocopying and duplication of the statewide voter registration list. *Public Interest Legal Foundation, Inc. v. Matthews* ........ 9

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**Election Code** Under certain circumstances, political-action committee funds may be used to pay legal fees incurred by a politician in connection with an FBI investigation. *Sigcho-Lopez v. Illinois State Board of Elections* ........ 11

**General Assembly Compensation Act** An action to collect back taxes for legislative office space is an action against the State and must be brought in the Court of Claims (rather than the circuit court). *People v. Davis* ........ 12

**Property Tax Code** The date of actual issuance of a tax deed (rather than the date the tax deed "could have" been issued) controls for purposes of declaring a tax sale in error. *In re County Treasurer and ex officio County Collector of Greene County* ........ 13

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[*] 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

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## SUMMARIES OF RECENT COURT DECISIONS

### FREEDOM OF INFORMATION ACT – WAIVER OF PRIVACY EXEMPTIONS

*A public body may redact information that is exempt from disclosure even though the public body may have previously released the information to satisfy other statutory obligations.*

In *Mancini Law Group P.C. v. Schaumburg Police Department*, 2021 IL 126675, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred when it held that a police department had not waived its right to redact information under the Freedom of Information Act by previously disclosing the redacted information. Subsection (1) of Section 7 of the Act (5 ILCS 140/7 (1) (West 2016)) authorizes a public body to redact information that is exempt from disclosure under the Act and goes on to enumerate categories of information that is exempt from disclosure, including private information and personal information. The plaintiff argued that the defendant had waived its right to redact information under Section 7 because the defendant had provided unredacted police reports to LexisNexis to facilitate compliance with certain reporting requirements under Section 11-408 of the Illinois Vehicle Code (625 ILCS 5/11-408 (West 2016)) and because LexisNexis offered access to the unredacted reports for sale. The defendant argued that a waiver of the exemption did not occur because it provided the traffic crash reports to LexisNexis pursuant to the defendant's duties under the Illinois Vehicle Code and because subsection (1) of Section 7 of the Act allows for discretionary disclosure when it states that "the public body may elect to redact the information that is exempt." The Illinois Supreme Court agreed with the police department, holding that "an Illinois public body does not have the ability to waive an individual's interest in his or her personal or private information that is contained in a document subject to a FOIA request." The court reasoned that selective disclosure by the government amounts to preferential treatment only when the selective disclosure concerns the government's interest and that, regardless of the financial arrangement between the defendant and LexisNexis, the defendant "could not waive the privacy interests of the individuals whose exempt information is contained in the traffic accident reports." A concurring opinion of the court noted that the 2010 amendment to subsection (1) of Section 7 by Public Act 96-542, which added the phrase "the public body may elect to redact," suggests "that the plain language of the amended statute allows a public body to elect to redact information in its purview" and permits "a public body to determine when specific data must be redacted as exempt."

### FREEDOM OF INFORMATION ACT – ATTORNEY'S FEES

*A plaintiff in the Fourth Appellate District who is provided documents after the filing of a lawsuit is entitled to attorney's fees as a prevailing plaintiff.*

In *Martinez v. City of Springfield*, 2022 IL App (4th) 210290, the Illinois Appellate Court for the Fourth District was asked to decide whether the trial court erred when it held that a plaintiff who receives requested documents after the filing of a lawsuit but before

the entry of an order to provide the documents does not "prevail" for purposes of awarding attorney's fees under the Freedom of Information Act. Subsection (i) of Section 11 of the Freedom of Information Act (5 ILCS 140/11(i) (West 2020)) provides, "If a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding . . . the court shall award such person reasonable attorney's fees and costs." The plaintiff argued that the trial court erred by not ordering attorney's fees after it established that the defendant violated the Act by not complying with his request. The defendant, citing case law from another appellate district, argued that the court should not award the plaintiff attorney's fees because the defendant complied with the Act's disclosure requirements before the court order had been entered. The appellate court reversed the trial court, holding that the term "prevails" does not require a court order. The court first determined that the term "prevails" in Section 11 of the Act is ambiguous, noting that there is a split among appellate districts. The court, in agreeing with the First District's analysis in *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, interpreted the removal by the General Assembly of the word "substantially" from "substantially prevailed" in the Section 11 to mean that the General Assembly intended for a plaintiff to be able to obtain attorney's fees regardless of the extent to which the plaintiff prevailed and that the General Assembly intended to increase the instances in which a plaintiff could obtain attorney's fees under the Act, not decrease them. The court also looked at the dictionary definition of the term "prevail," which means "to obtain the relief sought in an action; to win a lawsuit." Since the relief sought (i.e., the production of documents) can be obtained without a court order, the court reasoned that a plaintiff who does so is entitled to attorney's fees in connection with the litigation.

**ELECTION CODE – STATEWIDE VOTER REGISTRATION LIST**

*The Code is preempted by the National Voter Registration Act to the extent that it prohibits the photocopying and duplication of the statewide voter registration list.*

In *Public Interest Legal Foundation, Inc. v. Matthews*, 589 F. Supp. 3d 932 (2022), the United States District Court for the Central District of Illinois was asked to decide whether Section 1A-25 of the Election Code is preempted by Section 20507(i) of the National Voter Registration Act (NVRA) (52 U.S.C. § 20507(i)). Section 1A-25 of the Election Code (10 ILCS 5/1A-25) provides that "the disclosure of any portion of the centralized statewide voter registration list to any person or entity other than to a State or local political committee and other than to a governmental entity for a governmental purpose is specifically prohibited except [in specified circumstances]." Although one of the exceptions in the Election Code provides for public viewing of the list on a computer screen, the Code altogether prohibits the printing, duplication, transmission, or altering of the list. In contrast, Section 20507(i) of the NVRA provides, "Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters . . . ." The plaintiff requested an electronic copy of Illinois' statewide voter registration list, and the defendant denied the plaintiff's request, stating that the plaintiff's representative had to physically come to the defendant's offices to view the list. When the plaintiff's representative came to the office to view the list, the representative was prohibited from receiving a copy of the list and was unable to see the entire list because

the computer program allowed searches only by name. The plaintiff argued that Section 1A-25 of the Code conflicts with Section 20507(i) of the NVRA and that the Code is preempted to the extent of that conflict. The defendant argued that there is no conflict between the two statutes because Section 20507(i) of the NVRA does not regulate voter registration lists. The court agreed with the plaintiff, holding that Section 1A-25 of the Election Code is preempted by Section 20507(i) of the NVRA. The court reasoned that the phrase "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" in Section 20507(i) of the NVRA "must mandate the production of both the activities involved in the list's maintenance and the list itself." The court further reasoned that, since the statewide voter registration list is a "record" covered by the NVRA, Section 1A-25 of the Election Code is preempted to the extent it prohibits the photocopying and duplication of the list.

**ELECTION CODE – SIGNATURE REQUIREMENTS AFTER REDISTRICTING**

*Because the General Assembly did not specify signature requirements on candidate nominating petitions in a newly redrawn district, the catchall minimum signature requirement applies in the first primary election following redistricting.*

In *Hutchinson v. Illinois State Board of Elections*, 2022 IL App (1st) 220678, the Illinois Appellate Court was asked to decide whether the circuit court erred when it reversed the Board of Elections, holding that certain primary candidates for the office of Illinois Supreme Court Justice were required to only submit 500 nominating petition signatures to be listed on the ballot. Subsection (h) of Section 7-10 of the Election Code (10 ILCS 5/7-10(h)(West 2020)) provides, "Except as otherwise provided in this Code, if a candidate seeks to run for judicial office in a district, then the candidate's petition for nomination must contain the number of signatures equal to 0.4% of the number of votes cast in that district for the candidate for his or her political party for the office of Governor at the last general election at which a Governor was elected, but in no event less than 500 signatures." Subsection (b) of Section 2A-1.1b of the Election Code (10 ILCS 5/2A-1.1b(b) (West 2020)) reduced the signature requirement for an established party candidate for specific offices, including the Illinois Supreme Court, by one-third for the 2022 General Primary Election. Additionally, Section 15 of Judicial Districts Act of 2021 (705 ILCS 23/15) took effect on June 4, 2021, changing the district that the three petitioners were running in to include only five counties (the district had previously consisted of 12 counties). The petitioners argued that, because the district's boundaries changed, there was no prior general election for the new district to calculate the 0.4% of the number of votes cast. Therefore, the petitioners argued, the 500-signature minimum applied (less the one-third signatures under Section 2A-1.1b). The objecting persons argued that the minimum signature requirement of Section 7-10 could be calculated by looking at the voting data from the counties now comprising the redrawn district. The court agreed with the petitioners, holding that the petitioners needed to have only 334 signatures for the June 28, 2022 General Primary Election. The court reasoned, "Subsection (h) does not provide any alternative formula for calculating the signature requirement in the first primary election following redistricting . . . . Because the Second Judicial District did not vote in the last election and the legislature made no specific alternative calculus for the first primary election following redistricting, we look to the requirement that a petition be supported by

no fewer than 500 signatures, which would be reduced for this election by one-third to 334."

## ELECTION CODE – EXPENDITURES FOR LEGAL FEES

*Under certain circumstances, political-action committee funds may be used to pay legal fees incurred by a politician in connection with an FBI investigation.*

In *Sigcho-Lopez v. Illinois State Board of Elections*, 2022 IL 127253, the Illinois Supreme Court was asked to decide whether expenditures by a political-action committee for legal fees related to former alderman Daniel Solis' cooperation with the Federal Bureau of Investigation and the United States Department of Justice in those departments' investigations of alleged political corruption by Illinois public officials violated the statutory bar for using campaign funds to satisfy or repay a personal debt. Paragraph (3) of subsection (a) of Section 9-8.10 of the Election Code (10 ILCS 5/9-8.10(a)(3) (West 2018)) prohibits expenditures by a political committee for "satisfaction or repayment of any debts other than loans made to the committee or to the public official or candidate on behalf of the committee or repayment of goods and services purchased by the committee under a credit agreement . . . . [but n]othing in this Section authorizes the use of campaign funds to repay personal loans." Paragraph (1) of subsection (A) of Section 9-1.5 of the Code (10 ILCS 5/9-1.5(A)(1) (West 2018)) defines "expenditure" to mean "a payment, distribution, purchase, loan, advance, deposit, gift of money, or anything of value, in connection with the nomination for election, election, or retention of any person to or in public office or in connection with any question of public policy." The plaintiff argued that "legal fees expended for the criminal defense of public corruption charges amount to personal dept prohibited as a campaign fund expenditure." The defendant political-action committee argued that "legal fees expended for the criminal defense of public corruption charges are not personal in nature because the public corruption charges would not exist irrespective of the public official's position." The court rejected both parties' arguments for a hard-lined rule, holding that, "in limited circumstances, pursuant to the plain language of the campaign disclosure and regulation provisions of the Election Code, the Board may appropriately allow the use of campaign funds to pay for legal expenses in defending such allegations." The court reasoned, "Until the General Assembly amends the statute to, for example, specifically prohibit payment from campaign funds for legal fees incurred in defense of criminal allegations against a public official or candidate, the issue requires the [State Board of Election's] consideration on a case-by-case basis, applying the plain language of the applicable statutory provisions. In this case, despite the parties' arguments regarding legal defense fees incurred as a result of public corruption allegations, the record here reveals that Solis had not been indicted on criminal charges but only that he had worked with federal investigators using his official capacity to expose public corruption."

**GENERAL ASSEMBLY COMPENSATION ACT – LEASEHOLD TAX**

*An action to collect back taxes for legislative office space is an action against the State and must be brought in the Court of Claims (rather than the circuit court).*

In *People v. Davis*, 2021 IL App (1st) 191959, the Illinois Appellate Court was asked to decide whether the circuit court erred when it allowed a county to recover 20 years' worth of delinquent property taxes against a former State representative concerning property leased from a school district for use as a district office. Section 4 of the General Assembly Compensation Act (25 ILCS 115/4) grants members of the House of Representatives the authority to approve a certain amount of money every year for, among other things "contractual services", as defined in Section 15a of the State Finance Act (30 ILCS 105/15a (West 2020)). Section 15a of the State Finance Act provides that "contractual services" include expenditures for property or equipment. The defendant argued that, because she rented the district office as part of her official duties as a State representative, the circuit court lacked subject-matter jurisdiction over the matter because the proper defendant was the State, not the State representative in her personal capacity. Rather, the defendant argued that, under Section 8 of the Court of Claims Act (705 ILCS 505/8 (West 2020)), jurisdiction over claims against the State lies with the Court of Claims. The plaintiff argued that the action cannot be properly characterized as one "against the State" because the former representative's "duty" to pay leasehold taxes arose independently of her relationship with the State. Therefore, the plaintiff argued that sovereign immunity was inapplicable, that subject-matter jurisdiction was proper in the circuit court, and that the plaintiff was entitled to summary judgment as a matter of law. The Illinois Appellate Court, reversing the circuit court, held that the defendant was acting under the authority of the General Assembly Compensation Act, and consequently, that the State was the real party in interest. The court reasoned that the taxes, had they been paid, would have been an "expenditure" for rental property that the defendant leased. The court reasoned that the General Assembly Compensation Act authorized the defendant to negotiate the lease on behalf of the State because of the plain text of the statute, which specifically uses the words "authorized to approve." Further, the court reasoned that subsequent Sections of the statute clarify the central role played by the Illinois House of Representatives, an arm of the State, in allocating these funds and regulating the types of contracts that can be entered into by State representatives on behalf of the State. The court also reasoned that the defendant's authority to enter into the lease is confirmed by the fact that when the leasing company sued her for back rent, the State settled the matter in the Court of Claims. A dissenting opinion argued that the defendant's obligation to pay the leasehold tax did not arise by virtue of her State office but arose solely from her being the sole signatory to the lease. The dissent argued that the majority misconstrued the office allowance statute because a plain reading of the statute shows that a State representative is authorized to approve the expenditure of a capped dollar amount to pay for contractual services that include leases for legislative offices but is silent regarding whether the legislator is authorized to bind the State and, if she is, what lease terms and provisions must be present to bind the State. The dissent further noted that the current House of Representative guidance highlights just how little the statute says about the authority of a legislator to bind the State to a lease.

**PROPERTY TAX CODE – SALE IN ERROR**

*The date of actual issuance of a tax deed (rather than the date the tax deed "could have" been issued) controls for purposes of declaring a tax sale in error.*

In *In re County Treasurer and ex officio County Collector of Greene County*, 2022 IL App (4th) 190904, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied petitions to vacate three tax sales and declare those sales as sales in error. An "Order Directing Issuance of a Tax Deed" was entered for each parcel on August 9, 2018; however, the tax purchaser never actually sought to obtain the tax deed. Paragraph (2) of subsection (b) of Section 21-310 of the Property Tax Code (35 ILCS 200/21-310(b)(2) (West 2018)) provides that the court shall declare a tax sale to be a sale in error if "the improvements upon the property sold have been substantially destroyed or rendered uninhabitable or otherwise unfit for occupancy subsequent to the tax sale and prior to the issuance of the tax deed." In addition, Section 22-85 of the Property Tax Code (35 ILCS 200/22-85 (West 2018)) provides that the tax purchaser has a period of one year from the expiration of the period of redemption to record the tax deed. If the tax purchaser does not record the tax deed, then the tax sale is "absolutely void with no right to reimbursement." The State argued, and the trial court agreed, that the sale in error should be denied as untimely because the property passed to the tax purchaser at the time the order for a tax deed was issued. The State further argued that the tax purchaser failed to establish that the destruction occurred after the tax sale but before the tax deed "could have" been issued. The tax purchaser argued that the trial court erred in applying the reasoning of *Wagner v. Rumler,* 177 Ill. App. 3d 301 (1988), when it found that Section 21-310 of the Property Tax Code required the improvements to have been destroyed or rendered uninhabitable prior to the date the tax deed "could have" been issued (instead of the date the tax deed was actually issued). The court agreed with the tax purchaser, reversing the circuit court and holding that the plain language of the statute requires the improvements to the property to have been destroyed or rendered uninhabitable prior to the date the tax deed was actually issued. Although the court noted that the language may be an "apparent legislative oversight," the court declined to "correct that oversight 'by rewriting a statute in a manner inconsistent with its clear and unambiguous language.'"

