2020 CASE REPORT

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

December 2020

JOINT COMMITTEE ON LEGISLATIVE SUPPORT SERVICES

JIM DURKIN, Chair	House Minority Leader
WILLIAM E. BRADY	Senate Minority Leader
DON HARMON	President of the Senate
MICHAEL J. MADIGAN	Speaker of the House

LEGISLATIVE REFERENCE BUREAU BOARD

BRAD BOLIN, Chair	Assistant Clerk of the House
TIM ANDERSON	Secretary of the Senate
JOHN W. HOLLMAN	Clerk of the House
SCOTT KAISER	Assistant Secretary of the Senate

LEGISLATIVE REFERENCE BUREAU ATTORNEYS

Executive Director: James W. Dodge

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

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

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

Staff Attorneys: Kasey M. Farris, Casey P. Fitzgerald, Ronald Freeman, Christina M. Graham, Andrew W. Janetzke, Raydia A. Martin, Richard P. Schaller, Brian M. Sabal, Lauren N. Smith, Sarah M. Smith, Stephen P. Spence

CASE REPORT EDITORIAL BOARD

Heidi E. Poyer, Editor-in-Chief
Ronald Freeman
Heather L. Harding
Richard P. Schaller

TABLE OF CONTENTS

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

December 2020

To the Honorable Members of the General Assembly:

This is the Legislative Reference Bureau's annual review of decisions of the Federal Courts, the Illinois Supreme Court, and the Illinois Appellate Court, as required by Section 5.05 of the Legislative Reference Bureau Act, 25 ILCS 135/5.05.

The Bureau's attorneys screened all court decisions and prepared the individual case summaries. A cumulative report of statutes held unconstitutional, formerly included as an appendix to this publication, is available on the Bureau's website.

Respectfully submitted,

James W. Dodge
Executive Director

INTRODUCTION

This 2020 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 2019 to the summer of 2020.

QUICK GUIDE TO RECENT COURT DECISIONS

* Effective January 1, 2013, the Criminal Code of 1961 was renamed the Criminal Code of 2012 by P.A. 97-1108. This Case Report uses "Criminal Code of 2012" in all instances. A conversion table for the Criminal Code rewrite can be found online at http://ilga.gov/commission/lrb/Criminal-Code-Rewrite-Conversion-Tables.pdf

SUMMARIES OF RECENT COURT DECISIONS

FREEDOM OF INFORMATION ACT – ZIP CODES OF PERSONS RECEIVING MENTAL HEALTH SERVICES

The zip codes relating to certain persons who received mental health treatment while in jail are exempt from disclosure.

In *King v. Cook County Health and Hospitals System*, 2020 IL App (1st) 190925, the Illinois Appellate Court was asked to decide whether the trial court erred when it ordered the defendant to disclose full and complete zip code information relating to the geographic location of former Cook County Jail detainees who received mental health treatment while in jail pursuant to the plaintiff's request for the information under the Freedom of Information Act, despite the defendant's contention that an exemption under the Act prohibited the disclosure of the requested information. Subparagraph (1)(a) of Section 7 of the Freedom of Information Act (5 ILCS 140/7(1)(a) (West 2016)) exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law . . . ." The plaintiff argued that, because Section 2 of the Act (5 ILCS 140/2 (West 2016) expressly provides that the records of a public body "are presumed to be open to inspection and copying," a privacy exemption derived from federal or State law must be construed narrowly. The defendant argued that provisions under State law, specifically the Mental Health and Developmental Disabilities Confidentiality Act, prohibited the disclosure because the requested zip code numbers pertained specifically to information collected during the course of providing mental health services to the detainees. Subsection (a) of Section 3 of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/3(a) (West 2016) provides, "Unless otherwise expressly provided for in this Act, records and communications made or created in the course of providing mental health or developmental disabilities services shall be protected from disclosure." The court agreed with the defendant, holding that the strongly worded provisions in subsection (a) of Section 3 of the Mental Health and Developmental Disabilities Confidentiality Act imparted a public policy statement by the General Assembly that mental health records must remain confidential in order to encourage those in need to seek mental health treatment. The court acknowledged that although the General Assembly declared in Section 1 of the Freedom of Information Act (5 ILCS 140/1 (West 2016)) that "the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and official acts and policies . . . ," the court reasoned that when the Mental Health and Developmental Disabilities Confidentiality Act is read as a whole, including the emphatic use of "all" and "shall" in the language of Section 3(a) and the strict limitations imposed in the Act concerning the disclosure of confidential information, the public policy underlying the Mental Health and Developmental Disabilities Confidentiality Act required the finding that maintaining the confidentiality of mental health records outweighs the presumption for the full and complete disclosure of information set forth in the Freedom of Information Act.

ELECTION CODE – ELECTORAL COLLEGE

A state may penalize an elector for breaking his or her pledge to vote for the presidential candidate who won the state's popular vote.

In *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), the United States Supreme Court was asked to decide whether the Washington Supreme Court erred in determining that a state may penalize an elector for breaking his or her pledge and voting for someone other than the presidential candidate who won the state's popular vote. Clause 2 of Section 1 of Article II of the United States Constitution (U.S. CONST. art. II, §1, cl. 2) provides, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal of the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." The Twelfth Amendment of the United States Constitution (U.S. CONST. amend. XII) provides that "The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to [Congress, where] the votes shall then be counted." The plaintiffs argued that the Constitution gives members of the Electoral College the discretion to vote however they please and that Washington's penalty is a violation of their First Amendment right to vote. The state of Washington argued that it had the right to penalize an elector who broke his or her pledge to vote for the presidential and vice-presidential candidates who won the state's popular vote. The Court agreed with the state of Washington, holding that "Article II and the Twelfth Amendment give states broad power over electors, and give electors themselves no rights." The Court reasoned that the text of the Constitution and the Electoral College's history do not support the plaintiffs' argument of electoral voting discretion. The text of Article II provides states broad power of determination over who may be an electorate by using "in such manner as the legislature thereof may direct." The Court has upheld other state requirements for electors, including the pledge requirement used in Washington and many other states. Further, despite the plaintiffs' argument, the use of "vote," "ballot," and "elector" in the Constitution's text is not enough to establish an elector's discretion. The Court also relied on "long settled and established practice." The passage of the Twelfth Amendment eliminated the previous practice of electing the presidential runner-up as Vice President and allowed an elector to "vote the regular party ticket" and "carry out the desires of the people" who sent the elector to the Electoral College. Over the next 200 years, states began enacting laws that require an elector to pledge to vote for the candidate chosen by his or her state's popular vote. "In that practice, electors are not free agents; they are to vote for the candidate whom the State's voters have chosen."

In a concurring opinion, two justices argued that Washington's authorization to penalize faithless electors stems from the Tenth Amendment (U.S. CONST. amend. X), which grants powers to states not expressly denied in the United States Constitution.

ELECTION CODE – SIGNATURE REQUIREMENT

For purposes of determining ward committeeperson candidate signature requirements, "last regular election" refers to the last election in which voters in the ward were entitled to cast votes, not when an officer was elected exclusively from that ward.

In *Ramirez v. Chicago Board of Election Commissioners*, 2020 IL App (1st) 200240, the Illinois Appellate Court was asked to decide whether the rejection by the Chicago Board of Election Commissioners ("Board") of the candidate plaintiff's nomination papers due to an insufficient number of signatures was in error. Subsection (i) of Section 7-10 of the Election Code (10 ILCS 5/7-10(i) (West 2018)) provides, "If a candidate seeks to run for ward committeeperson, then the candidate's petition for nomination must contain no less than the number of signatures equal to 10% of the primary electors of his or her party of the ward." Subsection (k) of Section 7-10 of the Code further provides that the number of the ward's primary electors is determined by "taking the total vote cast for the candidate for that political party who received the highest number of votes in the ward or district at the last regular election at which an officer was regularly scheduled to be elected from that ward or district." The plaintiff argued that he met his signature requirement because "the last regular election" was in March 2016 when the ward at issue elected a Democratic ward committeeperson. The plaintiff argued that the March 2016 election was "the last regular election" because it was the last election in that ward in which voters elected someone exclusively for that ward. The plaintiff relied on *Lockhart v. Cook County Officers Electoral Board*, 328 Ill. App. 3d 838 (2002), arguing that the Illinois Appellate Court's decision equated the phrase "elected from a district" with being "elected by voters within a district." The Board argued that "the last regular election" was in November 2018, the last election held in the ward, and that the plaintiff's interpretation of the statute requires reading into words that do not appear in it. The Board rejected the plaintiff's argument that an officer is elected "from" a ward "when the voters are entitled to cast votes for an officer, even if the officer is not elected exclusively from that ward." The court agreed with the Board, holding that the plaintiff's nomination papers did not include the sufficient number of signatures. The court reasoned that *Lockhart* was distinguishable from the current case, because the statute at issue in *Lockhart* was interpreted "as one consistent whole to reach a consistent finding." The court agreed with *Lockhart*'s finding that "[t]he primary purpose of the signature requirement is to reduce the electoral process to manageable proportions by confining ballot positions to a relatively small number of candidates who have demonstrated initiative and at least a minimal appeal to eligible voters" and found that the Board's interpretation of the statute and signature requirements further that primary purpose.

ELECTION CODE – CERTIFICATE OF RESULTS

The requirement for an election judge to complete a certificate of results is directory, not mandatory.

In *Calloway v. Chicago Board of Election Commissioners*, 2020 IL App (1st) 191603, the Illinois Appellate Court was asked to decide whether the circuit court erred when it dismissed an alderman candidate's complaint contesting the results of an election because four precincts failed to comply with Section 18-14 of the Election Code (10 ILCS 5/18-14 (West 2018)). That Section provides that election judges shall create a certificate of results ("Form 80") for each political subdivision and shall sign, seal in a marked envelope, and deliver Form 80 to the county clerk. The statute also provides that within two days of delivery of complete returns of the election, the board of election commissioners shall transmit an original, sealed Form 80 to the local election official and that within 24 hours of receiving the Form 80, each local election official shall transmit the sealed Form 80 to a political subdivision's canvassing board. The plaintiff argued that the circuit court erred in dismissing his complaint for failure to state a cause of action because he "sufficiently alleged that the plain language of Section 18-14 of the Election Code makes completion of Form 80 by election judges on election day mandatory and that without a completed Form 80, the election results could not be verified or certified, undermining the integrity of the election." The defendant argued that, despite the statute's continued use of "shall", the General Assembly did not provide a penalty for failing to complete Form 80, rendering the requirements directory, rather than mandatory. The defendant further argued that the General Assembly already provided a process to correct any result discrepancy in Sections 24B-15 and 24C-15 of the Election Code (10 ILCS 5/24B-15; 10 ILCS 5/24C-15 (West 2018)), which contain procedures for correcting discrepancies between results for optical scan and touch screen ballots, such as were used in the precincts. The court agreed with the defendant, holding "that the plaintiff failed to allege sufficient facts to establish how completing a Form 80 on election night ensures the validity and integrity of the election" and that completion of a Form 80 is directory, not mandatory. The court reasoned that the General Assembly failed to provide a consequence of not complying with the requirement that each precinct fill out and file a Form 80, "which is generally required for a provision to be deemed mandatory."

ILLINOIS STATE AGENCY HISTORIC RESOURCES PRESERVATION ACT – LOCAL UNITS OF GOVERNMENT

A local unit of government is subject to the Act if it must obtain a permit from a State agency prior to demolition of a property.

In *Landmarks Illinois v. Rock Island County Board*, 2020 IL App (3d) 190159, the Illinois Appellate Court was asked to decide whether the trial court erred when it vacated the temporary restraining order halting the proposed demolition of a historic courthouse,

holding that the stormwater drainage permit issued by the Illinois Environmental Protection Agency does not constitute a State agency "undertaking" under the Illinois State Agency Historic Resources Preservation Act. Subsection (f) of Section 3 of the Illinois State Agency Historic Resources Preservation Act (20 ILCS 3420/3(f) (West 2016)) defines "undertaking" as "any project, activity, or program that can result in changes in the character or use of historic property . . . [and] includes [an] action which is . . . carried out pursuant to a State lease, permit, license . . . ." The plaintiff argued that, because the demolition of the historic property could not occur without the defendant first receiving a stormwater drainage permit issued by the Illinois Environmental Protection Agency, the issuance of the permit by a State agency constituted an "undertaking" under the Act. The plaintiff argued further that, as a consequence of this "undertaking", the defendant's planned demolition of a historic property was subject to certain mandated consultation proceedings before demolition of the property could occur. The defendant argued that the stormwater drainage permit did not relate to the demolition of a historic property because the permit would be used only after the courthouse had been demolished; as such, the action of demolishing the courthouse was not undertaken pursuant to a State permit. The defendant argued also that the demolition of the courthouse cannot constitute an "undertaking" under the Act because the definition of "undertaking" relates to actions "directly undertaken by a State agency . . ." and local units of government are excluded from the definition of "agency" under subsection (b) of Section 3 of the Act. The court agreed with the plaintiff, holding that the defendant's planned demolition of the historic courthouse constituted an "undertaking" as defined in the Illinois State Agency Historic Resources Preservation Act. The court found the defendant's argument regarding the timing of the use of the permit unpersuasive. The court reasoned that, because no part of the defendant's demolition of the historic property could proceed unless and until the defendant received the stormwater drainage permit granted by the Illinois Environmental Protection Agency, the demolition project involved a State agency subject to the consultation requirements of the Act. Regarding the defendant's argument that actions undertaken by local units of government that may adversely affect a historic property are exempt from the requirements set forth in the Act, the court stated that the General Assembly unambiguously and broadly defined "undertaking" to include "*any* project, activity, or program . . ." that may adversely alter or impact a historic property and "plainly evinces [the General Assembly's] intent to include "undertakings" conducted by units of local government." (Emphasis added.) The court concluded that any action including " . . . any project requiring a State agency permit that threatens a historic resource . . . may not commence until the Preservation Act's consultation requirements have been satisfied, regardless of whether [the project] is carried out by the State, by a private party, or, as here, by a unit of local government."

AIRCRAFT USE TAX LAW – TRANSFERS TO TRUSTEE

The transfer of ownership of an aircraft from a natural individual to ownership by that same individual as trustee of a revocable trust is a taxable event.