**ILLINOIS PENSION CODE – PRECLUSION OF STATUTORY CLAIMS**

*The Code's provisions enabling cities and villages to preclude certain lawsuits by ordinance do not extend to claims under the Wrongful Death Act.*

In *DiFranco v. City of Chicago*, 589 F. Supp.3d 909 (2022), the United States District Court for the Northern District of Illinois was asked to decide whether a claim under the Wrongful Death Act against a city by a police officer was precluded by that city's adoption of a specified ordinance under the Illinois Pension Code. Section 22-307 of the Illinois Pension Code (40 ILCS 5/22-307 (West 2018)) provides, "Whenever any city or village enacts an ordinance pursuant to this Division, no common-law right to recover damages against such city or village for injury or death sustained by any policeman or fireman while engaged in the line of his duty as such policeman or fireman . . . shall be available to any policeman or fireman who is covered by the provisions of such ordinance

. . . ." The plaintiff argued that the claim under the Wrongful Death Act is not precluded by Section 22-307 of the Code because Section 22-307 of the Code only precludes common-law claims. The defendant argued that Section 22-307 of the Code also prohibits claims under the Wrongful Death Act because the intent of Public Act 90-525, which removed references to statutory claims in that Section, was "not to lift the bar on Wrongful Death Act claims against employers, but to give 'downstate' firefighters and police officers access to remedies under the Workers' Compensation Act." The court agreed with the plaintiff, holding that Section 22-307 of the Code does not preclude Wrongful Death Act claims. The court reasoned that "[r]egardless of what legislators may have said in those debates, the fact remains that the General Assembly deleted the words "or statutory" from Section 22-307's text, thus removing all statutory claims from Section 22-307's ambit."

**EMERGENCY TELEPHONE SYSTEM ACT – IMMUNITY**

*Immunity granted by the Act, which is only partial, supersedes full immunity under the Local Governmental and Governmental Employees Tort Immunity Act.*

In *Schultz v. St. Clair County*, 2022 IL 126856, the Illinois Supreme Court was asked to decide whether the absolute immunity provided by Section 4-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/4-102 (West 2016)) or the limited immunity provided by subsection (a) of Section 15.1 of the Emergency Telephone System Act (ETS Act) (50 ILCS 750/15.1(a) (West 2016)) applied to claims in which a 9-1-1 dispatcher intentionally or recklessly refuses to dispatch emergency service after a caller is not able to provide an exact address. Section 4-102 of the Tort Immunity Act provides that a local government, public entity, or public employee is not liable for a failure to establish a police department or a failure to provide certain police protection services, such as a failure to provide adequate police protection or service, a failure to prevent, detect, or solve a crime, or a failure to identify or apprehend criminals. However, under Section 15.2 of the ETS Act, a public safety answering point's employees are not liable for their performance or provision of 9-1-1 service unless the performance or provision of police service was done intentionally or recklessly. The defendants argued that Section 15.2 of the ETS Act applies only to the technical aspects of 9-1-1 service, and not to the performance or provision of a 9-1-1 service. The court disagreed, affirming the lower courts and holding that if the General Assembly wanted to limit the scope of limited immunity to just the technical aspects of 9-1-1 in the ETS Act, then it would have done so expressly. The court reasoned that, when looking at a more specific statute and a general statute that relates to the same subject, the court will assume that the General Assembly intended the more specific statute to apply. Therefore, the court concluded that the limited immunity in the ETS applies to these facts, not the absolute immunity in the Tort Immunity Act, and that failing to provide police service because the caller did not provide an exact address is the performance and provision of 9-1-1 service within the scope of the ETS Act.

## COUNTIES CODE – SHERIFF QUALIFICATIONS

*Either part-time or full-time training offered by the Illinois Law Enforcement Training Standards Board satisfies training requirements for sheriff candidates.*

In *Brogan v. Colatorti*, 2022 IL App (2d) 220160, the Illinois Appellate Court was asked to decide whether the trial court erred when it affirmed an electoral board's decision that a candidate for sheriff was eligible to be elected to that office. Section 3-6001.5 of the Counties Code (55 ILCS 5/3-6001.5 (West 2020)) provides that a person is not eligible to be elected to the office of sheriff unless the person meets certain requirements, including a requirement to hold a certificate attesting to the person's "successful completion of the Minimum Standards Basic Law Enforcement Officers Training Course or a substantially similar training program of another state or the federal government." The petitioner argued that the respondent candidate for sheriff was not qualified under Section 3-6001.5 of the Counties Code because the candidate had completed only a part-time law enforcement training course under Section 8.2 of the Police Training Act (50 ILCS 705/8.2 (West 2020)) rather than the full-time course under Section 8.1 of that Act (50 ILCS 705/8.1 (West 2020)) . The respondent argued that "Minimum Standards Basic Law Enforcement Officers Training Course" was not defined in the statute and that both courses under Section 8.1 and 8.2 of the Police Training Act were similar in content, differing mainly in terms of the time to complete the courses and the final qualifications to serve. The court affirmed the lower court and ruled in favor of the respondent, holding that the respondent was qualified as a candidate for sheriff because the courses were substantially similar. The court reasoned that the term "Minimum Standards Basic Law Enforcement Officers Training Course" appears only once in the Illinois Compiled Statutes and not in the Police Training Act, which defines certification requirements for law enforcement officers. The court sought to determine the intent of the General Assembly by examining the words used in the Counties Code and the Police Training Act. The court determined that both courses were substantially similar, so both would qualify as a "Minimum Standards Basic Law Enforcement Officers Training Course." The court also reasoned that it would lead to an absurd outcome if the courses in the Police Training Act were not "Minimum Standards Basic Law Enforcement Officers Training Courses" because that would leave no one able to qualify for office and lead to the conclusion that the office of sheriff was abolished.

## COUNTIES CODE – ELECTORAL BOARD RESIDENCY REQUIREMENT

*Residency within a district, and not the county at large, is required for a county board candidate in a county that elects its board members by district.*

In *Sbara-Hagee v. Lake County Electoral Board*, 2022 IL App (2d) 220193, the Illinois Appellate Court was asked to decide whether trial court erred when it reversed a county electoral board's decision to remove the plaintiff from the ballot for not being a resident of the district from which the plaintiff sought office. Paragraph (1) of Section 2-3003 of the Counties Code (55 ILCS 5/2-3003(1) (West 2020)) provides, "If the county board determines that members shall be elected by districts, it shall develop an apportionment plan and specify the number of districts and the number of county board members to be elected from each district." Section 2-3015 of the Counties Code (55 ILCS

5/2-3015 (West 2020)) provides, "In counties with a population of 3,000,000 or less, no person is eligible to hold the office of county board member or commissioner unless he or she is a legal voter and has been a resident of the county for at least one year next preceding the election." Paragraph (4) of Section 25-2 of the Election Code (10 ILCS 5/25-2(4) (West 2020)) provides that an office becomes vacant when an official ceases "to be an inhabitant of the State; or if the office is local, his or her ceasing to be an inhabitant of the district . . . for which he or she was elected." The plaintiff argued that Sections 2-3003 and 2-3015 only require her to be a resident of the county. The defendant electoral board argued that Section 2-3003 stated that a candidate must be "from each district" and that the plaintiff could not be a candidate because she did not reside within the district. The appellate court held that the plaintiff was required to reside within the district for which she sought office at the time she filed her statement of candidacy. The court reasoned that the phrase "from each district" in Section 2-3003 did not imply a residency requirement because the Counties Code uses "from and residing in" multiple times to distinguish a residency requirement in addition to other language used in other provisions of the Counties Code that clearly establish residency requirements. However, the court held that paragraph (4) of Section 25-2 establishes a residency requirement because that provision would immediately create a vacancy in office upon a nonresident's election.

**ILLINOIS INSURANCE CODE – EFFECT OF MISREPRESENTATION**

*A material misrepresentation that would render an auto policy voidable cannot be invoked to rescind a policy that has been in effect for one year or one policy term, whichever is shorter.*

In *United Equitable Insurance Company v. Thomas*, 2021 IL App (1st) 201122, the Illinois Appellate Court was asked to determine whether the trial court erred when it held that a plaintiff was time-barred from rescinding a policy of automobile insurance under Section 154 of the Illinois Insurance Code (215 ILCS 5/154 (West 2020)). That Section of the Code provides that a policy of insurance or policy renewal shall not be rescinded after the policy has been in effect for one year or one policy term, whichever is less. The plaintiff insurance company argued that it was entitled to a declaratory judgment allowing it to rescind an insurance policy as void because the driver used the insured vehicle for a ridesharing service and did not disclose that use in the application for coverage. The plaintiff argued that the defendant should not benefit from the defendant's own omissions regarding the use of the insured vehicle for ridesharing. The defendant argued that the plaintiff could not rescind coverage under the terms of the insurance policy, which contained nearly identical language to Section 154 of the Illinois Insurance Code. The appellate court affirmed the trial court's rejection of the plaintiff's argument that the defendant was not entitled to insurance coverage due to misrepresentations or omissions regarding use of the vehicle, and held that the policy cannot be rescinded as a matter of law, even assuming the existence of a material misrepresentation, because the policy was in effect for longer than one year and Section 154 of the Code prohibits the rescission of a policy after it has been in effect for more than a year. While acknowledging that the defendant failed to disclose to the plaintiff that the insured vehicle had been used for ridesharing services, the court reasoned that insurers are empowered to draft their policies to include or exclude certain risks, and, for this reason, ambiguous policy terms are

generally construed against the drafter and in favor of coverage. The court also noted that the statutory language arguably imposed an unfair result for an insurer in the event of withheld information or deliberate misrepresentation by the insured. The court reiterated that automobile insurers are not expected to investigate to determine the truth of each representation in each application it receives, and stated that it was not imposing such a duty. However, the court was required to apply the plain language of the one-year time limit and affirmed the trial court's grant of summary judgment.

**ILLINOIS INSURANCE CODE – ATTORNEY'S FEES AND OTHER COSTS**

*The term "policy or policies of insurance" does not include reinsurance contracts.*

In *Stonegate Insurance Company v. Fletcher Reinsurance Company*, 2021 WL 5769528, the United States District Court was asked to determine whether to grant the defendants' motion to dismiss a breach of contract action. The parties, which were all insurance corporations, had entered into a series of reinsurance agreements. The plaintiff brought claims against the defendants alleging nonpayment under the agreements and argued that a provision that provides an extracontractual remedy for insurance policyholders applies to contracts of reinsurance. Section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2020)) provides that in any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow reasonable attorney's fees or other costs as part of the taxable costs in the action. The defendants argued that Section 155 does not apply to reinsurers or their agents, only to "the liability of a company on a policy of insurance," and that "policy" is defined in the Illinois Insurance Code to include "an insurance policy or contract" but not a reinsurance agreement. Also, while Section 155 is in Article IX of the Code, which contains general provisions applicable to all insurance companies, reinsurance provisions are located in Article XI of the Code. The court agreed with the defendants and held that Section 155 does not apply to contracts of reinsurance. The court reasoned that the term "insurance" is defined and when the General Assembly desires to include reinsurance in a definition it does so by specific inclusion of the term "reinsurance" and that if "reinsurance" were intended to be included in the definition of "insurance" then the specific inclusion of "reinsurance" in other definitions would be redundant. The court also noted that "reinsurance" has a separate and distinct meaning from "insurance" because reinsurance agreements do not involve a party with a risk of personal loss and are, therefore, more like contracts of indemnity between corporations.

**LIQUOR CONTROL ACT OF 1934 – DRAM SHOP ACTIONS**

*The dram shop provisions of the Act do not provide a remedy for the death of a fetus.*

In *Herndon v. Kaminski*, 2022 IL App (2d) 210297, the Illinois Appellate Court was asked to decide whether the circuit court erred by granting the defendant's motion to

dismiss for failure to state a claim under the dram shop provisions of subsection (a) of Section 6-21 of the Liquor Control Act of 1934 (235 ILCS 5/6-21 (West 2018)), because the claim was brought on behalf of the plaintiff's unborn fetus. Subsection (a) of Section 6-21 of the Act provides, "Every person who is injured within this State . . . by any intoxicated person has a right of action in his or her own name . . . against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor . . . causes the intoxication of such person." That Section further provides, "An action shall lie for injuries to . . . loss of society . . . caused by an intoxicated person or in consequence of the intoxication of any person . . . ." The plaintiff argued that the dram shop provisions establish a cause of action for loss of society of an unborn fetus because the terms "person" and "loss of society" in the dram shop provisions mirrored the usage of those terms in Section 2.2 of the Wrongful Death Act (740 ILCS 180/2.2 (West 2018)), which establishes a wrongful-death cause of action on behalf of an unborn fetus. The defendant argued that there is no cause of action under the dram shop provisions for the death of an unborn fetus because the dram shop provisions do not define "person" and, therefore, the definition of "person" adopted in Section 1.36 of the Statute on Statutes (5 ILCS 70/1.36 (West 2018)) applies, which specifies that "person" includes every person born alive. The court agreed with the defendant, holding that the dram shop provisions do not allow a cause of action for the death of an unborn fetus. The court reasoned that the dram shop provisions are not ambiguous and, accordingly, that it was not appropriate to consider the judicial interpretations of the Wrongful Death Act in interpreting the dram shop provisions. The court further reasoned that the General Assembly amended the Wrongful Death Act to explicitly allow for recovery on behalf of an unborn fetus and that the General Assembly had not amended the dram shop provisions in such a way. The court noted that it did not possess the authority to judicially amend the dram shop provisions, but that it was "not unsympathetic to [the plaintiff's] arguments" that "it is logically indefensible to say that [the decedent] could recover if she had been born alive but cannot recover because her injuries killed her before she was born" and "prohibiting family members from recovering for the loss of society of an unborn fetus grants immunity to liquor purveyors that contribute to collisions causing fatalities."

**GRAIN CODE – PRICE LATER CONTRACTS**

*The use of passive voice in the statute does not mean that grain prices are set automatically for purposes of determining eligibility for claims against the Illinois Grain Insurance Fund.*

In *Miller v. Department of Agriculture*, 2022 IL App (4th) 210204, the Illinois Appellate Court was asked to decide whether the circuit court erred when it affirmed the decision of the Department of Agriculture, denying the plaintiff's claim for compensation from the Illinois Grain Insurance Fund. The plaintiff was a grain producer who entered into a price later contract with SGI Agri-Marketing, LLC (SGI) for the sale of grain. The plaintiff filed a claim for compensation from the Illinois Grain Insurance Fund. Subsection (e) of Section 10-15 of the Grain Code (240 ILCS 40/10-15) provides that "if a price later contract is not signed by all parties within 30 days of the last date of delivery of grain intended to be sold by price later contract, then the grain intended to be sold by price later contract shall be priced on the next business day after 30 days from the last date of delivery

of grain intended to be sold by price later contract at the market price of the grain at the close of the next business day after the 29th day." That subsection also requires the grain dealer to provide notice of the pricing to the seller, including notice that "the Grain Insurance Fund shall provide protection for a period of only 160 days from the date of pricing of the grain." The Department argued that the pricing of the grain occurs automatically on the first business day after the 30th day following delivery of the grain because the statute provides only that the grain "shall be priced" and does not indicate who prices the grain. Because the grain was automatically priced 30 days after delivery, the Department argued, the plaintiff's claim for compensation fell outside the 160-day deadline. The plaintiff argued that the use of the passive voice in the phrase "shall be priced" requires the parties to take some action to price the grain, and that the price was set on the date that the plaintiff signed the purchase confirmation. The court agreed with the plaintiff, holding that the price was set by the parties within 160 days of SGI's failure; therefore, the plaintiff was entitled to compensation from the Illinois Grain Insurance Fund. The court reasoned that the absence of an identified person or entity in the same sentence as "shall be priced" does not necessarily indicate that the pricing occurs automatically, because the use of the passive voice means that "the subject of the sentence must act on the object of the sentence." The court also pointed to the phrase "shall transfer" in subsection (d) of Section 10-15 of the Grain Code as an example of language used by the General Assembly when it intends for an event to occur automatically.

**MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE – INVOLUNTARY ELECTROCONVULSIVE THERAPY**

*The doctrine of substituted judgment need not always be used to determine if a person can receive involuntary medical treatment.*

In *In re John F.*, 2022 IL App (1st) 220851, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that the appellant could be forced to receive involuntary electroconvulsive therapy without applying the doctrine of substituted judgment in a manner that gives weight to preferences expressed by a respondent several months before the filing of the petition. Section 2-107.1 of the Mental Health and Developmental Disabilities Code (405 ILCS 5/2-107.1 (West 2020)) provides that an adult patient may be administered psychotropic medication and electroconvulsive therapy without receiving informed consent from the patient based on certain requirements. The doctrine of substituted judgment holds that caregivers should attempt to ascertain and give effect to the decision the patient would make if the patient were competent to make that decision. The appellant argued that Section 2-107.1 required a substituted judgment consideration, and, as the appellant previously expressed a desire while competent to not undergo involuntary electroconvulsive therapy, then the appellant's stated preferences should be given effect after the appellant is no longer competent. The appellees argued that the requirements in Section 2-107.1 to make factual findings supplant the substituted judgment doctrine. The Illinois Appellate Court affirmed the circuit court, holding that while the substituted judgment doctrine is very relevant, it is not always required. Specifically, the court reasoned that while the statutory factors listed in Section 2-107.1 do not completely supplant the substituted judgment standard, the facts of this case do not firmly establish what the respondent's wishes would be, due to rapid and dramatic changes

in the respondent's condition. A dissenting opinion argued that the respondent had clearly declined electroconvulsive therapy while competent in the past, and that adults are entitled to refuse medical treatment. The dissent observed, "patients subject to involuntary treatment under Section 2-107.1 *always* lack capacity and *frequently* will have exhausted less coercive or intrusive treatment. Nothing in the law suggests that such a commonplace occurrence is a basis to turn a blind eye to the patient's previously expressed wishes."

## MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE – INVOLUNTARY ADMISSION TIME LIMITS

*Deadlines for involuntary admission for mental health treatment begin to run when statutorily required admission procedures are complete, not when the respondent is detained.*

In *In re Julie M.*, 2021 IL 125768, the Illinois Supreme Court was asked to decide whether the lower courts erred when the circuit court granted and the appellate court upheld a petition to admit the respondent for 90 days of inpatient mental health treatment, finding that the petitioner had complied with the 24-hour time limit under Section 3-611 of the Mental Health and Developmental Disabilities Code (405 ILCS 5/3-611 (West 2018)). That Section provides, "As soon as possible but not later than 24 hours, excluding Saturdays, Sundays and holidays, after admission of a respondent pursuant to this Article, the respondent shall be personally examined by a psychiatrist." Section 3-611 further provides that a person who is not provided with a psychiatric evaluation shall be released. The petitioner argued that the 24-hour period for involuntary admission of the respondent did not begin until the petitioner began the statutory procedure for specifically admitting the respondent. The respondent argued that under the petitioner's reasoning, a person could be involuntarily held for treatment and detention indefinitely and not have the protections that an admitted person would have, as the mental health facility could delay the official admission process. The court agreed with the petitioner, holding that a patient is "admitted," for purposes of triggering the 24-hour deadline, when the petition and certifications are properly executed, not when the patient is first detained at the hospital or begins receiving treatment. The court reasoned that the General Assembly, by distinguishing treatment, detention, and admission, intended for there to be separate categories and protections. Additionally, the court reasoned that there are other protections in the Mental Health and Developmental Disabilities Code and other legal avenues to bring a lawsuit for involuntary treatment or detention. A dissenting opinion argued that the court's interpretation leaves discretion in the hands of mental health facilities to determine when an admission and the statutory protections are provided and that, when a person enters into a facility for medical and mental health treatment, the admission process described in the Mental Health and Developmental Disabilities Code should occur. The dissent reasoned that the petitioner had a duty to timely document why someone is being admitted for treatment or has a change in status. The dissent further argued that the General Assembly intended for protections in the Mental Health and Developmental Disabilities Code to apply and for there to be other alternatives rather than a lawsuit available to a person kept in a facility involuntarily.

**CANNABIS REGULATION AND TAX ACT – LICENSING**

*Provisions granting preference to Illinois applicants for a dispensing license may violate the commerce clause of the United States Constitution.*

In *Finch v. Treto*, 2022 WL 2073572, the United States District Court was asked to decide whether preference for awarding Conditional Adult Use Dispensing Organization Licenses to Illinois residents by lottery violates the dormant commerce clause of Article 1, Section 8 of the United States Constitution (U.S. CONST. art. 1, § 8, cl. 3), under which states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce. Paragraph (8) of subsection (c) of Section 15-30 of the Cannabis Regulation and Tax Act (410 ILCS 705/15-30(c)(8)) provides that applicants for Conditional Adult Use Dispensing Organization Licenses may receive additional points toward being awarded the license if the applicant "is 51% or more owned and controlled by an Illinois resident, who can prove residency in each of the past 5 years . . . ." The plaintiff argued that the dormant commerce clause of the United States Constitution prohibits the State from penalizing out-of-state applicants by using Illinois residency in criteria upon which licenses to dispense cannabis are issued. The State argued that because the federal prohibition against cannabis precludes all legitimate interstate exchange relating to cannabis, the commerce clause does not apply. The court agreed with the plaintiff that the Cannabis Regulation and Tax Act's stated advantage of Illinois residents to be awarded licenses may be unconstitutional under the commerce clause. However, the court ruled for the State, holding that dispensing Conditional Adult Use Dispensing Organization Licenses in an upcoming lottery is not enjoined. The court reasoned that while the Act's language allows for a result that may be unconstitutional, the Department of Financial and Professional Regulation may choose not to award points based upon Illinois residency in the future lottery. An appeal was filed in the 7th Circuit Court of Appeals on June 14, 2022.

**FIREARM OWNERS IDENTIFICATION CARD ACT – PRIOR FELONIES**

*A felon may be granted a restoration of rights and issued a firearm owner's identification card without violating federal laws prohibiting felons from owning firearms.*

In *Evans v. Cook County State's Attorney*, 2021 IL 125513, the Illinois Supreme Court was asked to decide whether the lower courts erred when they upheld the denial by the Illinois State Police of an application for a firearm owner's identification (FOID) card, on the basis of felony drug convictions that occurred more than 20 years ago, pursuant to subsection (c) of Section 10 of the Firearm Owners Identification Card Act (430 ILCS 65/10 (West 2018)). Section 10 provides for the restoration of the right to possess a firearm if certain conditions are met, namely that (1) the petitioner has not been convicted of a forcible felony within 20 years or 20 years have passed since the end of a term of imprisonment for a forcible felony, (2) the petitioner is unlikely to be a danger to the public, (3) granting relief is not contrary to the public interest, and (4) granting relief is not contrary to federal law. The petitioner stated that he had turned his life around, pointed out that he was not convicted of forcible felonies, and argued, using case law from New Hampshire, that the prohibition was not contrary to federal law or the public interest because a conviction for which a person has had his civil rights restored is not considered a conviction

for purposes of the federal firearms ban. The respondent argued that Section 922(g)(l) of the federal Gun Control Act of 1968 (18 U.S.C. 922(g)(1)) prohibited the petitioner from owning a firearm, and that allowing the petitioner to possess a firearm was contrary to the public interest due to the criminal history of the petitioner. The Illinois Appellate Court "believed that petitioner was caught in a statutory loop between state and federal law that prohibited him from obtaining a FOID card." The Illinois Supreme Court agreed with the petitioner and disagreed with the appellate court, holding that there should be a way to grant relief that is not contrary to federal law. The court reasoned that as the General Assembly created a way to restore firearm rights, and intended to create a viable avenue of relief. However, the court found that the circuit court had not abused its discretion in finding that the respondent had not demonstrated that granting relief would not be contrary to the public interest. Accordingly, the petitioner's request for relief was properly granted.

**FIREARM CONCEALED CARRY ACT – CONCEALED CARRY**

*New York statute requiring demonstration that proper cause exists for the issuance of a concealed carry permit violates the Fourteenth Amendment to the United States Constitution.*

In *New York State Rifle and Pistol Association, Inc. v. Bruen,* 142 S.Ct. 2111 (2022), the United States Supreme Court was asked to decide whether a New York State law that provided that if a person wanted to carry a firearm for self-defense outside his or her home or place of business, the applicant must obtain an unrestricted license to have and carry a concealed pistol or revolver and that to secure that license, the applicant must prove that proper cause exists. Seven states had such laws, but not Illinois. The petitioners argued that the law violated their rights under the Second and Fourteenth Amendment to the United States Constitution (U.S. CONST. amend. II; U.S. CONST. amend. XIV) by denying their unrestricted license applications on the basis that they had failed to show proper cause, had failed to demonstrate a unique need for self-defense. The Court agreed with the petitioners, holding that the Second Amendment presumptively guarantees petitioners a right to bear arms in public for self-defense. The court held that to determine whether a firearm regulation is consistent with the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) point toward at least 2 relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified. Because "individual self-defense is 'the central component' of the Second Amendment right," these 2 metrics are "central" considerations when engaging in an analogical inquiry. The Court assumed it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine those modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible. The United States Supreme Court held that New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. Section 65 of the Firearm Concealed Carry Act (430 ILCS 66/65) lists 23 locations where a person with a concealed carry license may not

legally carry a concealed firearm. Whether all would be considered sensitive places under United States Supreme Court analysis could be the subject of litigation.

## ILLINOIS CONSTITUTION – TRANSPORTATION FUNDS

*Home rule units of local government are not exempt from requirement that county transportation taxes may be used only for purposes relating to transportation.*

In *Illinois Road and Transportation Builders Association v. County of Cook*, 2022 IL 127126, the Illinois Supreme Court was asked to decide whether the lower courts erred when they denied an action seeking declaratory and injunctive against Cook County, a home rule unit of local government, for using county transportation taxes for nontransportation purposes. Section 11 of Article IX of the Illinois Constitution (ILL. CONST. art. IX, § 11) provides, "No moneys, including bond proceeds, derived from taxes, fees, excises, or license taxes relating to" specified transportation infrastructure expenditures or "relating to any other transportation infrastructure or transportation operation, shall be expended for purposes other than" specified transportation purposes. The plaintiff argued that the restriction applies to all Illinois units of local government, including home rule units, because home rule units are not specifically exempted from Section 11. The defendant argued that home rule units are exempted from the provision because the Illinois Constitution does not specifically refer to tax revenues imposed by home rule units. The court agreed with the plaintiff, holding that tax impositions by any unit of government in Illinois, including a home rule unit, are subject to the provision's restrictions. The court reasoned that allowing home rule units, but not the State, to use transportation taxes for nontransportation purposes would negate Section 11's purpose of promoting infrastructure by preventing government bodies from shifting funds earmarked for transportation-related expenses to use for other unrelated purposes. The dissent argued that because Section 11 makes no mention of home rule units, the phrasing is ambiguous and should be resolved in favor of excluding home rule units from the requirement.

## RIPARIAN (WATER) RIGHTS – REASONABLE USE DOCTRINE

*Illinois' common law does not grant riparian owners the right to use the entire length of a nonnavigable river to cross the property of other riparian owners.*

In *Holm v. Kodat*, 2022 IL 127511, the Illinois Supreme Court was asked to determine if the circuit court erred in a trespass dispute between neighboring riparian property owners when it granted the defendants' motion for summary judgment and held that Illinois' common law does not grant a riparian owner on a nonnavigable river the right to use the waterway to cross the property of another riparian owner without that owner's consent. The plaintiffs, who wanted to kayak past their property line on the Mazon River, argued that the circuit court erred in its decision because the common-law reasonable use doctrine established in *Evans v. Merriweather*, 4 Ill. 492 (1842), grants riparian owners a right to the reasonable use of the surface water of a nonnavigable river or stream on their property. The plaintiffs furthermore argued that "this riparian right to reasonable use of the water should be interpreted to include a right to use the surface water of the entire river or

stream for reasonable navigational purposes." The defendants argued that Illinois' common law grants a riparian owner a right only to the reasonable use of a waterway for the purpose of "direct consumptive uses of the water itself," not for "using the surface to navigate the entire river or stream." The Illinois Supreme Court ultimately agreed with the defendants and affirmed the circuit court's decision, reasoning that nothing under Illinois' common law grants riparian owners the right to use the entire length of a nonnavigable river to cross the property of other riparian owners without their consent. The court rejected the plaintiffs' assertion that the reasonable use doctrine grants riparian owners unqualified reasonable use of a nonnavigable river's surface water. The court noted that under Evans, the extent of a riparian owner's right to reasonable use of a waterway depends on whether the owner's use is: (i) a "natural" use that is "absolutely necessary in order to [sustain the owner's] existence [such as] drinking water, household purposes, or watering livestock;" or (ii) an "artificial" use that is "not essential to the [owner's] existence [such as] crop irrigation or manufacturing purposes." Consequently, the court found that the reasonable use doctrine established in Evans "applies to [a riparian owner's] direct consumptive or diversionary uses of water." The court furthermore found that Evans "is not instructive on the issue presented [in the plaintiffs' appeal] – the use of surface water to enter the property of another riparian owner without their consent" – because " . . . the [reasonable use] doctrine is limited to the use of water on the riparian owner's property." The court sympathized with the plaintiffs' efforts to advance "public policy arguments in favor of promoting the recreational use of [Illinois'] nonnavigable streams and rivers." However, the court opined that "the legislature is the best venue to consider [the] plaintiffs' request for the creation of a new public policy on riparian rights for nonnavigable rivers and streams" because there are "significant competing interests [involved] that . . . the General Assembly is better equipped to address."

**ILLINOIS VEHICLE CODE – UNAUTHORIZED LICENSE PLATE**

*In a case concerning two statutes prohibiting identical conduct, the Illinois Supreme Court inferred that one required a knowing mental state, while the other imposed absolute liability.*

In *People v. Sroga*, 2022 IL 126978, the Illinois Supreme Court was asked to decide whether a conviction for a violation of subdivision (a)(4) of Section 4-104 of the Illinois Vehicle Code (625 ILCS 5/4-104 (West 2012)), which punishes the same conduct but with a harsher penalty than Section 3-703 of the Code (625 ILCS 5/3-703 (West 2012)), violates the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art. I, § 11) Section 3-703 provides, "No person shall . . . knowingly permit the use of any [license plate] by one not entitled thereto, nor shall any person display upon a vehicle any . . . registration plate . . . not issued for such vehicle or not otherwise lawfully used thereon under this Code. . . . Any violation of this Section is a Class C misdemeanor." Section 4-104 provides that it is a Class A misdemeanor for a person to display or affix to a vehicle any license plate not authorized by law for use on the vehicle. The defendant argued that because the two statutes carried different penalties, his being charged under the statute with the harsher penalty violated the proportionate penalties clause of the Illinois Constitution. The Illinois Supreme Court rejected the defendant's proportionate penalty analysis and affirmed the lower court's dismissal of his petition for postconviction relief. The court

analyzed subdivision (a)(4) to ascertain whether it imposed absolute liability under Section 4-9 of the Criminal Code of 2012 (720 ILCS 5/4-9 (West 2012)). Under previous Illinois Supreme Court decisions, an offense imposes absolute liability if it is a misdemeanor that cannot be punished by incarceration or a fine of over $1,000. A first-time violation of subdivision (a)(4), however, is a Class A misdemeanor that carries the possibility of up to 364 days in jail and a fine of up to $2,500. 625 ILCS 5/4-104(a)(4), (b)(3) (West 2012) and (730 ILCS 5/5-4.5-55(a), (e) (West 2012)). Moreover, a subsequent violation of subdivision (a)(4) of Section 4-104 constitutes a Class 4 felony, accompanied by even harsher penalties. Because the potential penalties for a violation of subdivision (a)(4) of Section 4-104 exceeded the threshold for imposing absolute liability under Section 4-9, the court found that subdivision (a)(4) of Section 4-104 does not qualify as an absolute liability offense. In the absence of an express mental state requirement or a finding of absolute liability for subdivision (a)(4) of Section 4-104, the court found it appropriate to apply Section 4-5 of the Criminal Code of 2012 (720 ILCS 5/4-5 (West 2012)) to infer a mental state of knowledge into subdivision (a)(4) of Section 4-104. The Illinois Supreme Court reasoned that a mental state of knowing is sufficient to deter the misdemeanor conduct defined in subdivision (a)(4) of Section 4-104. Having inferred a requisite mental state of knowledge for the petitioner's conviction under subdivision (a)(4) of Section 4-104 and having concluded that the parallel provision in Section 3-703 imposes absolute liability, the Illinois Supreme Court concluded that although the two offenses criminalize the same physical act, they possess different mental state requirements. Because subdivision (a)(4) of Section 4-104 has an inferred mental state of knowledge and Section 3-703 imposes absolute liability, the imposition of a harsher punishment under subdivision (a)(4) of Section 4-104 did not violate the proportionate penalties clause of the Illinois Constitution.