In *Shakman v. Department of Revenue*, 2019 IL App (1st) 182197, the Illinois Appellate Court was asked to decide whether the circuit court erred when it granted the Department of Revenue's motion for summary judgment, finding that the Department of Revenue properly imposed a tax under the Aircraft Use Tax Law after the taxpayer changed legal ownership of an aircraft from himself as an individual to himself as trustee of a revocable trust. Section 10-15 of the Aircraft Use Tax Law (35 ILCS 157/10-15) imposes a tax "on the privilege of using, in this State, any aircraft … acquired by gift, transfer, or purchase after June 30, 2003." That Section also contains several exemptions, including an exemption "if the use of the aircraft is otherwise taxed under the Use Tax Act" and an exemption "if the transfer is a gift to a beneficiary in the administration of an estate and the beneficiary is a surviving spouse." The appellant taxpayer argued that, even though the legal ownership of the aircraft had changed, he still retained the privilege of using the plane. He also argued that, under the terms of the trust, he has the power during his life to direct the retention or sale of the aircraft as well as the sole management responsibility for the aircraft. The Department argued that the plain language of the statute provides that such a transfer is a taxable event. The court agreed with the Department, holding that the transfer is taxable. In doing so, the court examined the legislative intent behind the applicable provisions of the Act. The court found that the "legislative intent was to cover an expansive and nearly limitless array of aircraft dispositions." Although the individual taxpayer and the trustee are the same person, the privileges and use associated with the aircraft changed when he became trustee. The court also considered the exemption under the Act for gifts to a surviving spouse in the administration of an estate and determined that, by including that specific exemption, the General Assembly intended to exclude other estate planning scenarios. At the same time, the court acknowledged that it is "not unsympathetic to [taxpayer's] case," and noted that several other states have included exemptions for the type of transfer that occurred in this case.

PROPERTY TAX CODE – UNIVERSITY PROPERTY

Property owned by a university but operated by a for-profit entity for the benefit of the university is not entitled to a property tax exemption, even if the university did not profit from the use of the property.

In *University of Chicago v. Department of Revenue*, 2020 IL App (1st) 191195, the Illinois Appellate Court, on appeal from the circuit court's order, was asked to decide whether the Department of Revenue's decision to deny property tax exemptions to certain properties owned by the University of Chicago was clearly erroneous. The properties housed on-campus day care centers operated by Bright Horizons, a for-profit day care

provider. The day care centers were primarily used by employees of the University. Section 6 of Article IX of the Illinois Constitution (ILL. CONST. art. IX, § 6) provides that the General Assembly may exempt from taxation only "property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes." Section 15-35 of the Property Tax Code (35 ILCS 200/15-35) exempts "all property of schools, not sold or leased or otherwise used with a view to profit." The University argued that the day care centers were reasonably necessary for the accomplishment and fulfillment of its educational objectives because many other similar universities offered on-campus child care. Consequently, the day care centers were necessary to recruit and retain a high quality professional staff. The University also argued that the phrase "leased or otherwise used with a view to profit" applies only to the owner of the property and not to the operator. Since the University did not collect rent from or receive any portion of the tuition paid to Bright Horizons, the University argued that the property was not used with a view to profit. The Department argued that the University "put up no evidence that University-affiliated families had scheduling issues or other special, unique considerations that made on-campus day care a necessity." The Department also argued that the phrase "used with a view to profit" in Section 15-35 includes profit made by any entity, not just the owner of the property. The court agreed with the University that the day care centers were reasonably necessary for the accomplishment and fulfillment of the University's educational objectives. In doing so, the court looked to prior cases in which student dormitories, dining halls, and recreational facilities were granted exemptions, as well as a prior case upholding an exemption for a child care facility associated with a charitable hospital. Nevertheless, the court affirmed the Department's decision that the University and Bright Horizons were not entitled to a property tax exemption on the grounds that the property was used by Bright Horizons with a view to profit. The court reasoned that the statute must be construed narrowly in favor of taxation. In this case, the statute contained no language stating that the profits must be received by the owner of the property.

PROPERTY TAX CODE – FORUM FOR TAX OBJECTIONS

For purposes of seeking relief under the federal Tax Injunction Act, the Code does not provide an adequate state court forum for certain tax objection complaints.

In *A.F. Moore & Associates, Inc. v. Pappas*, 948 F.3d 889 (2020), the United States Court of Appeals for the Seventh Circuit was asked to decide whether the district court erred when it dismissed the plaintiffs' federal lawsuit against the Cook County Assessor on the grounds that the lawsuit was barred by the federal Tax Injunction Act (28 U.S.C. 1341). In that lawsuit, the plaintiff taxpayers alleged that the Assessor violated equal protection and due process guarantees under the United States Constitution and the Illinois Constitution (U.S. CONST. AMEND. XIV; ILL. CONST. art I, §2) because, although their properties were assessed at the proper statutory rate, similarly situated properties were assessed at lower rates. The Tax Injunction Act provides that federal courts do not have

jurisdiction over challenges to state and local taxes as long as the taxpayer has an adequate forum in state court to raise his or her constitutional claims. The plaintiffs argued that Section 23-15 of the Property Tax Code (35 ILCS 200/23-15) effectively denied them a state court forum for their constitutional claims because that Section provides that they may challenge only the correctness of the assessment and not the intent of the assessor or the practices, procedures, or methods of valuation used by the assessor. Furthermore, the plaintiffs argued that Section 23-15 contemplates naming only the collector as a defendant in a tax objection proceeding, which prohibits the assessor from being named as a defendant in such an action. The defendants conceded that the plaintiffs are not free to raise their constitutional claims in a Section 23-15 action. The defendants also failed to set forth any alternative means by which the taxpayers may seek relief. As a result, the court agreed with the plaintiffs, holding that the Tax Injunction Act does not bar the taxpayers' federal case because the taxpayer does not have an adequate forum in state court under the Property Tax Code.

ILLINOIS ESTATE AND GENERATION-SKIPPING TRANSFER TAX ACT – STATE QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP) ELECTION

For Illinois estate tax purposes, State, rather than federal, law governs the procedures for making a State QTIP election by a surviving spouse.

In *In re Estate of Dunston*, 2020 IL App (5th) 190017, the Illinois Appellate Court was asked to decide whether the circuit court erred when it determined that the filing of the disclaimer of an interest in property, in this case a power of appointment, made by the decedent's surviving spouse in order for the estate to take the State marital deduction for qualified terminable interest property (QTIP) election for Illinois estate tax purposes is governed by Illinois law and not by federal law. Subsection (b-1) of Section 2 of the Illinois Estate and Generation-Skipping Transfer Tax Act (35 ILCS 405/2(b-1) (West 2018)) provides, "The person required to file the Illinois return may elect on a timely filed Illinois return a marital deduction for qualified terminable interest property under Section 2056(b)(7) of the Internal Revenue Code (26 U.S.C. 2056(b)(7) (2018)) for purposes of the Illinois estate tax that is separate and independent of any qualified terminable interest property election for federal estate tax purposes." The plaintiff, the Illinois Attorney General, argued that the estate made an invalid State QTIP election on the Illinois estate tax return because the surviving spouse failed to disclaim her power of appointment within nine months of the date of the decedent's death as required in Section 2518 of the Federal Code (26 U.S.C. 2518 (2018)); therefore, the surviving spouse owed the State $398,516.00 in unpaid Illinois estate tax and accrued statutory interest. The defendant argued that because: (i) the language in subsection (b-1) of Section 2 provides that an Illinois estate tax QTIP election is "separate and independent" of a federal estate tax QTIP election; and (ii) this express distinction in the statutory language between a State QTIP election and a federal QTIP election requires that State law, not federal law, govern the effectiveness and timeliness of a disclaimer; the surviving spouse did not owe the State any amount of estate

tax. The defendants further argued that, unlike in the federal provisions, the disclaimer provisions in subsection (d) of Section 2-7 of the Illinois Probate Act of 1975 (755 ILCS 5/2-7(d) (West 2018)) do not impose a time requirement to disclaim an interest in property. The court agreed with the defendants, holding that both the legislative history and plain language of subsection (b-1) of Section 2 of the Illinois Estate and Generation-Skipping Transfer Tax Act clearly convey the intent of the General Assembly to create a distinction between a State QTIP election and a federal QTIP election. The court reasoned that, because Illinois law applied to the timeliness of the filing of the disclaimer by the surviving spouse, the disclaimer effectively disclaimed her power of appointment and the State QTIP election was valid for Illinois estate tax purposes.