## ILLINOIS VEHICLE CODE – ORDINANCE VIOLATIONS

*A Section that contains both a $500 and $250 limit for ordinance fines limits municipalities to imposing no more than $250 per violation.*

In *Blaha v. City of Chicago*, 2022 WL 1438966, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that Section 11-208.3 of the Illinois Vehicle Code (625 ILCS 5/11-208.3 (West 2020)) does not prohibit a municipality from imposing fines in excess of $250 for ordinance violations that were adjudicated administratively. Section 11-208.3 authorizes municipalities to establish a system to adjudicate administratively certain parking and traffic-related offenses. Under subsection (a) of that Section, a municipality is authorized to adjudicate administratively only civil offenses that carry fines not in excess of $500, that require the completion of a traffic education program, or both. However, under subdivision (b)(10) of the same Section, a municipality is prohibited from imposing a fine and penalty in excess of $250 for any one violation. The city argued, and the circuit court agreed, that the two different caps listed in Section 11-208.3 were irreconcilable, that the $250 cap in subdivision (b)(10) was a drafting error, and that the legislative history of Section 11-208.3 and the larger statutory scheme demonstrate an intent to permit municipalities to impose fines and penalties of up to $500 per violation. Alternatively, the city argued that its home rule powers enabled it to bypass the limitations set out in Section 11-208.3, which did not expressly limit home rule powers. The plaintiffs, however, argued that the $500 limit in subsection (a) applies to

"fines" for the entire administrative system whereas the $250 limit on "fines and penalties" in subdivision (b)(10) is a more specific limitation on violations enacted under a municipality's own ordinance. The court agreed with the plaintiffs and reversed the circuit court's decision, holding that the $250 limit applies to violations enacted by city ordinance. The court conducted its analysis under a strong presumption that "the legislature, in enacting various statutes, act[ed] rationally and with full knowledge of all previous enactments." The court noted that specific Illinois Vehicle Code provisions that were administratively enforceable (e.g., 625 ILCS 5/11-208.6; 11-1201.1; 11-208.8; and 11-208.9) carried civil penalties of up to $500, but subdivision (b)(10) could be read as applying to ordinances enacted by the municipality under the authority given to it by Section 11-208.3. The court was not persuaded by the city's argument that those Sections of the Illinois Vehicle Code operate by permitting local governments to pass ordinances carrying civil penalties of up to $500.

The court further held that nothing in the text of Section 11-208.3 suggests that the city may bypass the limitations set forth in Section 11-208.3, regardless of home rule status. The Illinois Constitution provides that home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive (ILL. CONST. art. VII, § 6(i)). The court held that, although the text of Section 11-208.3 contains no specific peremptory language, the Section of the Illinois Vehicle Code immediately preceding Section 11-208.3 does contain such language and is clearly meant to apply to Section 11-208.3 as well.

## ILLINOIS VEHICLE CODE – TRAFFIC STOP

*Provisions requiring a driver of a vehicle emerging from an alley, building, private road or driveway within an urban area to stop before entering traffic apply regardless of whether any pedestrians or vehicles are present.*

In *United States v. Phillips*, 2021 WL 5107721, the United States District Court for the Central District of Illinois was asked to decide whether to grant a motion to suppress evidence based upon an improper application of Section 11-1205 of the Illinois Vehicle Code (625 ILCS 5/11-1205) to the defendant. Section 11-1205 provides that the driver of a vehicle emerging from an alley, building, private road, or driveway within an urban area shall stop the vehicle immediately prior to driving into the sidewalk area extending across such alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic thereon, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on such roadway. The defendant was indicted on one count of possession with intent to distribute 100 grams or more of mixtures or substances containing a detectable amount of heroin in violation of federal law. The evidence was discovered during a warrantless search of the defendant's vehicle, which was stopped for violation of Section 11-1205. The defendant filed a motion to suppress the evidence. The defendant contended that a vehicle is required to stop prior to entering the roadway only if pedestrians or an approaching vehicle are present. The court construed the statute to include an absolute obligation to stop that is not limited to situations in which pedestrians or oncoming traffic

are present. The court held that Section 11-1205 requires every driver to do one of 2 things: either (1) stop before reaching the sidewalk in front of the roadway, or (2) stop directly before entering the roadway. The court interpreted the statute to require the defendant to stop regardless whether pedestrians or oncoming vehicles are present.

**CRIMINAL CODE OF 2012 – ATTEMPTED MURDER SENTENCE**

*A court may simultaneously impose a status-based sentencing range and a firearm enhancement for attempted first degree murder of a peace officer.*

In *People v. Taylor*, 2022 IL App (3d) 190281, the Illinois Appellate Court was asked to decide whether the trial court erred by applying status-based sentencing and a 20-year firearm enhancement to a sentence for attempted first degree murder of a peace officer under paragraph (1) of subsection (c) of Section 8-4 of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)(A) (West 2020)). That statute provides that the sentence for attempted first degree murder is the sentence for a Class X felony, except that (A) an attempt to commit first degree murder when at least one of the aggravating factors specified in paragraphs (1), (2), and (12) of subsection (b) of Section 9-1 is present 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; (B) an attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court; (C) an attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court; (D) 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; and (E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony. The aggravating factor at issue in this case is the attempt to commit first degree murder of a peace officer in the course of performing his official duties pursuant to paragraph (1) of subsection (b) of Section 9-1 of the Criminal Code of 2012 (720 ILCS 5/9-1(b)(1) (West 2020)). In this case, the defendant was convicted of the attempted murder of a peace officer for firing 23 shots at an Illinois State Police trooper after the trooper initiated a traffic stop of the defendant's vehicle. The defendant was sentenced to 50 years in prison, which consisted of a 30-year term under subparagraph (A) of paragraph (1) of subsection (c) of Section 8-4 based on the existence of the aggravating factor plus a 20-year firearm enhancement under subparagraph (C) of paragraph (1) of subsection (c) of Section 8-4. The defendant argued that once the trial court applied the status-based sentencing range under subparagraph (A) of paragraph (1) of subsection (c) of Section 8-4, the other subsections could not be applied without imposing double enhancements. The State argued that the term "shall" in the statute required the imposed sentence. The State further argued that the failure to apply both subparagraph (A) and

subparagraph (C) would allow for an individual attempting to murder a peace officer while discharging a firearm to receive a sentence below the mandatory minimum sentence of attempted first degree murder of an ordinary citizen under the same facts. The court agreed with the State and affirmed the defendant's sentence. The court held that subsection (A) is not an enhancement, but a baseline sentence, while subparagraphs (B), (C), and (D) set forth firearm sentence enhancements that shall be added to whichever sentence range is applicable. The court reasoned that the General Assembly intended to address two separate issues by the status-based sentencing range and the firearm enhancements. The status-based sentencing range is a result of the intent of the General Assembly to punish attempted first degree murder of a peace officer more severely than the same attempt on an ordinary citizen. At the same time, the General Assembly also intended to impose sentencing enhancements for offenses perpetrated with firearms. The court also held that because subparagraph (E) of paragraph (1) of subsection (c) of Section 8-4 is a baseline sentence if certain mitigating factors are present, which renders the firearm enhancements inapplicable, it is proper to read the "and" before subparagraph (E) as an "or" to allow that subparagraph alone to apply disjunctively.

A dissenting opinion disagreed with the majority on the statutory construction of the Section. The dissent argued that the plain language of the first degree murder provision of the attempted murder statute does not allow for the imposition of a 20-to-80-year sentence under subparagraph (A) of paragraph (1) of subsection (c) of Section 8-4 combined with the firearm enhancement under subparagraph (C) of paragraph (1) of subsection (c) of Section 8-4. The dissent reasoned that, as a baseline, the plain language of the attempt statute requires attempted first degree murder to be sentenced as a Class X felony offense, which under paragraph (a) of Section 5/5-4.5-25 of the Unified Code of Corrections (730 ILCS 5/5-4.5-25(a) (West 2020)), is a sentencing range of 6 to 30 years. The dissent reasoned that the placing of semicolons at the end of each subparagraph and the use of the word "and" between subparagraphs (D) and (E) indicate that there are five exceptions that modify the Class X sentence for attempted murder that must be read disjunctively, and that the dissent noted that the language of the statute does not contain a statement clearly indicating the approval of the General Assembly of a double enhancement.

On May 25, 2022, the Illinois Supreme Court granted a Petition for Leave to Appeal in the case.

**CRIMINAL CODE OF 2012 – SEX OFFENDER IN A SCHOOL ZONE**

*Property used jointly by a church and its associated school constitutes real property comprising a school for purposes of a provision in the Code that prohibits a child sex offender from being present in a school zone.*

In *People v. Leib*, 2022 IL 126645, the Illinois Supreme Court was asked to decide whether the appellate court erred in affirming the bench trial conviction in the circuit court of the defendant for being a child sex offender in a school zone. Subsection (a) of Section 11-9.3 of the Criminal Code of 2012 (720 ILCS 5/11-9.3(a) (West 2014)) provides, in pertinent part, that "It is unlawful for a child sex offender to knowingly be present in any school building, on real property comprising any school, or in any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related

activity when persons under the age of 18 are present in the building, on the grounds or in the conveyance . . . ." The defendant argued that the parking lot in which he was present was not real property comprising a school because the property was not contiguous with the school buildings, and he further asserted that he believed he was at a church function on church property. The State argued that the festival at which the defendant was present was a school fundraiser held by a parish on property used for school functions, and that the General Assembly intended to prohibit a sex offender from being in the same school area as children. The court agreed with the State and affirmed the defendant's conviction. The court held that the parking lot where the defendant was present during a parish carnival was real property comprising a school and that the defendant, as a registered sex offender, was prohibited from being present at that location. The court reasoned that, at the time of the carnival, the street separating the parking lot from the school buildings was closed off, creating a school zone that included the parking lot. The court further reasoned that the parking lot, school, and church are owned by the parish; that the school and church are synonymous; and that children were present during the carnival. The court concluded, as a matter of first impression, that the plain language of the statute does not require that the real property comprising a school be contiguous with the school.

## CRIMINAL CODE OF 2012 –DISSEMINATION OF SEXUAL IMAGES

*Dissemination of private sexual images does not include a person accessing private sexual images on another person's phone and using the phone to send the images to himself.*

In *People v. Devine*, 2022 IL App (2d) 210162, the Illinois Appellate Court was asked to decide whether the trial court erred when it construed the meaning of "dissemination" in subsection (b) of Section 11-23.5 of the Criminal Code of 2012 (720 ILCS 5/11-23.5(b) (West 2018)) to include a defendant who accessed private sexual images on another person's phone and used the phone to send the images to himself. Subsection (b) of Section 11-23.5 of the Criminal Code of 2012 provides that a person commits non-consensual dissemination of private sexual images when he or she: (1) intentionally disseminates an image of another person: (A) who is at least 18 years of age; and (B) who is identifiable from the image itself or information displayed in connection with the image; and (C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and (3) knows or should have known that the person in the image has not consented to the dissemination. In this case, the defendant was accused of non-consensual dissemination of private sexual images after he accessed photos of the victim's intimate parts on her cell phone and then sent the photos to himself by text message. The State argued that the defendant disseminated the images when he distributed them to himself. The defendant argued the State failed to prove he disseminated the images because the State did not prove that he either sent the images to another person or otherwise distributed them. The court agreed with the defendant, reversing the trial court and holding that dissemination requires either publication of the images, such as by posting on social media, or distribution to another person. The court relied on *People v. Austin*, 2019 IL 123910, which held that the term "disseminate" means to foster general knowledge of and make more widely known. The court also reasoned under the doctrine of *in pari materia* ("in the same subject matter") that the definition of

"disseminated" in Section 5 of the Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act (740 ILCS 190/5 (West 2020)) was instructive in determining the definition for purposes of the Criminal Code of 2012. The court reasoned that two statutes concerning the same subject should be considered relative to one another to give them harmonious effect. "Disseminate" is defined in the Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act as publication or distribution to another person with the intent to disclose. Similarly, a defendant who clandestinely transfers private sexual images to his own phone but does not publish or share them with another person is not guilty of the criminal offense of dissemination of private sexual images.

**CRIMINAL CODE OF 2012 – ARMED HABITUAL CRIMINAL**

*A defendant's age at the time of a prior convicted offense is irrelevant for purposes of the armed habitual criminal statute.*

In *People v. Irrelevant*, 2021 IL App (4th) 200626, the Illinois Appellate Court was asked to decide whether a prior offense may be considered in determining that a defendant is an armed habitual criminal if, at the time of the later determination but not at the time of the prior offense, a court would consider the defendant to be a juvenile. Subsection (a) of Section 24-17 of the Criminal Code of 2012 (720 ILCS 5/24-17(a)) provides that a "person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of . . . [specified offenses.]" The defendant argued that because one of the prior offenses upon which his conviction of being an armed habitual criminal relied occurred when he was 17, and because after that prior offense, the relevant legal age of majority was raised to 21, the prior offense could not be considered in determining whether he was or was not an armed habitual criminal. The State, on the other hand, argued that, because the defendant was a legal adult and met all other elements of the offense at the time of the prior conviction, that conviction could be used to satisfy an element of being an armed habitual criminal. The court agreed with the State, affirming the conviction and holding that the relevant legal age of majority at the time that a defendant is convicted of a prior offense, and not the legal age of majority at the time of adjudication of the later charge of being an armed habitual criminal, is to be applied when making that determination. The court reasoned that allowing defendants to retroactively apply a subsequent change in the legal age of majority in the determination of being an armed habitual criminal would effectively introduce an unstated age requirement into the statutory elements. Because the statute includes no language indicating that the age at which a person is convicted of a prior offense is an element of being an armed habitual criminal, the court determined that legal age at the time of the prior offense should not be considered.

## SEARCH AND SEIZURE – INVESTIGATIVE ALERTS

*A warrantless arrest based solely on an investigative alert issued by law enforcement is unconstitutional.*

In *People v. Smith*, 2022 IL App (1st) 190691, the Illinois Appellate Court was asked to decide whether the trial court erred in denying the defendant's motion to quash arrest and suppress evidence when the defendant's arrest was based on an investigative alert issued by the Chicago Police Department six months prior to the arrest, rather than a warrant from a magistrate. Section 6 of Article I of the Illinois Constitution (ILL. CONST. art. I, § 6), concerning searches, seizures, invasions of privacy, and interceptions of communication, provides, "No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." The federal counterpart to this provision is the Fourth Amendment of the United States Constitution (U.S. CONST. amend. IV), which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." The State argued that, under the limited lockstep doctrine, Article 1, Section 6 of the Illinois Constitution does not provide greater protection to citizens than the Fourth Amendment, because the drafters of the Illinois Constitution intended Article 1, Section 6 to be analogous to the Fourth Amendment. Although the defendant did not dispute that there was probable cause for his arrest, nor did he argue that his arrest violated the Fourth Amendment, he argued that an arrest based solely on an investigative alert violates the Illinois Constitution, because the determination of probable cause is not supported by an affidavit and is not made by a neutral magistrate. In making this argument, the defendant relies on *People v. Bass*, 2019 IL App (1st) 160640, in which the Illinois Appellate Court found that "with regard to the necessity of a warrant issued by a neutral magistrate, historical precedent concludes that Article 1, Section 6 [of the Illinois Constitution] provides greater protection than the Fourth Amendment." However, during the pendency of the appeal in *Smith,* the Illinois Supreme Court in *Bass* vacated the portion of the Illinois Appellate Court's decision in that case pertaining to the constitutionality of investigative searches and reached its decision supporting the defendant's motion to suppress on separate grounds. The court in *Smith* agreed with the defendant, holding that, although there are circumstances in which a warrantless arrest may be justified, the Illinois Constitution generally requires that an affidavit should be presented to a neutral magistrate before a warrant may issue. In this case, the court reasoned that the police had ample time to obtain a warrant, but chose not to do so out of expediency. Nevertheless, the court found that the admission of the evidence derived from the arrest was harmless error, given the overwhelming evidence of guilt that was not tied to the illegal arrest. A concurring opinion expressed the belief that it was not necessary to address the constitutionality of investigative alerts to reach a decision in the case.