ILLINOIS PENSION CODE – BENEFIT OVERPAYMENTS

The Illinois Municipal Retirement Fund's ability to recoup benefits erroneously paid to a member is not limited to circumstances in which there was an inadvertent arithmetical error.

In *Chappell v. Board of Trustees of Illinois Municipal Retirement Fund*, 2020 IL App (1st) 192255, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found that the Illinois Municipal Retirement Fund (IMRF) did not have the statutory authority to recover pension benefits that were paid to the plaintiff based on an erroneous certification that the plaintiff was an employee under the IMRF Article of the Illinois Pension Code. The plaintiff was an executive director of a not-for-profit community center that worked under a contract with a township, and the township erroneously certified to IMRF that the plaintiff was an employee, which allowed the plaintiff to purchase omitted service credit. Subsection (c) of Section 7-217 of the Illinois Pension Code (40 ILCS 5/7-217(c) (West 2018)) provides, "The board may retain out of any annuity or benefit payable to any person such amount . . . as the board may determine are owing to the fund because . . . money was paid to any annuitant or employee through misrepresentation, fraud or error." The plaintiff argued, in part, that IMRF's ability to recoup benefits based on an error was limited to circumstances in which there was an "inadvertent arithmetical error." The defendant, IMRF, argued that the term "error" should be construed more broadly to include other types of errors that result in an overpayment of benefits. The court agreed with IMRF, holding that the term "error" was not limited to circumstances in which there was an "inadvertent arithmetical error." The court reasoned that "[the term "error"] must be given its ordinarily and popularly understood meaning in light of the statute's purpose," which is "[a]n assertion or belief that does not conform to objective reality." Accordingly, the court reasoned that "neither the [township's] certification, nor IMRF's approval conformed to objective reality." The court further reasoned that if the General Assembly "had intended to limit the IMRF Board's authority to recalculate a pension and recoup the overpayment

of benefits to cases involving arithmetical error in calculating the benefit, it would have done so."

ILLINOIS PENSION CODE – ELIGIBILITY REQUIREMENTS

Imposing additional eligibility requirements on current members of the Illinois Municipal Retirement Fund violates the pension protection clause of the Illinois Constitution.

In *Williamson County Board of Commissioners v. Board of Trustees of Illinois Municipal Retirement Fund*, 2020 IL 125330, the Illinois Supreme Court was asked to decide whether changes to the certification process and eligibility requirements for elected county board members violated the pension protection clause of the Illinois Constitution (ILL. CONST. art. XIII, § 5) when those changes were applied to current members of the Illinois Municipal Retirement Fund (IMRF). Section 7-137.2 of the Illinois Pension Code (40 ILCS 5/7-137.2 (West 2016)) provides that an "elected member of a county board is not eligible to participate in the Fund with respect to that position unless the county board has adopted a resolution . . . certifying that persons in the position of elected member of the county board are expected to work at least 600 hours annually . . . ," requires elected members to "submit time sheets documenting the time spent on official government business," and requires those members to meet that annual hourly standard. The plaintiffs argued that these limitations violated their rights under the pension protection clause because the plaintiffs continued to meet the eligibility requirements that were in effect when they first became members of IMRF and were therefore contractually entitled to continue participating in IMRF. The defendant argued that the plaintiffs' continued participation in IMRF is not a guaranteed contractual benefit if they no longer continue to qualify under the applicable requirements. The court agreed with the plaintiffs, holding that Section 7-137.2 could not be constitutionally applied to the plaintiffs because it is a "newly created requirement" that "did not exist when plaintiffs' began their public employment and participation in IMRF." The court reasoned that the "legislature's unilateral decision to create section 7-137.2 effectively [imposed] a new requirement for continued IMRF participation that did not exist when plaintiffs began their public employment."

LOCAL RECORDS ACT – POLICE MISCONDUCT RECORD DESTRUCTION

The Act supersedes collective bargaining agreements concerning the destruction of police misconduct records.

In *City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7*, 2020 IL 124831, the Illinois Supreme Court was asked to decide whether a collective bargaining agreement provision requiring destruction of disciplinary files after a fixed period of time violates public policy. Section 7 of the Local Records Act (50 ILCS 205/7 (West 2016)) provides that ". . . no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained." The collective bargaining agreement at issue provided that disciplinary records or summaries ". . . will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer." The City of Chicago argued the arbitration award upholding the collective bargaining agreement violated "well-defined and dominant public policy" favoring the proper retention of important public records under the plain language of the Local Records Act. The Fraternal Order of Police argued "that there is no well-defined, dominant public policy that would allow Illinois courts to set aside a provision within a collective bargaining agreement mandating document destruction of governmental records like police disciplinary and investigation records." The court agreed with the City of Chicago, holding that "the statutory framework the General Assembly constructed makes clear that Illinois recognizes a public policy favoring the proper retention of government records and that the destruction of public records may occur only after consideration by and with the approval from the Commission in a process established by the Commission." The court reasoned that while "parties are generally free to make their own contracts, this court has long held that when a conflict exists between a contract provision and State law, as it clearly does in this case, State law prevails."

ILLINOIS MUNICIPAL CODE – ASSOCIATION MEMBERSHIP

Municipal taxpayer money may be used to fund a private, third-party entity that engages in lobbying efforts.

In *O'Brien v. Village of Lincolnshire*, 955 F.3d 616 (2020), the United States Court of Appeals for the Seventh Circuit was asked to decide whether the district court erred when, in dismissing the taxpayer plaintiffs' suit, it declined to exercise supplemental jurisdiction over the plaintiffs' State law claims. The plaintiffs alleged that the Village of Lincolnshire improperly used the plaintiffs' tax money to fund the Illinois Municipal League's lobbying and political activities that ran against plaintiffs' economic interests and political beliefs. Section 1-8-1 of the Illinois Municipal Code (65 ILCS 5/1-8-1 (West 2020)) provides that the "corporate authorities of each municipality may provide for joining the municipality in membership in the Illinois Municipal League, an unincorporated, nonprofit, *nonpolitical* association of Illinois cities, villages and incorporated towns and

may provide for the payment of annual membership dues and fees." (Emphasis added). The plaintiffs argued that the Illinois Municipal League is, in fact, a private, third-party entity that engages in lobbying efforts; as a result, the Village's membership in the League compelled them to subsidize private speech on matters of substantial public concern in violation of the First Amendment to the United States Constitution. (U.S. CONST. amend I). The defendants argued that the payment of dues to the League and the adoption of the Illinois Municipal League's speech constituted government speech and association that is not subject to First Amendment review. The court agreed with the Village, holding that the plaintiffs' rights and the Constitution were not violated. The court reasoned that the Village had the right to speak for itself and had a right to voluntarily associate with and join the Illinois Municipal League. The court also reasoned that the League itself consists entirely of governmental members who shape the League's message and agenda. At the same time, the court commented that, although Section 1-8-1 of the Code calls the Illinois Municipal League "nonpolitical" (which is inconsistent with its entire purpose "to act as an instrumentality of its governmental members"), the General Assembly likely meant "nonpartisan," which "would be consistent with and give effect to the other provisions of the statute [since] [n]onprofit organizations such as the League may not engage in partisan activities."