## CODE OF CRIMINAL PROCEDURE OF 1963 – SEPARATION OF POWERS

*The scheduling of criminal trials is a matter of procedure within the realm of the Illinois Supreme Court, and the court's exercise of that authority through its orders prevails over the speedy trial provisions enacted by the General Assembly.*

In *People v. Mayfield*, 2021 IL App (2d) 200603, the Illinois Appellate Court was asked to decide whether an Illinois Supreme Court order, effective March 20, 2020, which authorized the chief judges of each circuit to continue trials for the next 60 days and until

further order of the court violated the separation of powers provisions of the Illinois Constitution (ILL. CONST. art. II, § 1). The Illinois Supreme Court subsequently amended its order on April 7, 2020 to provide that the chief judge of each circuit may continue trials until further order of the Illinois Supreme Court. On May 20, 2020, the Illinois Supreme Court amended its order to provide that the provision also applies when a trial is delayed when the court determines proper distancing and facilities limitations prevent the trial from proceeding safely. Under the order, the judge in the case must find that such limitations necessitated the delay and must make a record that the limitations necessitated the delay. Pursuant to this order, the trial court continued the case to August 13, 2020. On August 11, 2020, the defendant filed a motion to dismiss for failure to bring him to trial within the 120-day speedy trial term set forth in subsection (a) of Section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5). That statute provides that every person in custody for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to the Code, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. It further provides that delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record. The defendant argued that the Illinois Supreme Court overstepped its authority by suspending the operation of the speedy trial provisions of the Code of Criminal Procedure of 1963. The defendant further argued that the Illinois Supreme Court violated the separation of powers doctrine, encroaching upon legislative authority. Under Article VI, Section 1 of the Illinois Constitution (ILL. CONST. art. VI, § 1), the judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts. Furthermore, Section 16 of Article VI (ILL. CONST. art. VI, § 16) provides, in pertinent part, that general administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Illinois Appellate Court held that the separation of powers provision does not seek to achieve a complete divorce between the branches of government; the purpose of the provision is to prevent the whole power of 2 or more branches from residing in the same hands. The court reasoned that there are areas in which separate spheres of governmental authority overlap and certain functions are thereby shared. Where matters of judicial procedure are at issue, the constitutional authority to promulgate procedural rules can be concurrent between the court and the General Assembly. The General Assembly may enact laws that complement the authority of the judiciary or that have only a peripheral effect on court administration. Ultimately, however, the Illinois Supreme Court retains primary constitutional authority over court procedure. Consequently, the separation of powers principle is violated when a legislative enactment unduly encroaches upon the inherent powers of the judiciary, or directly and irreconcilably conflicts with a rule of the court on a matter within the court's authority. The court concluded that the scheduling of criminal cases is a matter of procedure within the realm of the Illinois Supreme Court's primary constitutional authority. Citing *Kunkel v. Walton*, 179 Ill. 2d 519 (1997), the Illinois Supreme Court's exercise of that authority through its orders prevails over the speedy trial provisions of the Code of Criminal Procedure of 1963. Therefore, the court concluded, the Illinois Supreme Court had the authority to allow the tolling of the time limits under Section 103-5 of the Code of Criminal Procedure of 1963 for bringing criminals to trial in response to the COVID-19 pandemic.

On March 30, 2022, the Illinois Supreme Court granted a Petition for Leave to Appeal in the case.

**CODE OF CRIMINAL PROCEDURE OF 1963 – DOMESTIC VIOLENCE**

*Other-crimes evidence must be specifically included in the State's pretrial motion in order to be admitted into evidence during trial.*

In *People v. Valdez*, 2022 IL App (1st) 181463, the Illinois Appellate Court was asked to decide whether the trial court erred in admitting propensity evidence of domestic violence when the State did not provide the required disclosure of the evidence before the trial. Subsection (c) of Section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4(c) (West 2010)) provides that when the State intends to offer evidence of prior incidents of domestic violence "it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown." The State argued that the evidence was disclosed in both a police report that was produced in discovery, which provided notice of potential testimony, and a pretrial motion that disclosed the act described in the testimony. The defendant argued that the State did not include testimony that was presented during the trial in its pretrial motions to admit proof of other crimes. The court agreed with the defendant, holding that the witness's testimony of domestic violence was not properly disclosed prior to trial. The court reasoned that "an obvious purpose of the disclosure provisions is to ensure that the trial court can rule on the admissibility and proper use(s) of any other-crimes evidence *before* it is put in front of a jury, where it may invite an improper and prejudicial inference." The court further reasoned that "a rule that requires the State to specify in advance the other-crimes evidence it intends to offer, and the purpose(s) for which it intends to offer it, will accomplish this goal far more effectively and efficiently than a rule that requires the defense to guess at the State's intentions and potentially inundate the trial court with anticipatory motions *in limine*, many of which may be entirely off the mark and unnecessary."

**CODE OF CRIMINAL PROCEDURE OF 1963 – EVIDENCE PRESERVATION**

*Failure to preserve evidence after conviction but before completion of sentence in violation of statutory requirements is not grounds for vacatur of the defendant's conviction.*

In *People v. Grant*, 2022 IL 126824, the Illinois Supreme Court was asked to decide whether the appellate court erred in reversing the trial court's decision denying the defendant's motion for a new trial and vacating the defendant's conviction, remanding the case for a potential new trial, and ordering that, at any new trial, an adverse-inference instruction must be given to the jury. In this case, in 2004, the defendant was convicted of aggravated criminal sexual assault and criminal sexual assault. In 2013, under Section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2006)), the defendant sought forensic testing of a hair found on the victim that was not tested prior to his criminal trial. Section 116-3 provides that, regarding a claim of actual innocence, a defendant may move for the performance of fingerprint, ballistic, or forensic DNA testing

that was not available at trial, and the court shall allow the testing under reasonable conditions that are designed to protect the State's interests in the integrity of the evidence and the testing process. In this case, after learning that the law enforcement agency had destroyed all forensic evidence in the defendant's case in 2007, in violation of Section 116-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-4 (West 2006)), the defendant filed a motion for a new trial or for a judgment notwithstanding the verdict. Subsection (a) of Section 116-4 requires that before or after the trial in a prosecution for certain criminal offenses, including aggravated criminal sexual assault and criminal sexual assault, a law enforcement agency or an agent acting on behalf of the law enforcement agency must preserve, subject to a continuous chain of custody, any physical evidence that is reasonably likely to contain forensic evidence, including, but not limited to, fingerprints or biological material secured in relation to a trial and with sufficient documentation to locate that evidence. After a judgment of conviction for certain offenses, including aggravated criminal sexual assault and criminal sexual assault, subsection (b) of Section 116-4 requires that the evidence must either be impounded with the Clerk of the Circuit Court or must be securely retained by a law enforcement agency, and that retention shall be until the completion of the sentence, including the period of mandatory supervised release for the offense, or January 1, 2006, whichever is later. Pursuant to subsection (a) of Section 33-5 of the Criminal Code of 2012 (720 ILCS 5/33-5(a) (West 2006)), it is unlawful for a law enforcement agency or an agent acting on behalf of the law enforcement agency to intentionally fail to comply with the provisions of subsection (a) of Section 116-4 of the Code of Criminal Procedure of 1963. A person who does intentionally fail to comply is guilty of a Class 4 felony as set forth in subsection (b) of Section 33-5 of the Criminal Code of 2012. The State agreed that compliance with the Code of Criminal Procedure of 1963 is mandatory, but argued that the intent of the General Assembly with regard to a violation was to specify a penalty of felony liability for intentional violations. The defendant argued that the remedy must be a consequence that relieves the injurious effect of the violation, therefore the consequence must be an invalidation of the governmental action to which the command relates, and because his conviction was the governmental action to which the command to preserve evidence most clearly relates, his conviction must be invalidated. The court agreed with the State, finding that the plain language of the statute established that the General Assembly did not intent to prescribe a vacatur of defendant's conviction as a consequence for violating the requirement to preserve forensic evidence, and reversed the judgment of the appellate court and affirmed the judgment of the trial court. The court reasoned that the criminal liability for intentional noncompliance demonstrates that the General Assembly considered consequences for noncompliance and expressly provided for the consequence it deemed appropriate and the circumstances to which a consequence applies.

A dissenting opinion disagreed with the majority that the defendant is not entitled to vacatur of his conviction based on the failure to maintain evidence. The dissent reasoned that Article 116 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116 (West 2012)) is unambiguous and does not distinguish between intentional and unintentional conduct. The dissent further noted that Article 116 does not reference Section 33-5 of the Criminal Code of 2012 as a possible penalty, nor does it impose any other consequence for noncompliance with the obligation to preserve forensic evidence. The dissent argued that the defendant is entitled to a remedy, and, because prosecution of a law enforcement agency employee under the Criminal Code of 2012 does nothing to advance the statutory purpose of Article 116 of the Code of Criminal Procedure of 1963, but is ancillary to the defendant's

statutory right to obtain testing of preserved evidence, the defendant is entitled to vacatur of his conviction.

## CODE OF CRIMINAL PROCEDURE OF 1963 – POSTCONVICTION HEARING

*There is no temporal limit on the conditions of post-partum depression or post-partum psychosis.*

In *People v. McCarrron*, 2022 IL App (3d) 200404, the Illinois Appellate Court was asked to decide whether the circuit court erred when it denied a motion for a postconviction petition because the court determined the requirements to meet the definitions of "post-partum depression" and "post-partum psychosis" were not met. Paragraph (3) of subsection (a) of Section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(a)(3) (West 2018)) provides that "'post-partum depression' means a mood disorder which strikes many women during and after pregnancy which usually occurs during pregnancy and up to 12 months after delivery" and "'post-partum psychosis' means an extreme form of post-partum depression which can occur during pregnancy and up to 12 months after delivery." The State argued that the definition of post-partum depression or post-partum psychosis did not apply to a defendant who murdered her oldest child 25 months and 4 days after the youngest child was born. The defendant argued that the way the circuit court construed the statutory definition of post-partum depression and post-partum psychosis improperly limited its existence at one year past the last child's birthday. The court agreed with the defendant, holding that the defendant was not precluded from seeking postconviction relief on the basis of post-partum depression due to the fact that the defendant murdered the child more than two years after the birth of the last child. The court reasoned that the use of "occur" in the definitions of "post-partum depression" and "post-partum psychosis" is related to the origin and not the duration of the illness, thus the statutory definitions do not place a strict temporal limit on the conditions of post-partum depression or post-partum psychosis.

Paragraph (3) of subsection (a) of Section 122-1 of the Code of Criminal Procedure of 1963 was repealed by Public Act 101-411, which went into effect on August 16, 2019. However, in the same Public Act, the definitions of "post-partum depression" and "post-partum psychosis" were copied and moved to subsection (b-10) of Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401).

## CODE OF CRIMINAL PROCEDURE OF 1963 – YOUNG ADULT OFFENDERS

*In declining to apply United States Supreme Court precedent against mandatory life imprisonment to persons over 21 years of age, the court noted that such protections are within the purview of the General Assembly.*

In *People v. Montanez*, 2022 IL App (1st) 191930, the Illinois Appellate Court was asked to decide whether the circuit court improperly denied the petitioner's motion for leave to file a successive petition for postconviction relief. Subsection (f) of Section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(f) (West 2018)) provides that leave to file successive petitions for postconviction relief "may be granted only if a

petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." The petitioner argued, among other things, that he was entitled to relief because the imposition of a mandatory natural life sentence for the offense he committed at the age of 21 violated the prohibition on cruel and unusual punishment under the Eighth Amendment to the United States Constitution (U.S. CONST. amend. VIII) pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) and related precedent, and violated the proportionate penalties clause of the Illinois Constitution (ILL. CONST. art. I, § 11). The court held that the denial of leave to file a successive petition for postconviction relief was proper, holding that the petitioner could not establish prejudice warranting leave to file a successive petition for postconviction relief because of the "significant precedent setting the dividing line for *Miller* protections at 21-years-old." Although the court acknowledged that there have been extensions of *Miller* to persons over the age of 21 at the time of the offense, the court distinguished those cases as having involved circumstances where the defendant's functional age may have been under the age of 21. The court concluded that "any further extension of *Miller* should come from either the legislature or the Illinois Supreme Court." A concurring opinion asserted that the petitioner's proportionate penalties claim failed on the grounds that the petitioner could not demonstrate cause for his failure to raise it because the reasoning in *Miller* was based in the Eighth Amendment to the United States Constitution, not the proportionate penalties clause. Therefore, the concurring opinion reasoned, the petitioner could have raised a claim under the proportionate penalties clause at the time of his initial appeal. On September 28, 2022, the Illinois Supreme Court granted a Petition for Leave to Appeal in the case.

**UNIFIED CODE OF CORRECTIONS – ELECTRONIC MONITORING**

*Notice requirements in rules governing home confinement are not an element of the offense of escape or a prerequisite to prosecution.*

In *People v. Duffie*, 2022 IL App (2d) 210281, the Illinois Appellate Court was asked to decide whether receipt of notice under Sections 5-8A-4 and 5-8A-4.1 of the Electronic Monitoring and Home Detention Law of the Unified Code of Corrections is an element of the offense of escape or is a prerequisite to prosecution. Subsection (a) of Section 5-8A-4.1 (730 ILCS 5/5-8A-4.1(a) (West 2020)) provides, "A person charged with or convicted of a felony . . . conditionally released from the supervising authority through an electronic monitoring or home detention program, who knowingly violates a condition of the electronic monitoring or home detention program . . . is guilty of a Class 3 felony." Subsection (H) of Section 5-8A-4 (730 ILCS 5/5-8A-4(H) (West 2020)) further states, "The supervising authority may promulgate rules that prescribe reasonable guidelines under which an electronic monitoring and home detention program shall operate. When using electronic monitoring for home detention these rules *shall* include but not be limited to the following: . . . (H) Notice to the participant that violation of the order for home detention may subject the participant to prosecution for the crime of escape as described in Section 5-8A-4.1." The defendant argued that his conviction of escape, by means of his unlawful removal of an electronic monitoring device from his ankle, must be reversed because the State failed to meet its burden of proof because it presented no evidence that he received the notice required under Section 5-8A-4.1, and notice is a prerequisite to a

prosecution for escape. He argued that Section 5-8A-4.1 must be read in conjunction with subsection (H) of Section 5-8A-4, because that Section provided that the rules governing an electronic monitoring and home detention program "shall" include notice that a violation might lead to a prosecution for escape. Consequently, the defendant argued, the notice requirement was mandatory for a prosecution. The court, while remanding the case on other grounds, did not agree with the defendant and held that nothing in the plain language of the definition of escape in Section 5-8A-4.1 suggests that receipt of notice is an element of the offense or a prerequisite to prosecution. The court further reasoned that the statutory provisions in question contain no language prohibiting a prosecution for escape in the absence of the notice required by subsection (H) of Section 5-8A-4 because "mandatory," as used in this sense, is in contradistinction to "directory" as opposed to "permissive." The court explained that there is a presumption that the language issuing a procedural command to a government official indicates an intent that the statute is directory, and the presumption is overcome when there is negative language prohibiting further action in the case of noncompliance or when the right the provision is designed to protect would generally be injured under a directory reading. The court explained that the presumption was not overcome in this case, because the statutory provisions in question contain no language prohibiting a prosecution for escape in the absence of notice under subsection (H) of Section 5-8A-4. The General Assembly subsequently passed Public Act 101-652, which changed the "shall" under Section 5-8A-4 to "may." Currently, Section 5-8A-4 states " . . . When using electronic monitoring for home detention these rules *may* include but not be limited to . . . " (Emphasis added).