TAX INCREMENT ALLOCATION REDEVELOPMENT ACT – CONTIGUITY

Parcels of land separated only by a utility right-of-way are not "contiguous" for TIF purposes.

In *Board of Education of Richland School District No. 88A v. City of Crest Hill*, 2020 IL App (3d) 190225, the Illinois Appellate Court was asked to decide whether the circuit court erred when it granted the City of Crest Hill's motion for summary judgment and denied the Richland School District's motion for summary judgment in connection with a complaint by the School District that a tax increment financing (TIF) district proposed by the City was invalid. Subsection (a) of Section 11-74.4-4 of the Tax Increment Allocation Redevelopment Act within the Illinois Municipal Code (65 ILCS 5/11-74.4-4(a)) provides that a TIF district "shall include only those contiguous parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvements." The plaintiff School District argued that the TIF district did not meet the criteria set forth in that Section because a portion of the proposed project area was not contiguous. The City argued that the territory was contiguous because the only separation between the parcels came from a natural gas right-of-way. The City further argued that Section 7-1-1 of the Illinois Municipal Code (65 ILCS 5/7-1-1), which pertains to annexations, specifically allows the City to "jump" the natural gas right-of-way for purposes of establishing contiguity. The Illinois Appellate Court agreed with the School District, holding that the area was not contiguous for purposes of the TIF Act. The court reasoned that importing the language from Section 7-1-1 into Section 11-74.4-4 would "require a departure from the plain language of the statute by reading into it exceptions,

conditions, or limitations that the legislature did not express." The court further reasoned that, if the General Assembly had intended to include parcels separated by a public utility right-of-way in the definition of "contiguous" for purposes of the TIF Act, it would have said so.

FIRE PROTECTION DISTRICT ACT – TAX FOR AMBULANCE SERVICES

A fire protection district is not required to show inadequacy of existing ambulance services before adding a ballot question proposing a new tax for ambulance services.

In *Capron Rescue Squad District v. North Boone Fire Protection District No. 3*, 2019 IL App (2d) 190355, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that a fire protection district may add a ballot question proposing a new tax for ambulance services without showing the inadequacy of existing ambulance services. The first paragraph of Section 22 of the Fire Protection District Act (70 ILCS 705/22 (West 2018)) provides that the "Board of Trustees of any fire protection district incorporated under this Act is authorized under the terms and conditions hereinafter set out, to provide emergency ambulance service . . . ." Subsection (a) of Section 22 of the Act provides that it "is declared as a matter of public policy: . . . (3) That, in the event adequate and continuing emergency ambulance services do not exist, fire protection districts should be authorized to provide, and shall cause to be provided, ambulance service as a public responsibility." Subsection (b) of Section 22 of the Act provides, "Whenever the Board of Trustees of a fire protection district desires to levy a special tax to provide an ambulance service, it shall certify the question to the proper election officials . . . ." The plaintiff argued that subsection (a) of Section 22 ""clearly and unambiguously" sets forth the lack of adequate existing ambulance services as a condition precedent to adding a ballot question proposing a new tax to fund additional ambulance services." The defendant argued that subsection (a) of Section 22 is an "aspirational" statement of public policy and that subsequent Sections of the Act grant the board the authority to certify ballot questions without the limitations argued for by the plaintiff. The court agreed with the defendant, holding that subsection (a) of Section 22 contains general aspirational objectives of Section 22 but does not require a fire protection district first to arrive at any formal finding of fact concerning the objectives listed in subsection (a). The court reasoned that Section 22 does not contain "language requiring formal findings of fact regarding the adequacy of ambulance services in a fire protection district before it may add a ballot question proposing a new tax for such services . . . and we will not infer limitations or conditions that the legislature did not set forth."

SCHOOL CODE – SICK LEAVE FOLLOWING BIRTH OF CHILD

A teacher who gives birth at the end of the school year may not delay using her accumulated paid sick leave until the beginning of the following school year.

In *Dynak v. Board of Education of Wood Dale School District 7*, 2020 IL 125062, the Illinois Supreme Court was asked to decide whether the sick leave provisions of the School Code allow a teacher who gives birth at the end of the school year to delay using her accumulated paid sick leave until the beginning of the following school year. Section 24-6 of the School Code (105 ILCS 5/24-6 (West 2016)) provides, "If any . . . teacher or employee does not use the full amount of annual [sick] leave . . . the unused amount shall be allowed to accumulate to a minimum available leave of 180 days at full pay . . . Sick leave shall be interpreted to mean personal illness, quarantine at home, serious illness or death in the immediate family or household, or birth, adoption, or placement for adoption." The plaintiff argued that because the language in Section 24-6 does not include a requirement about the time for when the use of paid sick leave for birth must begin, the defendant wrongly denied her request to begin using her six weeks of accumulated paid sick leave for birth at the start of the following school year. The defendant argued that the school district correctly denied the request because of the plaintiff's intent to begin the use of her paid sick leave more than 10 weeks following the birth, which meant that the event that qualified the plaintiff to use the accumulated paid sick leave and the plaintiff's use of that paid sick leave for that qualifying event would not be closely linked in time as required in Section 24-6. The Illinois Supreme Court agreed with the defendant, holding that the use of accumulated paid sick leave for birth must begin immediately following birth. The court reasoned that the interpretation of Section 24-6 presented by the plaintiff would suggest that the General Assembly intended for a teacher or an employee to use paid sick leave at his or her convenience, rather than as necessitated by the occurrence of a qualifying event. The court explained that the General Assembly would not intend to effect an unreasonable or absurd result, such as allowing a teacher to begin paid sick leave for a personal illness four weeks after he or she recovered from the illness. The court surmised that by looking at the context of the statute, it is reasonable to infer from the purposeful grouping of the qualifying event of birth into the same category as the other qualifying events described in Section 24-6 that the General Assembly intended for birth to be given the same temporal consideration as the other sick leave events; that is, the most reasonable interpretation of Section 24-6 is that the General Assembly intended the use of accumulated paid sick leave to be contemporaneous with the occurrence of a qualifying event. The court reasoned further that if the General Assembly intended the use of accumulated paid sick leave for the event of birth to be treated differently from the other qualifying events, the General Assembly would have provided distinct, additional, or separate provisions relating to the qualifying event of birth. A concurring opinion argued that the majority opinion departed from "the plain and ordinary meaning of the statutory language to impermissibly insert the additional limitation that sick leave for birth must be taken immediately following the birth of a child."

SCHOOL CODE – DISCIPLINARY ACTION IN A DISMISSAL PROCEEDING

In a dismissal proceeding against a teacher, a board of education may not impose a lesser sanction against a teacher.

In *Board of Education of the City of Chicago v. Moore*, 2019 IL App (1st) 182391, the Illinois Appellate Court was asked to review whether the petitioner, the Board of Education of the City of Chicago, in imposing a disciplinary action consisting of a 90-day time-served suspension and a corresponding deduction of wages against a teacher who had been reinstated to her teaching position, violated Section 34-85 of the School Code (105 ILCS 5/34-85 (West 2016)). Paragraph (7) of subsection (a) of Section 34-85 provides that "the board, within 45 days of receipt of the findings of fact and recommendation . . . shall make a decision as to whether the teacher . . . shall be dismissed . . . In the event that the board declines to dismiss the teacher . . . the board shall set the amount of back pay and benefits to award the teacher . . . which shall include offsets for interim earnings and failure to mitigate losses." The petitioner argued that although paragraph (7) provides that the outcome of a dismissal hearing may be only that the teacher either is dismissed or is not dismissed, the authority to impose disciplinary penalties lesser than a dismissal is granted both impliedly in Section 34-85 and in other provisions of the School Code. The respondent argued that the language in paragraph (7) provides that the only authorized disciplinary action that the Board could have taken was to dismiss her from her teaching position. The respondent further argued that, because the Board declined to dismiss her from her position, paragraph (7) required the Board to award her back pay and benefits reduced only by interim earnings and failure to mitigate losses. The court agreed with the respondent, holding that, because the petitioner instituted dismissal proceedings under Section 34-85 of the School Code and not under any other provision, the authority of the petitioner to impose a disciplinary action in the dismissal proceeding was limited strictly to the language that authorizes only the disciplinary action of dismissal. The court held further that because the 90-day time-served suspension and corresponding deduction of wages imposed on the respondent was not authorized under Section 34-85, the petitioner must award to the respondent her back pay and benefits without any deduction for a 90-day time-served suspension. On May 27, 2020, the Illinois Supreme Court granted the Board of Education of the City of Chicago's Petition for Leave to Appeal.

PUBLIC COMMUNITY COLLEGE ACT – TENURED FACULTY MEMBER SENIORITY

Tenured faculty members who have been dismissed have priority for reappointment to their positions over the hiring of adjunct instructors.

In *Barrall v. Board of Trustees of John A. Logan Community College*, 2019 IL App (5th) 180284, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that tenured faculty members who have been dismissed do not have priority for reappointment to their positions over the hiring of adjunct instructors under Section 3B-5 of the Public Community College Act (110 ILCS 805/3B-5 (West 2016)). That Section provides that "any faculty member shall have the preferred right to reappointment to a position entailing services he is competent to render prior to the appointment of any new faculty member; provided that no nontenured faculty member or other employee with less seniority shall be employed to render a service which a tenured faculty member is competent to render." The plaintiff argued that an adjunct instructor, who is hired on a year-to-year basis and who does not accrue any seniority, is an "employee with less seniority" within the meaning of Section 3B-5, and therefore may not be hired to replace a tenured faculty member who has been dismissed. The defendant, citing *Biggiam v. Board of Trustees of Community College District No. 516*, 154 IL App (3d) 627 (1987), argued that because an adjunct instructor does not have any seniority, it follows that an adjunct instructor cannot be an "employee with less seniority" and may be hired to teach a course formerly taught by a tenured faculty member who has been dismissed. The court agreed with the plaintiff, holding that the clear and unambiguous meaning of "employee with less seniority" includes employees without any seniority. The court reasoned that the holding in *Biggiam* unreasonably limited the priority of tenured faculty to be reappointed to a position, and noted that an application of the *Biggiam* court's ruling would have the absurd effect of giving hiring priority to employees with the least or no seniority over those employees with the most seniority.

A dissenting opinion argued that because "adjunct instructors do not accrue seniority and will therefore never have any more or less seniority . . . [i]t is clear . . . that ["other employee with less seniority"] was meant to apply to those faculty members who are able to accrue any seniority," and that adjunct instructors are not included in the plain language of "other employee with less seniority."

On January 29, 2020, the Illinois Supreme Court granted the defendant's Petition for Leave to Appeal.

NURSING HOME CARE ACT – INVOLUNTARY TRANSFER PROCEEDINGS

The Department of Public Health's failure to comply with certain statutory deadlines does not invalidate its actions regarding an involuntary transfer.

In *Lakewood Nursing and Rehabilitation Center, LLC v. Department of Public Health*, 2019 IL 124019, the Illinois Supreme Court was asked to decide whether the appellate court erred in overturning the circuit court's finding that the failure of the Department of Public Health to conform to certain Nursing Home Care Act provisions does not deprive it of jurisdiction over administrative hearings related to the involuntary transfer of a resident for nonpayment. Section 3-411 of the Nursing Home Care Act (210 ILCS 45/3-411 (West 2012)) provides that in the case of involuntary transfer of a resident, the Department "shall hold a hearing at the resident's facility not later than 10 days after a hearing request is filed, and render a decision within 14 days after the filing of the hearing request." The plaintiff argued that because the timing of a hearing for involuntary transfer may affect the personal care and medical treatment of the resident, the Act's provision must be regarded as mandatory, and noncompliance with the timing provisions deprives the Department of jurisdiction over the involuntary transfer proceedings. The Department argued that the language is directory, and that the Department's failure to hold a hearing or render a decision within the period provided does not invalidate its actions regarding a resident's involuntary transfer. The court agreed with the Department, holding that the requirements are directory. The court reasoned that because the provision contains neither (1) negative language prohibiting further action by the Department if it fails to comply; or (2) a specific consequence for noncompliance, the provision must be read as directory and therefore was not invalidated by the Department's failure to hold a hearing within the time frame specified.

EMERGENCY MEDICAL SERVICES (EMS) SYSTEMS ACT – CIVIL IMMUNITY

The Act does not provide immunity from liability in negligence cases for traffic accidents occurring while on the way to pick up a patient for nonemergency transport.

In *Hernandez v. Lifeline Ambulance, LLC*, 2020 IL 124610, the Illinois Supreme Court was asked to decide whether appellate court erred when it reversed the trial court and held that the Emergency Medical Services (EMS) Systems Act does not provide immunity from liability in negligence cases for traffic accidents occurring while the defendant is on his or her way to pick up a patient for nonemergency transport. Subsection (a) of Section 3.150 of the Emergency Medical Services (EMS) Systems Act (210 ILCS 50/3.150(a) (West 2016)) provides civil immunity for nonemergency medical services

performed under the Act in good faith. Subsection (g) of Section 3.10 (210 ILCS 50/3.10(g) (West 2016)) defines nonemergency medical services as "medical care, clinical observation, or medical monitoring rendered to patients" not meeting the definition of an emergency and occurring "before or during transportation" of a patient. The plaintiff argued that immunity does not extend to instances in which an ambulance is picking up a patient from a medical facility where the patient is already receiving treatment and imminent transportation is not necessary. The defendant argued that immunity under Section 3.150 applies whenever an ambulance is on the way to pick up a patient. The court agreed with the plaintiff, holding that immunity under Section 3.150 does not extend to acts or omissions that were not integral or related to providing nonemergency medical care. The court reasoned that immunity from acts or omissions for nonemergency medical services occurring "before or during transportation" is focused on the need in situations for preparatory conduct integral to providing medical care at the time the patient is picked up.

ILLINOIS INSURANCE CODE – RECORD RETENTION

Federal HIPAA privacy requirements apply to and preempt record retention provisions of the Code.