**UNIFIED CODE OF CORRECTIONS – REVOCATION OF A FINE**

*A discretionary penal fine is revocable if good cause is shown, but a mandatory fine imposed in addition to any discretionary penal fine is not revocable.*

In *People v. Reyes*, 2022 IL App (2d) 190474, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied the defendant's petition to revoke the fines imposed as part of his sentence for aggravated driving while under the influence of alcohol. Section 5-9-2 of the Unified Code of Corrections (730 ILCS 5/5-9-2 (West 2018)) states, "Except as to fines established for violations of Chapter 15 of the Illinois Vehicle Code, the court, upon good cause shown, may revoke the fine or the unpaid portion or may modify the method of payment." The State argued that only the discretionary penal fines imposed under the Code of Corrections may be revoked under the statute, and if, as here, a discretionary fine is not imposed, it may not be revoked regardless of whether good cause is shown. The defendant argued that all fines, except those imposed under Chapter 15 of the Illinois Vehicle Code, are subject to revocation if good cause is shown. The court agreed with the State and affirmed the judgment of the trial court. The court found that the term "fine," as used in Section 5-9-2, means the discretionary penal fines authorized under Section 5-9-1 of the Unified Code of Corrections (730 ILCS 5/5-9-1 (West 2018)). That statute provides, "An offender may be sentenced to pay a fine as provided in [the general sentencing provisions of the Unified Code of Corrections]." The court reasoned that the fines authorized by Section 5-9-1 are discretionary and subject to revocation, but mandatory fines are imposed on a defendant in addition to any penal fine imposed under the Unified Code of Corrections and, as such, are not revocable.

## CODE OF CIVIL PROCEDURE – SPECIFICITY OF PLEADINGS

*A statement of a lack of knowledge in a response that ends with a denial is surplusage and does not require an affidavit to avoid being construed as an admission.*

In *Dartt v. Pegman*, 2022 IL App (1st) 210633, the Illinois Appellate Court was asked to decide the following certified question: "Under subsection (b) of Section 2-610 of the Code of Civil Procedure (735 ILCS 5/2-610(b) (West 2018)), when an answer to an allegation in a complaint concludes, 'and therefore it is denied,' is the denial to be disregarded when earlier in the answer the defendant stated that it lacks sufficient knowledge, and did not attach an affidavit of no knowledge?" Subsection (b) of Section 2-610 provides that every allegation in a complaint that is not explicitly denied is admitted, unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny. The plaintiff filed a negligence action based on an incident outside one of the bars owned by the defendant. The defendant admitted and denied some of the plaintiff's allegations. The defendant also responded to allegations as follows: "This defendant lacks sufficient knowledge to form a belief as to the truth of the allegations . . . and therefore they are denied." The plaintiff moved for summary judgment against the defendant, arguing that the allegations answered in this manner should be deemed admitted because the defendant failed to submit an affidavit supporting the defendant's claims of lack of sufficient knowledge in violation of the Code. The defendant argued that all answers at issue ended with "and therefore they are denied," which constituted an explicit denial of the plaintiff's allegations. The court agreed with the defendant, holding that the explicit denial of the claim controlled, and the claim of lack of knowledge was surplusage that should be disregarded. The court reasoned that the first question was whether there is an "explicit admission or denial of each allegation of the pleading to which it relates." Then, if there is no explicit denial or admission of an allegation, it is deemed admitted, unless the party states that he or she has insufficient knowledge to form a belief and attaches an affidavit averring the same. Thus, the court concluded that the additional portions of the answer in which the defendant claimed a lack of knowledge was surplusage.

## CODE OF CIVIL PROCEDURE – CERTIFICATE OF INNOCENCE

*A petitioner seeking a certificate of innocence must establish innocence as to all of the offenses charged in the information, not just charges for which the petitioner was incarcerated.*

In *People v. Warner*, 2022 IL App (1st) 210260, the Illinois Appellate Court was asked to decide whether the circuit court erred in denying a petition for a certificate of innocence when it required the defendant to prove his innocence as to all the offenses charged in the information, rather that only the charges for which he was incarcerated. Subsection (g) of Section 2-702 of the Code of Civil Procedure (735 ILCS 5/2-702(g) (West 2016)) provides, "In order to obtain a certificate of innocence the petitioner must prove by a preponderance of evidence that the petitioner is innocent of the offenses charged in the indictment or information or his or her acts or omissions charged in the indictment or information did not constitute a felony or misdemeanor against the State." The petitioner

argued that the statute requires that he prove his innocence only as to the charge for which he was incarcerated and not as to the charges in the information that the State did not prosecute and did not move to reinstate or refile. The State argued that, based on the plain meaning of the statute, the petitioner must establish his innocence as to all of the offenses charged in the information. The court agreed with the State, holding that the statute requires a petitioner to establish his innocence as to all of the offenses charged in the information. The court reasoned that the language in the statute would be duplicative if the General Assembly had intended that a petitioner was required to allege and show only that the petitioner was innocent of the offenses for which the petitioner was incarcerated. In subsections (b) and (h) of Section 2-702, the General Assembly specifies "offenses for which he or she is incarcerated." In subsection (g), the General Assembly used the language "offense charged in the . . . information," showing its intent that a petitioner must allege and prove that he or she is innocent of all of the offenses charged in the information.

A concurring opinion reasoned that the circuit court properly denied the defendant's request for a certificate of innocence in this case, but it expressed concerns that requiring a petitioner to prove himself or herself innocent of all offenses charged in the information, including charges not pursued by the State, may be unduly cumbersome and contrary to the General Assembly's intent. The concurrence argued that a defendant not proven guilty of dropped charges through stipulated facts or evidence at trial may face great difficulty in proving his or her innocence of those charges. Requiring a wrongfully imprisoned person to prove himself or herself innocent of these charges could result in petitioners having to litigate charges far removed from the reasons they were incarcerated. The concurrence concluded that the General Assembly expressly intended to reduce the barriers that innocent, wrongfully convicted persons face, and the court's interpretation of the statute is not consistent with this intent.

**CODE OF CIVIL PROCEDURE – APPOINT SPECIAL REPRESENTATIVE**

*When an estate has not been opened and letters of office naming a personal representative have not been issued, a plaintiff may bring a cause of action against the decedent's special representative (rather than the personal representative of the estate).*

In *Lichter v. Carroll*, 2022 IL App (1st) 200828, the Illinois Appellate Court was asked to decide whether the circuit court erred when it dismissed an action for damages, holding that the plaintiff was required to bring the action against the deceased defendant's personal representative under subsection (c) of Section 13-209 of the Code of Civil Procedure (735 ILCS 5/13-209(b)(2) (West 2016)), rather than against the defendant's special representative as set forth in paragraph (2) of subsection (b) of Section 13-209 of the Code. Paragraph (2) of subsection (b) provides, "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives . . . if no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person entitled to bring an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action." Conversely, subsection (c) provides, "If a party commences an action against a deceased person whose death is unknown to the party before the expiration of the time limited for the commencement thereof, and the cause of action survives, . . . the action may be commenced against the deceased person's personal representative if

[specified] terms and conditions are met." The plaintiff argued that paragraph (2) of subsection (b) was applicable and that it was proper for the court to appoint a special representative because no petition for letters of office was ever filed for the defendant's estate. The defendant, however, argued that the matter fell within the purview of subsection (c) and that the plaintiff was required to sue a personal representative because the plaintiff did not know of the defendant's death until after the expiration of the limitations period. The appellate court agreed with the plaintiff and reversed the circuit court's decision, holding that the plaintiff had correctly filed the action under paragraph (2) of subsection (b). The court reasoned that nothing in the language of subsection (c) suggested that a plaintiff must name the personal representative when the option of appointing a special representative is available under paragraph (2) of subsection (b). The court found that the language of paragraph (2) of subsection (b) provides a less costly, more efficient, and streamlined option to a plaintiff when an estate has not already been opened and a personal representative has not already been named for the deceased defendant. On September 28, 2022, the Illinois Supreme Court granted a Petition for Leave to Appeal in the case.

**BIOMETRIC INFORMATION PRIVACY ACT – ACCRUAL OF CLAIMS**

*A cause of action accrues with each and every instance of the unauthorized capture and use of an individual's biometric information in violation of the Act.*

In *Watson v. Legacy Healthcare Financial Services, LLC*, 2021 IL App (1st) 210279, the Illinois Appellate Court was asked to determine if the trial court erred when it granted the defendant's motion to dismiss, finding that the plaintiff's 2019 suit under the Biometric Information Privacy Act (BIPA) (740 ILCS 14/1 *et seq*. (West 2018)) was time-barred under the Code of Civil Procedure's 5-year statute of limitations period, because the plaintiff's claim accrued the first time he submitted a hand scan to the defendant (December 27, 2012). Subsection (b) of Section 15 of the Biometric Information Privacy Act prohibits a private entity from collecting, capturing, or otherwise obtaining a person's or customer's biometric identifier or biometric information "unless it first: (1) informs the subject . . . in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject in writing of the specific purpose and length of term for which the . . . information is being collected or stored; and (3) received a written release executed by the subject of the biometric identifier or biometric information." Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (West 2018)) provides that actions to recover damages for personal injuries "shall be commenced within 5 years next after the cause of action accrued." The plaintiff, a former certified nursing assistant who was employed by the defendant from December 27, 2012 through February 21, 2019, alleged in his initial complaint that the defendant failed to provide notice or obtain his written consent before collecting his biometric information via an employee time entry system that utilized fingerprint and hand scan technology to "clock in" and "clock out" employees. On appeal, the plaintiff argued that the trial court erred in dismissing his suit because the accrual date for his BIPA claim was the date he last submitted his hand scan to the defendant without his informed consent. The defendant argued that dismissal was proper because the use of the word "first" in subsection (b) of Section 15 of the Act "means that the prohibitions, and hence, the accrual date apply to an entity's "first" capture or collection" of a person's biometric information. The appellate court ultimately agreed with the plaintiff and reversed the trial court's holding, finding that "the plain language of the statute established that it applies to each and every capture and use of the plaintiff's fingerprint or hand scan," not

just the plaintiff's first fingerprint or hand scan as asserted by the defendant. The court reasoned that, even though the Act does not explicitly set forth an accrual date, the Act's definition for "biometric information" states that the Act applies to "any information, regardless of how it is captured." Therefore, the court held that the Act "applies, by its plain terms, to the twice-daily 'capture' of the plaintiff's hand to identify him." The court also noted that the stated purpose of the Act is to "regulate not simply the "collection" [of biometric information] but also everything that follows, including the subsequent "use" and "storage" of the collected information." Consequently, the appellate court found that the Act's purpose Section (740 ILCS 14/5 (West 2018)) "further supports [the] finding that the Act applies to defendants' subsequent "use" of plaintiff's hand scan or fingerprints and not just its initial collection." The appellate court also dismissed the defendant's reading of the word "first" in subsection (b) of Section 15, finding that the word does not modify or change the words "collect" or "capture" as they appear in that provision's listed paragraphs, but instead modifies the words "informs" and "receives." The appellate court opined that those words signify an entity's obligations, not the actions that trigger a violation under the Act. Consequently, the appellate court found that since "there is no modifier limiting [the words] "collect" or "capture," . . . the requirements apply to each and every collection and capture" of a person's biometric information. Hence, the appellate court held that there is nothing in the Act's plain language, stated purpose, or legislative history to support the defendant's assertion that the statute of limitations begins to run at the first collection of a person's fingerprint or handprint.

## BIOMETRIC INFORMATION PRIVACY ACT – EXEMPTED INFORMATION

*Biometric information obtained by a healthcare provider from its employees for purposes of dispensing medicine is not exempt from the requirements of the Act.*

In *Mosby v. Ingalls Memorial Hospital*, 2022 IL App (1st) 200822, the Illinois Appellate Court was asked to answer the following certified question on interlocutory appeal: whether the exemption under Section 10 of the Biometric Information Privacy Act (740 ILCS 14/10 (West 2018)) applies to biometric identifiers and information collected by a health care provider from its employees via finger-scan technology, when such information is used for purposes related to 'healthcare,' 'treatment,' 'payment,' or 'operations' as those terms are defined under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Under the Biometric Information Privacy Act, a private entity must make certain written disclosures and obtain an individual's consent before collecting or otherwise obtaining the individual's biometric identifier or biometric information. Section 10 of the Act defines "biometric identifier" to mean "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry . . . [but does] not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996."

The defendant argued that the certified question should be answered in the affirmative "because the plain language of Section 10 demonstrates that employee biometric information used in medication dispensing systems is excluded from the protections of the Act." The defendant noted that Section 10 contains a "disjunctive "or" [which] connotes two different alternatives . . . [and] indicates . . . a different category of exemptions . . . that is not limited to patient data." Accordingly, the defendant argued that,

for biometric information to be exempted, "it must (1) be obtained in a healthcare setting or (2) be collected, used, or stored in connection with healthcare treatment, payment, and operations under HIPAA." Applying this interpretation, the defendant argued that its medication dispensing system secured by finger-scan technology "falls within [Section 10's] definitional carveouts for health-related information" because the employee biometric information collected is used "for the "health care" and "treatment" of patients as those terms are defined by HIPAA."

The plaintiff countered that Section 10's "explicit reference to [patient] biometric data shows the intent of the General Assembly to exclude patient biometrics from the Act's protections because they were already protected by HIPAA." Had the General Assembly wanted to provide a sweeping categorical exemption for hospitals, the plaintiff continued, it would have done so as evidenced by the exclusion of financial institutions in subsection (c) of Section 25 of the Act (740 ILCS 14/25(c) (West 2018)). The plaintiff furthermore dismissed the defendant's interpretation of the disjunctive "or" in Section 10, contending that the "interpretation of how 'or' creates two clauses would make sense if the 'under HIPAA' language was not present because patient information is the only information governed by HIPAA." The plaintiff furthermore warned that the defendant's reading of Section 10 would "leave thousands of hospital workers unprotected from the risks that the Act was designed to protect against."

The appellate court agreed with the plaintiff and answered the certified question in the negative, finding that Section 10 does not exclude employee biometric information from the protections of the Biometric Information Privacy Act. The court reasoned that the plain language of Section 10 clearly articulates that the Act excludes "(1) information from the patient in a healthcare setting and (2) information that is already protected under the federal Health Insurance Portability and Accountability Act of 1996." The court dismissed the defendant's two clauses argument, finding, "Even taking into consideration the disjunctive "or," Section 10 still has the same effect of excluding those two classifications of information. Indeed, the disjunctive "or" means that patient information and information under HIPAA are alternatives that are to be considered separately." Furthermore, the court noted that employee biometric information is "not defined or protected under HIPAA. Accordingly, the plain language of the statute does not exclude employee information . . . because [employees] are neither (1) patients nor (2) protected under HIPAA." The court affirmed that had the General Assembly wanted to create a broad exemption for hospitals, it would have explicitly written such an exemption into the statute.

## BIOMETRIC INFORMATION PRIVACY ACT – STATUTE OF LIMITATIONS

*Claims under the Act are subject to the five-year statute of limitations for personal injuries rather than the one-year limitations period applicable to invasions of privacy.*

In *Martinez v. Ralph Lauren Corporation, Inc.*, 2022 WL 900019, the United States District Court for the Northern District of Illinois was asked to determine if the plaintiff's claims under subsections (a), (b), and (d) of Section 15 of the Biometric Information Privacy Act (740 ILCS 14/15) were time-barred by the one-year statute of limitations under Section 13-201 of the Code of Civil Procedure (735 ILCS 5/13-201). Subsection (a) of Section 15 of the Biometric Information Privacy Act requires a private entity that collects biometric information to "develop a written policy . . . establishing a retention schedule

and guidelines for permanently destroying biometric identifiers when the initial purpose for collecting or obtaining such identifiers or information had been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first." Subsection (b) of Section 15 prohibits a private entity from collecting, purchasing, or otherwise acquiring an individual's biometric identifier or biometric information without first making certain disclosures and obtaining the individual's written consent. Subsection (d) of Section 15 prohibits a private entity from disclosing, redisclosing, or otherwise disseminating an individual's biometric identifier or biometric information unless specified conditions are met. The plaintiff, who was employed by the defendant from May 2018 to August 2019, filed an action in January 2021 alleging that the defendant violated subsections (a), (b), and (d) of Section 15 of the Biometric Information Privacy Act when the defendant collected her "fingerprints and biometric information for its clock-in, clock-out timekeeping system without proper written consent and without making required disclosures." In response, the defendant filed a motion to dismiss asserting that the plaintiff's claims were time-barred under Section 13-201 of the Code of Civil Procedure, which provides, "Actions for slander, libel or for publication of matter violating the right of privacy shall be commenced within one year next after the cause of action accrued." The plaintiff countered that the correct limitation period to apply is under Section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (West 2022)), which provides that actions to recover damages for personal injuries "shall be commenced within 5 years next after the cause of action accrued." The court agreed with the plaintiff, holding that the plaintiff's claims were not time-barred because the claims are subject to the 5-year limitation period. Invoking the court's rationale in *Tims v. Black Horse Carriers, Inc*., 2021 IL App (1st) 200563, the court reasoned that privacy actions brought under Sections 15(a) and 15(b) "do not require allegations of publication or disclosure, so they are not actions for "publication of matter violating the right of privacy," subject to the one-year limitations period." The court noted that on January 26, 2022, the Illinois Supreme Court granted leave for appeal in *Tims*. However, the court opined that there was no "persuasive reasons to think that the Illinois Supreme Court would decide differently" on the statute of limitations matter.