In *Haage v. Zavala*, 2020 IL App (2d) 190499, the Illinois Appellate Court was asked to decide whether circuit courts erred in granting plaintiffs' motions for the entry of qualified protective orders under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. No. 104-191, 110 Stat. 1936 (1996)). HIPAA prohibits the use or disclosure of an individual's personal health information by a covered entity unless the individual has consented in writing. The proposed protective orders would have prohibited the parties from using or disclosing personal health information for any purpose other than litigation and required the return or destruction of personal health information within 60 days of the conclusion of litigation. The intervenor, a property and casualty insurer for at least one defendant in each case, objected to the HIPAA qualified protective orders. The intervenor argued that it was exempt from the requirements of HIPAA because it is not a covered entity and the protective order conflicted with its obligations under various provisions of the Illinois Insurance Code (215 ILCS 5/1 *et seq.*) (West 2018)) and the rules adopted under the Code related to record retention. The court disagreed with the intervenor, holding that although the intervenor is not a "covered entity" under HIPAA, it is not exempt from the restrictions of a HIPAA qualified protective order. The court reasoned that the record retention requirements under the Code did not conflict with HIPAA and that no provisions in the Code or the rules adopted under the Code require an insurer to use or disclose personal health information after the conclusion of litigation. The court further noted that "[a]lthough we have concluded that the terms of the HIPAA qualified protective orders do not conflict with the intervenor's obligations under state law, to the extent that

they could be so construed, we agree with the trial courts that the state law provisions are preempted by HIPAA."

HIGHWAY ADVERTISING CONTROL ACT OF 1971 – MAINTENANCE AND REPAIR

Returning the original uprights of a highway sign that has fallen down to their original location does not constitute replacing or erecting a sign.

In *Dusty's Outdoor Media, LLC v. Department of Transportation*, 2019 IL App (5th) 180269, the Illinois Appellate Court was asked to decide whether the trial court erred when it allowed a billboard to remain in place, holding that returning it to its upright position after a windstorm constitutes maintenance, rather than replacement, within the meaning of the Highway Advertising Control Act of 1971. Section 3.06 of that Act (225 ILCS 440/3.06 (West 2010)) defines the term "maintain" as "to allow to exist and includes the periodic changing of advertising messages as well as the normal maintenance or repair of signs and sign structures." Section 3.08 (225 ILCS 440/3.08 (West 2010)) enumerates several activities that fall within the meaning of the term "erect" and specifically outside the meaning of "normal maintenance or repair," including "replacing more than 60% of the uprights, in whole or in part, of a wooden sign structure." The Highway Advertising Control Act does not define the term "replace." The plaintiff argued that, within the context of the statute, "replace" means to put something new in the place of the original sign or structure. The defendant argued that the word "replace" includes restoring a sign to its former place or position. The court agreed with the plaintiff, holding that returning the original uprights of a highway sign to their original position did not constitute replacing the sign, but rather constituted "normal maintenance or repair" of the sign. The court reasoned that adopting the defendant's meaning of the statute would render the exclusion of specific activities that do not constitute "normal maintenance or repair" in Section 3.08 meaningless. The court argued that by choosing to end the list of activities that do not constitute "normal maintenance or repair" with the phrase "or similar activities that substantially change a sign or make a sign more valuable," the General Assembly intended to preclude sign owners from enhancing the value of nonconforming signs or significantly changing the nature of those signs. The court concluded that this does not include returning the sign to its original position with no alterations or enhancements.

FIREARM CONCEALED CARRY ACT – INVESTIGATIVE STOPS

A defendant's failure to volunteer that he or she possesses a concealed carry license during an officer's investigative stop is a factor in the determination of probable cause to seize a weapon and make an arrest.

In *People v. Spain*, 2019 IL App (1st) 163184, the Illinois Appellate Court was asked to decide whether a reasonable suspicion of criminal activity existed to justify an investigative stop that led to the arrest of the defendant. A "police officer may stop an individual for temporary questioning where the officer observes unusual conduct which leads him reasonably to conclude" that criminal activity may be occurring. (*Terry v. Ohio*, 392 U.S. 30 (1968)). Subsection (h) of Section 10 of the Firearm Concealed Carry Act (430 ILCS 66/10(h) (West 2016)) provides that if an officer initiates an investigatory stop, he or she may request that the stopped individual produce his or her concealed carry license, and the licensee shall, upon request of the officer, produce such license. The State argued that based upon the officer viewing what was suspected to be a firearm, sufficient reasonable suspicion existed to justify the stop, and that there was sufficient evidence to justify the probable cause by which the officer arrested the defendant. The defendant argued that the circumstances did not give rise to a reasonable suspicion that criminal activity was occurring, and that without such reasonable suspicion, the stop and the subsequent arrest were not justified. The court agreed with the State, holding that the trial court properly denied the defendant's motion to quash his arrest and suppress evidence gained through the investigatory stop. The court reasoned that, despite the fact that the defendant possessed a concealed carry license, which authorized him to carry the firearm in this possession, and the arresting officer did not request to view the defendant's concealed carry license upon stopping the defendant, the defendant also did not volunteer to the officer that he possessed a concealed carry license. The court further reasoned that the defendant's failure to volunteer that he possessed a valid concealed carry license upon the finding of the firearm on his person is a factor that the officer is entitled to use when determining probable cause to seize the weapon and make an arrest.

A dissenting justice would have granted the defendant's motion to quash the arrest, reasoning that the defendant's failure to volunteer that he possessed a concealed carry license was "insufficient to have created probable cause because Illinois law does not require a weapons suspect to volunteer his or her concealed carry license". Illinois law only requires that the subject of an investigatory stop "present his or her concealed carry license upon the request of the officer," and no such request was made. As such, the dissent further reasoned that gun possession alone is insufficient to create probable cause to arrest.

ILLINOIS VEHICLE CODE – CHEMICAL AND OTHER TESTS

Statute permitting drug and alcohol tests on a driver without a warrant is unconstitutional as applied if the police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

In *People v. Eubanks*, 2019 IL 123525, the Illinois Supreme Court was asked to decide whether the Appellate Court erred when it found paragraph (2) subsection (c) of Section 11-501.2 of the Illinois Vehicle Code (625 ILCS 5/11-501.2(c)(2) (West 2008)) facially unconstitutional. That language provides that "if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another, the law enforcement officer shall request, and that person shall submit, upon the request of a law enforcement officer, to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol content thereof or the presence of any other drug or combination of both." The defendant argued that the testing amounted to an unconstitutional search because "he did not consent to chemical testing of his blood and urine, the police did not have a warrant for the testing, and no exigent circumstances were present that would have prevented the police from obtaining a warrant." The State argued that even if the court finds the statute unconstitutional, it should find it unconstitutional as applied to the defendant, rather than facially unconstitutional, because "it is not invalid in all its applications." The court agreed with the State, holding that the statute is not unconstitutional on its face, but that it is rather unconstitutional as applied to the defendant's case. The court reasoned that while it did not find the statute facially unconstitutional, "it is nevertheless misleading in suggesting that the facts set forth therein amount to exigent circumstances whenever they are present." The court further reasoned that while the statute allows police to test without a warrant if they “have probable cause to believe a person has driven or been in actual physical control of a vehicle under the influence of drugs or alcohol and has caused a death or injury," the statute “will not apply in those unusual cases in which the blood draw is solely for law enforcement purposes and the police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties."

A dissenting opinion argued that the statute is facially unconstitutional. The dissent reasoned that the statute is facially unconstitutional because it authorizes officers, on the basis of the severity of injury to a third party, to disregard the warrant requirements for chemical testing of a suspected drunk driver under the Fourth Amendment (U.S. CONST. amend. IV).

CRIMINAL CODE OF 2012 – COMPULSORY JOINDER OF MISDEMEANORS

Criminal misdemeanor charges initially filed by a police officer can be subject to compulsory joinder and subject to speedy trial requirements.