**BIOMETRIC INFORMATION PRIVACY ACT – FINANCIAL INSTITUTION**

*The financial activities of a university do not make it a financial institution for purposes of the Act's exemptions for financial institutions.*

In *Patterson v. Respondus, Inc.*, 593 F. Supp. 3d 783 (2022), the United States District Court for the Northern District of Illinois was asked to decide whether a university is exempt from the Biometric Information Privacy Act based on its status as a financial institution. Subsection (c) of Section 25 of the Biometric Information Privacy Act (740 ILCS 14/25(c) (West 2016)) provides, "Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder." The defendant argued that the Act should incorporate the definition of "financial institution" from the Gramm-Leach-Bliley Act. Under that Act (15 U.S.C. 6809(3)(A)), the term "financial institution" is defined as "any institution the business of which is engaging in financial activities," such as "lending, exchanging, transferring, investing for others, or safeguarding money or securities." The defendant argued that

because the university provides student loans and participates in financial-aid programs, it is a financial institution under the definition incorporated from the Gramm-Leach-Bliley Act. The plaintiff argued that the definition of "financial institution" should be given its plain meaning, which does not include a university. In the alternative, the plaintiff argued that if the definition from the Gramm-Leach-Bliley Act is adopted, a university would still not fall within the statutory definition of "financial institution." The court agreed with the plaintiff, holding that the university is not exempt from the Biometric Information Privacy Act under subsection (c) of Section 25. The court reasoned that, based on the information the defendant provided it was not clear that the university was subject to the Gramm-Leach-Bliley Act and the rules promulgated thereunder. The court declined to "untangle this web of agency authority without the benefit of further briefing," but rejected the defendant's arguments based on the information that was provided in the case. The court further noted that "the statute itself does not obviously answer the question about whether [a university] is a regulated financial institution."

## STALKING NO CONTACT ORDER ACT – COURSE OF CONDUCT

*A two-hour incident involving calls, text messages, and voicemail messages constitutes a sufficient course of conduct to allow a judge to issue a plenary stalking no contact order.*

In *Coutant v. Durell*, 2021 IL App (3d) 210255, the Illinois Appellate Court was asked to decide whether a two-hour incident involving calls, text messages, and voicemail messages was a sufficient course of conduct to allow a judge to issue a plenary stalking no contact order. A person who is a victim of stalking may file a petition for a stalking no contact order under Section 15 of the Stalking No Contact Order Act (740 ILCS 21/15 (West 2020)). "Stalking" is defined to mean "engaging in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety . . . or suffer emotional distress" under Section 10 of the Act (740 ILCS 21/10 (West 2020)). "Course of conduct" is defined to mean "2 or more acts, including, but not limited to, acts in which a respondent directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, or threatens a person, workplace, school, or place of worship, engages in other contact, or interferes with or damages a person's property or pet" and "may include contact via electronic communications." The petitioner filed a petition for a stalking no contact order against the respondent, who was the girlfriend of the petitioner's ex-husband. For a period of about two hours, the respondent called the petitioner, texted the petitioner, and left the petitioner voicemails of a threatening nature. The petitioner argued that the trial court did not err in finding multiple separate acts to support the entry of a 2-year plenary stalking no contact order. The respondent argued that her conduct failed to establish the two or more acts necessary to establish a "course of conduct" required under the Act, as the 2-hour incident constituted one event and didn't establish a "course of conduct." The court agreed with the petitioner, holding that the trial court's decision was not against the manifest weight of the evidence. The court reasoned that the respondent's numerous calls, 27 text messages, and 6 voicemail messages, of which at least two combined messages contained threats of violence or intimidation, constituted engaging in a prohibited course of conduct.

## WHISTLEBLOWER ACT – EXTRATERRITORIAL ACTIONS

*The Act does not protect a person who refuses to participate in conduct that violates the laws of another state but not the laws of the State of Illinois.*

In *Perez v. Staples Contract & Commercial LLC*, 31 F. 4th 560 (2022), the United States Court of Appeals for the Seventh Circuit was asked to decide whether the district court erred when it found that Section 20 of the Whistleblower Act (740 ILCS 174/20 (West 2018)) does not apply to a person's refusal to participate in conduct that would violate the laws of another state but not the laws of the State of Illinois. Section 20 provides, "An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation . . . ." The plaintiff argued that he was retaliated against because he refused to participate in the sale to an establishment in New York of a type of laundry detergent that was banned by New York's environmental regulations. The defendant argued that the plaintiff did not engage in protected activity under the Act because the activity did not involve a violation of Illinois law. The court agreed with the defendant, affirming the lower court and holding that the term "State" in Section 20 of the Act referred to the State of Illinois and not just any state in the United States. The court adopted the circuit court's reasoning that "the presumption of consistent usage canon supported [the defendant's] view that 'State' means 'Illinois'" because the Act "elsewhere refers to 'State college[s] and universit[ies]' and 'State agenc[ies],' and the presumption against extraterritorial effect makes it highly improbable that 'State' in those contexts meant 'any state in the United States.'"

## WRONGFUL DEATH ACT – ABORTION AS SUPERSEDING CAUSE

*A legal abortion in not an absolute superseding cause for the death of a fetus.*

In *Thomas v. Khoury*, 2021 IL 126074, the Illinois Supreme Court was asked, via certified question, whether the Wrongful Death Act bars a cause of action for wrongful death against physicians whose alleged malpractice resulted in an injury to a fetus that was subsequently aborted by a different physician. Section 2.2 of the Act (740 ILCS 180/2.2 (West 2018)) provides, "There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given." The plaintiff argued that the Act does not bar a cause of action against another physician when the alleged malpractice is separate from the abortion procedure. The defendant argued that, even if their actions during the treatment of the plaintiff were negligent and even if those actions injured the fetus, they cannot be held liable in a wrongful-death action because the "immediate cause of the fetus's death" was the abortion, not their negligent conduct. The court agreed with the plaintiff, holding that the Act does not bar a cause of action against another physician whose negligence results in an injury to a fetus that is later aborted. After noting that the Act abrogates common law and must be strictly construed, the court reasoned that "a strict construction of Section 2.2 would thus require that the General Assembly state explicitly that an abortion is always a superseding cause in every wrongful-death action." The court further reasoned that legislative history indicates that the intent of the Section was to prevent causes of action against physicians who perform abortions and

not to prevent a cause of action against "other doctors who tortiously injure a fetus during a different medical procedure and whose tortious conduct is a but-for cause of a subsequent abortion." A dissenting opinion argued that the "plain language makes no reference to the physician who is actually performing an abortion . . . rather, the statute focuses on the manner in which the fetus died . . . not what led to the decision to undergo an abortion."

**LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – IMMUNITY UNDER ILLINOIS CIVIL RIGHTS ACT OF 2003**

*The Act does not grant immunity for claims brought under the Illinois Civil Rights Act of 2003.*

In *Howard v. Cook County Sheriff's Office*, 2022 WL 1404833, the United States District Court for the Northern District of Illinois was asked to decide whether the Local Governmental and Governmental Employees Tort Immunity Act (TIA) (745 ILCS 10/) bars the claims made by the plaintiffs, women who work in the Cook County Jail, under the Illinois Civil Rights Act of 2003 (ICRA) (740 ILCS 23/) alleging that the defendants failed to take adequate measures to curtail extensive and disturbing sexual harassment by detainees of the County and the Sheriff's Office. The defendants argued that the TIA includes a list of statutes to which it does not apply and that the ICRA is not one of the enumerated exceptions. The plaintiffs argued that the ICRA was enacted after the TIA in support of the idea that exclusion from the list of exceptions does not necessarily mean that the General Assembly intended to provide immunity in such situations. The court agreed with the plaintiffs' overall conclusion, holding that the claims made by the plaintiffs under the ICRA are not barred and thus the defendants do not have immunity under the TIA. The court reasoned that the mere fact that a statute was enacted after the TIA does not automatically except it from the TIA's immunity provisions, and that numerous Illinois State court opinions suggest that the TIA immunity extends only to tort claims. The court, in a footnote, observed that the question of whether the TIA applies to non-tort claims is still unsettled as a matter of Illinois law because the Illinois Supreme Court expressly declined to adopt this interpretation of the TIA but left this question open. The court further reasoned that the claims under the ICRA are not tort claims under Illinois law and, thus, are not immune under the TIA.

**LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – FAILURE TO INSPECT PROPERTY**

*Immunity for failure to make inspection applies only to public entities with a specific duty to make an inspection to determine whether property complies with laws or poses a hazard.*

In *Williams v. The Miracle Center*, 2022 IL App (1st) 210291, the Illinois Appellate Court was asked to decide whether circuit court erred when it dismissed an action for damages, holding that the defendants were immune from liability under Section 2-105 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-105 (West 2020)). That Section provides that a local public entity is

not liable for an injury caused by a failure to make inspection (or making an inadequate or negligent inspection) of property other than its own. The plaintiff in the case slipped and fell because of water that leaked from a defective water cooler inside a commercial building that was being occupied by a school at the time. The plaintiff argued that Section 2-105 does not provide blanket immunity for a local public entity. Instead, the plaintiff asserted that the Act provides immunity only for the negligent performance of an inspection to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety. The defendants, in contrast, argued that the General Assembly intended to provide blanket immunity. To resolve the issue, the court first looked at the language of the Act and found it to be ambiguous regarding the scope of its coverage. In doing so, the court noted that the Act was capable of being understood as either immunizing from tort liability only public entities whose official function or purpose was to perform health and safety inspections of any properties other than their own or as immunizing all local public entities for any tort liability arising out of negligent inspection of any property other than their own prior to use, even if their official function was not to perform such an inspection. The court then turned to the legislative background of the Act and noted that the Act was to be construed against the public entity seeking immunity. With that background in place, court reasoned that the Tort Immunity Act was adopted with the general principle that local public entities are liable for torts except in those enumerated circumstances where immunity is to be granted. Because the defendants, in this case, were a charter school and a city school board whose function was to provide educational services and because those entities were not tasked with the function of inspecting the facility's water cooler, the appellate court held that they were not immune from liability under the Act from plaintiff's negligence claims, arising from the slip and fall that occurred when the plaintiff slipped on water that leaked from the water cooler.

## HEALTH CARE RIGHT OF CONSCIENCE ACT – COVID-19 VACCINE

*COVID-19 vaccination and testing requirements for employees are not discriminatory.*

In *Glass v. Department of Corrections*, 2022, IL App (4th) 220270, the Illinois Appellate Court was asked to decide whether the circuit court abused its discretion by denying the plaintiffs' petition for a temporary restraining order. The plaintiffs, who are or were public employees for the State of Illinois, claimed that the State vaccination and testing requirements were an act of discrimination prohibited under Health Care Right of Conscience Act. Section 5 of that Act (745 ILCS 70/5 (West 2016)) prohibits discrimination against any person in employment for his or her conscientious refusal to receive any form of health care services contrary to his or her conscience. The employees made two arguments on appeal. The first argument was that the legislative amendment that clarified that the Act does not apply to vaccine mandates goes into effect June 1, 2022, therefore it does not apply to them. The plaintiffs' second argument was that the General Assembly cannot retroactively change the meaning of a statute that is not ambiguous. The appellate court held that the circuit court did not abuse its discretion and upheld its decision. The court reasoned that the term "discriminate" in Section 5 of the Health Care Right of Conscience Act was ambiguous and that the General Assembly was, therefore, permitted to change the Act to achieve the meaning or desire it intended. When determining if the word "discriminate" was ambiguous, the court found that the ordinary definition of the word "defeats the express legislative purpose" of the Act. Therefore, the General Assembly possibly intended an unconventional meaning of the word, creating ambiguity. A

dissenting opinion argued that the word "discriminate," as used in Section 5, is not ambiguous or of uncertain meaning. The dissent reasoned that since the General Assembly listed a number of examples for when discrimination is prohibited, the word discriminate is not ambiguous in the Act. Also, Section 2 of the Act (745 ILCS 70/2 (West 2016)) sets forth its purpose and policy, clearly defining what discrimination is within the meaning of the Act. Therefore, the dissent concluded, the court should not have found the term ambiguous or uncertain, and the circuit court did abuse its discretion.

## ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – FEES

*The court may not award attorney's fees incurred successfully defending a criminal prosecution for violating visitation provisions.*

In *In re Marriage of Miklowicz*, 2022 IL App (2d) 210713, the Illinois Appellate Court was asked to decide whether the circuit court erred when it dismissed the respondent's petition for attorney's fees under paragraphs (1) and (6) of subsection (a) of Section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508 (West 2020)). The fees were incurred when the respondent successfully defended a criminal prosecution based on an alleged violation of the visitation provisions of the judgment that dissolved the respondent's marriage. Paragraphs (1) and (6) of subsection (a) of Section 501 of the Illinois Marriage and Dissolution of Marriage Act provide that parties may be awarded attorney's fees in connection with "[the] maintenance or defense of any proceeding under [the Act]" or "ancillary litigation incident to, or reasonably connected with, a proceeding under [the Act]." The respondent argued that the criminal proceeding was ancillary to a proceeding under the Act. The petitioner argued that the criminal prosecution was not brought to enforce or modify the judgment under the Act, but to punish the respondent for violating the judgment. The court agreed with the petitioner, holding that the criminal case was not brought under the Illinois Marriage and Dissolution of Marriage Act, nor was it ancillary litigation. The court reasoned that the criminal prosecution was brought for the purpose of punishing the respondent. It further reasoned that the prosecution was brought in a different court, heard by a different judge, and was subject to a higher burden of proof. At the same time, the court noted that the language concerning ancillary litigation is ambiguous, suggesting that the General Assembly "intended to allow courts to 'fill in the blanks.'"

## ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – FRIVOLOUS MOTIONS FOR MODIFICATION

*Filing multiple amendments to a single petition for modification is not making "frivolous and repeated" filings for purposes of imposing sanctions.*

In *In re Marriage of Vickers*, 2022 IL App (5th) 200164, the Illinois Appellate Court was asked to decide whether the circuit court erred when it sanctioned the respondent for filing "frivolous and repeated" petitions for modification. Subsection (f) of Section 610.5 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/610.5(f) (West 2018)) provides, "If the court finds that a parent has repeatedly filed frivolous motions for

modification, the court may bar the parent from filing a motion for modification for a period of time." The trial court noted that the respondent had filed nine different motions or filings during the course of the respondent's petition to modify, found them to be "frivolous and repeated," and thus barred the respondent from filing future petitions to modify. The Illinois Appellate Court found that the "repeated" element was not met, holding that the trial court erred when issuing sanctions against the respondent. The Illinois Appellate Court reasoned that "the statute's language expressly limits the trial court's consideration to "motions for modification" and since the respondent filed only one petition to modify that was "merely amended multiple times" the "repeated" requirement was not met.

**ADOPTION ACT – PARENTAL RIGHTS OF ADULT ADOPTEE**

*Parental rights cannot be terminated if the adoptee is an adult.*

In *In re Adoption of Konieczny*, 2022 IL App (2d) 210333, the Illinois Appellate Court was asked to decide whether the circuit court erred when it refused to terminate the parental rights of an adult daughter. Section 17 of the Adoption Act (750 ILCS 50/17 (West 2018)) provides, "After either the entry of an order terminating parental rights or the entry of a judgment of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child and shall be deprived of all legal rights as respects the child, and the child shall be free from all obligations of maintenance and obedience as respects such natural parents." Subsection A of Section 1 of the Act (750 ILCS 50/1 (West 2018)) provides, "'Child' means a person under legal age subject to adoption under this Act." The plaintiff argued that "the legislature must have intended Section 17 of the Adoption Act to apply in adult adoptions as well as in child adoptions." The defendant argued that the provisions of the Act apply only when the adoptee is a child. The court agreed with the defendant, holding that because the adoptee was an adult at the time of the adoption, the Adoption Act does not apply. The court reasoned that "the legislature intended this Section to apply only in the adoption of minors and deliberately chose not to include broader or additional language extending the reach of the Section to adults." As such, the court concluded that it cannot "hold that the provision should apply to adult adoptees as well."

**PROBATE ACT OF 1975 – MARRIAGE OF ADULT WITH DISABILITIES**

*Notwithstanding the provisions of the Illinois Marriage and Dissolution of Marriage Act, the marriage of a person with a guardian is valid if a best interests hearing is held and the guardian of the person consents to the marriage.*

In *In Re Estate of John W. McDonald III*, 2022 IL 126956, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that the Probate Act of 1975 does not require a best interests hearing before a ward may marry, and whether the validity of a ward's marriage is governed by the Illinois Marriage and Dissolution of Marriage Act or the Probate Act of 1975. Paragraph (1) of Section 301 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/301(1) (West 2016)) provides, "The court shall enter its judgment declaring the invalidity of a marriage . . . entered into

under the following circumstances: (1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs or other incapacitating substances, or a party was induced to enter into a marriage by force or duress or by fraud involving the essentials of marriage." Subsection (a-10) of Section 11a-17 of the Probate Act of 1975 (755 ILCS 5/11a-17(a-10) (West 2016)) provides, "Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian of the ward's person or estate to consent, on behalf of the ward, to the ward's marriage pursuant to Part II of the Illinois Marriage and Dissolution of Marriage Act if the court finds by clear and convincing evidence that the marriage is in the ward's best interests." The plaintiff argued that "the marriage was without legal effect and void" because the ward "lacked the legal capacity to consent to the marriage without a judicial finding that the marriage was" in the ward's best interest. The defendant argued that the Probate Act of 1975 does not require a best interests hearing before a ward may marry, that a ward's competency to marry is governed by the Illinois Marriage and Dissolution of Marriage Act, and that it is "only necessary to show that the ward understood the nature, effect, duties, and obligations of the marriage contract." The court agreed with the plaintiff, holding that for a ward to enter a marriage, the ward has to obtain the consent of the ward's guardian "given upon the authorization and direction of the court after a best interest determination." The court reasoned a person who is "adjudged a disabled person in need of a guardian under the Probate Act . . . is limited in his ability to enter into a marriage" and that, under the Probate Act of 1975, "the lack of capacity to enter into a marriage is based on the ward's failure to comply with the provisions for obtaining consent, not because the ward lacked the mental competence to understand the nature, effect, duties, and obligations of marriage."

**RESIDENTIAL REAL PROPERTY DISCLOSURE ACT – IRON BACTERIA**

*Iron bacteria in a drain tile system is considered a condition affecting plumbing that must be disclosed if the seller has knowledge of the defect.*

In *Levato v. O'Connor*, 2021 WL 5759170, the United States District Court for the Eastern Division of Illinois was asked to decide whether an iron bacteria condition is a type of condition that is required to be disclosed as a defect in a plumbing system when selling property. Subsection (b) of Section 25 of the Residential Real Property Disclosure Act (765 ILCS 77/25(b)) provides that a "seller shall disclose material defects of which the seller has actual knowledge." Section 35 of the Residential Real Property Disclosure Act (765 ILCS 77/35) provides that a material defect is "a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the residential real property . . . ," and further provides that a seller must disclose the seller is aware of material defects in the plumbing system (including such things as the water heater, sump pump, water treatment system, sprinkler system, and swimming pool). The plaintiff argued that the defendant "failed to disclose chronic defects in the drain tile system." The defendant argued that "a drain tile system involves pipes and water, but is otherwise completely separate from the home's plumbing system." The court agreed with the plaintiff, holding that "an indisputably irreparable condition that continually produces rust-colored sludge that clogs a home's plumbing fixtures and sump pumps fits within the disclosure requirements of the [Act] by

any reasonable interpretation of the statute's plain terms." The court reasoned that, since the defendant admitted that "iron bacteria produces a gelatinous slime that builds up over time," and the defendant "had knowledge of the presence of iron bacteria in the drain tile system," including the iron bacteria presence in the sump pump, the iron bacteria is a condition that is a type of defect in the plumbing system that the defendant had an obligation to disclose.

## ILLINOIS HUMAN RIGHTS ACT – PLACE OF PUBLIC ACCOMMODATION

*An organization may be subject to liability as a place of public accommodation.*

In *M.U. by and Through Kelly U. v. Team Illinois Hockey Club, Inc.*, 2022 IL App (2d) 210568, the Illinois Appellate Court was asked to decide whether an organization can meet the place of public accommodation requirement for purposes of determining liability under the Illinois Human Rights Act. Subsection (A) of Section 5-101 of the Illinois Human Rights Act (775 ILCS 5/5-101) provides a definition of "place of public accommodation" that lists several specific locations, but does not list any form of sports association. The plaintiff argued that the defendant, a private sports association, was subject to liability under the Act because it held events that were open to the public in the same manner as places of public accommodation. The defendant argued that the plain meaning of the statute required the defendant's exclusion as a place of public accommodation under the Act because an organization is not a location and because the Act's definition of "place of public accommodation" does not include a description matching the defendant. The court agreed with the plaintiff, holding that while an organization is not itself a place of public accommodation, an organization's discrimination that occurs while it exercises substantial control over a place of accommodation subjects it to the Act. The court reasoned that, although the Act's definition does not include a description encompassing the defendant and was not the actual venue of events, the defendant (1) generis was similar enough to other listed places of public accommodation under the doctrine of ejusdem and (2) allowed substantial access to the general public in exercising its lease of the location. On November 30, 2022, the Illinois Supreme Court granted a Petition for Leave to Appeal in the case.

## BUSINESS CORPORATION ACT OF 1983 – SHAREHOLDER REMEDIES

*A trial court may order a nonpetitioning shareholder to sell shares in a corporation as a remedy to resolve a shareholder deadlock.*

In *Oshage v. Oasis Hospice and Palliavtive Care*, *Inc.*, 2021 IL App (1st) 200515, the Illinois Appellate Court was asked to decide whether the trial court erred in ordering a nonvoluntary buyout of a nonpetitioning shareholder's shares in a corporation as a remedy to resolve a shareholder deadlock. Paragraph (11) of subsection (b) of Section 12.56 of the Business Corporation Act of 1983 (805 ILCS 5/12.56(b)(11) (West 2018)) provides, "The relief which the court may order in an action under subsection (a) includes but is not limited to . . . The purchase by the corporation or one or more other shareholders of all, but not less than all, of the shares of the petitioning shareholder for their fair value and on the terms determined under subsection (e)." Subsection (c) further provides, "The remedies set forth

in subsection (b) shall not be exclusive of other legal and equitable remedies which the court may impose." The defendant argued that the trial court acted within its discretion under the nonexclusive provision of subsection (c) of Section 12.56 when it ordered the plaintiff to sell her shares back to the corporation. The plaintiff argued that the statutory language in subdivision (b)(11) of Section 12.56 shows that the General Assembly intended that only a petitioning shareholder's shares can be ordered sold as a remedy for shareholder deadlock. She argued that allowing the trial court's reliance on the nonexclusive provision of subsection (c) to circumvent the specific purchase remedy provided in subdivision (b)(11) would render that provision of law meaningless. The court agreed with the defendant, holding that the trial court had the discretionary authority to order a buyout of a nonpetitioning shareholder's shares in a corporation to resolve shareholder deadlock. The court reasoned that the list of remedies provided in subsection (b) does not contain specific language, rather, "includes but is not limited to" renders the list of remedies nonexclusive. Since there is no conflict between subdivision (b)(11) and subsection (c), the trial court was within its discretionary authority to order the sale of the plaintiff's shares.

**UNIFORM COMMERCIAL CODE – MUTUAL RESCISSION**

*The acceptance and retention of a refund after a party fails to deliver goods under a contract is not sufficient to prove mutual rescission of the contract.*

In *ABC International, Inc. v. GD Group USA Company*, 2021 WL 4459462, the United States District Court for the Northern District of Illinois was asked to decide whether the plaintiff failed to state a claim for breach of contract because the parties had agreed to mutually rescind the contract when a full refund for contracted goods was accepted by the plaintiff. The Uniform Commercial Code (810 ILCS 5/ (West 2014)) regulates financial contracts and transactions in this State. Illinois courts have held that mutual recession of a contract is consistent with the Uniform Commercial Code (*Chicago Limousine Serv., Inc. v. Hartigan Cadillac, Inc.*, 563 N.E.2d 797 (Ill. 1990)). The defendant argued that the parties' conduct demonstrated that they mutually agreed to terminate the contract when the plaintiff accepted and retained the full refund from the defendant's account. The plaintiff argued that the defendant breached the contract by failing to ship the contracted goods and that the refund of the purchase price alone is not evidence of an effective agreement to rescind the contract of sale. The court agreed with the plaintiff, holding that the plaintiff's acceptance of a refund was not sufficient to prove that the parties mutually agreed to terminate the contract. The court reasoned that the cancellation of a contract by mutual consent requires more than mere communication of intent by one party to the other. Rather, the mutual rescission of a contract requires an agreement that both parties are to be excused from the contract. The court further reasoned that the mere failure to object to the repudiation of a contract is not a manifestation of assent to an agreement of recession. Under the defendant's reading of the law, the plaintiff has to endure the loss of the product it had purchased and agreed to resell for a profit and refuse to accept the refund of funds advanced for a product that was not delivered. The court determined that this is not a reasonable interpretation of the law, and that the plaintiff's claim should advance to trial.

## CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT – DAMAGES FOR NONECONOMIC LOSSES

*A claim may not be brought based on alleged emotional injuries without economic loss.*

In *Clark v. Receivables Management Partners, LLC*, 2022 WL 767149, the United States District Court for the Northern District of Illinois was asked to decide whether a plaintiff can bring a claim under the Consumer Fraud and Deceptive Business Practices Act alleging only emotional damages. Section 10a of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/10a (West 2016)) provides, "Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion, may award actual economic damages or any other relief which the court deems proper." The defendant argued that the plaintiff's claim fails because he alleged only emotional damages and the Consumer Fraud and Deceptive Business Practices Act exclusively provides recovery for actual damages. The plaintiff argued that the court should adopt the interpretation of the court in *Duarte v. Convergent Outsourcing, Inc.*, 2018 WL 3427910, which held that because Section 10a of the Consumer Fraud and Deceptive Business Practices Act uses both the term "actual damages" and "actual economic damages," the General Assembly must have intended for "actual damages to mean more than "actual economic damages." The court agreed with the defendant, holding that a claim cannot be brought under the Consumer Fraud and Deceptive Business Practices Act based only on emotional injuries without economic loss. The court reasoned that the *Duarte* decision failed to address a prior decision from the Seventh Circuit that reiterated that a claim brought under the Consumer Fraud and Deceptive Business Practices Act requires evidence of actual "pecuniary loss" (*Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826 (7th Cir. 2018)). Based on the Seventh Circuit's decision in *Dieffenbach*, the court reasoned that a party may recover noneconomic damages under the Consumer Fraud and Deceptive Business Practices Act only if it also suffered an economic loss.

## WORKERS' COMPENSATION ACT – EXCLUSIVITY PROVISIONS

*The Act's exclusivity provisions do not bar an employee from claiming statutory damages under the Biometric Information Privacy Act.*

In *McDonald v. Symphony Bronzeville Park LLC*, 2022 IL 126511, the Illinois Supreme Court was asked to decide whether the exclusivity provisions of the Workers' Compensation Act bar an employee's claim for statutory damages under the Biometric Information Privacy Act when an employer is alleged to have violated an employee's statutory privacy rights. Subsection (a) of Section 5 of the Workers' Compensation Act (820 ILCS 305/5(a) (West 2018)) provides, "No common-law or statutory right to recover damages from the employer . . . is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury." The plaintiff argued that only physical or psychological injuries are compensable under the Workers' Compensation Act, and that if the General Assembly intended for

privacy claims to fall under the provisions of the Workers' Compensation Act, it would have provided for those claims to be heard by the Workers' Compensation Commission. The defendant argued that the exclusivity provisions of the Workers' Compensation Act are broadly worded and require a court to resort to the Workers' Compensation Act for any injury arising out of and in the course of employment. The court agreed with the plaintiff, holding that the exclusivity provisions of the Workers' Compensation Act do not bar a claim for statutory damages under the Biometric Information Privacy Act. The court reasoned that the plain language of the Biometric Information Privacy Act supports a conclusion that the General Assembly did not intend for the Act to be preempted by the Workers' Compensation Act. Section 10 of the Biometric Information Privacy Act (740 ILCS 14/10 (West 2018)) defines the "written release" required in the context of employment as "a release executed by an employee as a condition of employment." The court viewed this definition as evidence that the General Assembly was aware that claims under the Biometric Information Privacy Act could arise in the employment context, but treated these claims identically to nonemployee claims except for methods of obtaining consent. The court also reasoned that the claim brought on behalf of the plaintiff is not one that categorically falls under the purview of the Workers' Compensation Act. The court concluded that whether a different balance should be struck under the Biometric Information Privacy Act "is a question more appropriately addressed by the legislature."

**UNITED STATES CONSTITUTION – EX POST FACTO LAWS**

*The retroactivity test to determine whether a law is ex post facto is whether the law changes the legal consequences of acts committed before its effective date.*

In *Koch v. Village of Hartland*, 43 F. 4th 747 (2022), the United States Court of Appeals for the Seventh Circuit was asked to decide whether a municipal ordinance passed by the Village of Hartland in Wisconsin prohibiting any new sex offenders from residing in the municipality violated the *ex post facto* clause of Article 1, Section 10 of the United States Constitution (U.S. CONST. art. 1, § 10, cl. 1), which states, "No State shall . . . pass any *ex post facto* law." A law violates the *ex post facto* clause if it is retroactive and penal. Under the precedent set by *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011), and *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018), with regard to retroactivity, the *ex post facto* clause is not violated if a regulatory scheme applies "only to conduct occurring after the law's enactment." The district court granted the Village's motion for summary judgment concluding, under the *Leach-Vasquez* rule, the ordinance was not retroactive and thus, not an *ex post facto* law. The defendant conceded that under the *Leach-Vasquez* rule, the law did not violate the *ex post facto* clause, but the defendant urged the court to overturn the *Leach-Vasquez* rule, arguing that the rule "conflicts with the history and values of the *ex post facto* clause, Supreme Court precedent, and consensus among circuits and state courts." The court agreed with the defendant and overruled the retroactivity rule set by *Leach* and *Vasquez*. The court reasoned that the *ex post facto* clause protects the legal principle of *nulla poena sine lege* (no penalty without law), and that "it is the effect, not the form, of the law that determines whether it is *ex post facto*." The court held that the proper retroactivity test for the purposes of determining whether a law is *ex post facto* is "whether the new provision attaches new legal consequences to events completed before its enactment." Under this inquiry, the court held that the municipal ordinance was

retroactive because convicted sex offenders face "additional burdens that did not exist at the time of their offenses; they cannot establish residence in the Village of Hartland." The court reversed and remanded for the district court to consider whether the municipal ordinance is also penal, the second prong of the test to determine if a law violates the *ex post facto* clause.

A concurring opinion agreed with the majority that the ordinance passed by the Village of Hartland is retroactive, but disagreed with overruling *Leach* and *Vasquez* and disagreed with the new retroactivity test established by the majority. The concurring opinion reasoned that according to more recent law on retroactivity, a court must first determine whether the target of the law is "preenactment misconduct" or "postenactment dangers" and consider the "law's expressed 'reason for the new disability imposed on' regulated individuals." If the law's "reason is to target 'present . . . wrongful activity,' i.e., postenactment dangers, then the activity is the reference point and the law - enacted antecedent to that conduct - is nonretroactive." If the law's "reason is to target 'past misconduct.' i.e., a previous conviction, then the conviction is the reference point and the law - enacted subsequent to the conviction - is retroactive." The concurrence reasoned that there is no reason to overrule *Leach* and *Vasquez* because both cases "survive" under this test because "the laws in both cases were antecedent to the reference points - the postenactment dangers addressed." The concurring opinion agrees that the Village of Hartland's ordinance is retroactive because it is a law that "restrict[s] future movement based on past misconduct," the reference point is the defendant's conviction, and the reason for the ordinance is the previous convictions of designated sex offenders.

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