In *People v. Rogers*, 2020 IL App (3d) 180088, the Illinois Appellate Court was asked to reverse a defendant's conviction on the basis of ineffective assistance of counsel because counsel failed to move to dismiss charges in violation of the defendant's right to a speedy trial. The compulsory joinder statute, subsection (b) of Section 3-3 of the Criminal Code of 2012 (720 ILCS 5/3-3(b) (West 2016)), provides that "if the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution . . . if they are based on the same act." A police officer filed charges against the defendant for misdemeanor driving under the influence (DUI) under paragraph (4) of subsection (a) of Section 11-501 of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(4) (West 2016)). Four months later, the State's Attorney filed a superseding information that added a misdemeanor DUI charge under paragraph (6) of subsection (a) of Section 11-501 of the Illinois Vehicle Code. The defendant argued that the charges were subject to the compulsory joinder statute and, therefore, the filing of charges four months after the initial charge violated his right to a speedy trial. The State argued that the compulsory joinder statute did not apply because the State's Attorney, not the police officer, was the proper prosecuting officer. The court agreed with the defendant, holding that the compulsory joinder statute can apply to misdemeanor charges that are initially filed by a police officer. The court noted that "there is a split of authority on the issue of whether the compulsory joinder statute applies when the initial charge is filed by a police officer," but reasoned that, based on the similarity of the two misdemeanor DUI charges and the facts in the record, the police officer would have had sufficient knowledge to charge both offenses at the same time.

CRIMINAL CODE OF 2012 – SEX OFFENDERS PARENTAL RIGHTS

Statutory defense for a felony charge of being a child sex offender in a public park does not apply to the misdemeanor offense.

In *People v. Legoo*, 2020 IL 124965, the Supreme Court was asked to decide whether the appellate court erred when it failed to apply a statutory defense for a felony charge of being a child sex offender in a public park to a defendant accused of misdemeanor being a child sex offender in a public park. Subsection (a-10) of Section 11-9.3 of the Criminal Code of 2012 (720 ILCS 5/11-9.3(a-10) (West 2016)) provides, "It is unlawful for a child sex offender to knowingly be present in any public park building, a playground or recreation area within any publicly accessible privately owned building, or on real

property comprising any public park when persons under the age of 18 are present in the building or on the grounds and to approach, contact, or communicate with a child under 18 years of age, unless the offender is a parent or guardian of a person under 18 years of age present in the building or on the grounds." Subsection (b) of Section 11-9.4-1 of the Criminal Code of 2012 (720 ILCS 5/11-9.4-1(b) (West 2016)) provides, "It is unlawful for a sexual predator or a child sex offender to knowingly be present in any public park building or on real property comprising any public park." The State argued that "the plain language of Section 11-9.4-1(b) does not contain any exception to criminal liability for offenders when their children are present". The defendant argued that Sections 11-9.3(a-10) and 11-9.4-1(b) should be read together to protect children from convicted sex offenders while also preserving sex offenders' parental rights. The court agreed with the State and upheld the conviction. The court reasoned, "While the statutes may overlap, they also differ in important respects." The court further reasoned that "when viewed as a preventative measure, it makes sense that Section 11-9.4-1(b) is drafted broadly without the exception contained in Section 11-9.3(a-10)," and that the "defendant's argument reduces to an assertion that the legislature intended to include the exception to criminal liability from Section 11-9.3(a-10) but forgot to include that language in Section 11-9.4-1(b)." The court concluded that it "cannot add the language . . . on that basis".

CRIMINAL CODE OF 2012 – STALKING BY THREATS

The portion of the stalking statute criminalizing a course of conduct that the defendant should know will cause another person to fear for his or her safety is unconstitutionally overbroad.

In *People v. Ashley*, 2020 IL 123989, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that certain portions of the stalking statute did not violate the defendant's right to free speech and substantive due process under the First and Fourteenth Amendments of the United States Constitution. (U.S. CONST. amend. I; U.S. CONST. amend. XIV). Subsection (a) of Section 12-7.3 of the Criminal Code of 2012 (720 ILCS 5/12-7.3(a) (West 2014)) provides, "A person commits stalking when he or she knowingly engages 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 the safety of a third person; or suffer other emotional distress." The defendant argued, among other things, that the stalking statute is overbroad because it allows a person to be convicted of negligently conveying a message that a reasonable person would understand as threatening and, therefore, unconstitutionally chills protected speech. The State argued that the stalking statute is not overbroad. The court agreed with the defendant and held that the stalking statute's "should know" standard was "overly broad and cannot be constitutionally applied with regard to a course of conduct that 'threatens'." The court construed the term "threatens" as referring to "true threats of unlawful violence,"

requiring "proof that the accused be consciously aware of the threatening nature of the speech," that fall outside of first amendment protections. The court concluded that the negligent mental state of "should know" could not satisfy that standard.

CRIMINAL CODE OF 2012 – EAVESDROPPING

A video recording of a confidential informant's drug transaction with a defendant and the confidential informant's in-person testimony regarding the transaction do not constitute eavesdropping, and are therefore admissible evidence.

In *People v. Davis*, 2020 IL App (3d) 190272, the Illinois Appellate Court was asked to decide whether a recording of a drug transaction between the defendant and a confidential informant surreptitiously recorded with an audio and video recording device hidden on the informant's person should be suppressed because it constituted as illegal eavesdropping. Section 14-5 of the Criminal Code of 2012 (720 ILCS 5/14-5 (West 2018)) provides that any evidence obtained through eavesdropping is not admissible in any civil or criminal trial. Both parties agreed that the audio portion of the recording should be suppressed because it constituted illegal eavesdropping. The State argued that neither the video (without the audio) nor the confidential informant's in-person testimony should have been suppressed by the trial court. The defendant argued that Section 14-5 of the Criminal Code of 2012 barred the video portion of the recording. The court agreed with the State, holding that the confidential informant did not eavesdrop but acted as a party to the conversation. The Court reasoned that the confidential informant's in-person testimony is admissible under *People v. Gervasi*, 89 Ill. 2d 522 (1982), and the video recording did not derive from eavesdropping activity but was independent of eavesdropping and admissible. The court observed that the confidential informant made the video recording at the same time as the audio recording, and found that the audio eavesdropping did not lead the confidential informant or police to the drug transaction.

CRIMINAL CODE OF 2012 – ONE-ACT, ONE-CRIME RULE

The one-act, one-crime rule does not bar simultaneous convictions of robbery and aggravated battery of a senior citizen.

In *People v. Smith*, 2019 IL 123901, the Illinois Supreme Court was asked to decide whether the one-act, one-crime rule (which prohibits convictions for multiple offenses that are based on precisely the same physical act) prohibited the defendants' convictions of both robbery and aggravated battery of a senior citizen after one of the men punched a 65-year old man during the theft of money carried by the senior citizen. Subsection (a) of Section 18-1 of the Criminal Code of 2012 (720 ILCS 5/18-1(a) (West 2008)) provides that a "person commits robbery when he or she knowingly takes property . . . from the person or

presence of another by the use of force or by threatening the imminent use of force." Paragraph (4) of subsection (a) of Section 12-3.05 of the Criminal Code of 2012 (720 ILCS 5/12-3.05(a)(4) (West 2008)) provides that a "person commits aggravated battery when, in committing a battery . . . he or she [c]auses great bodily harm or permanent disability or disfigurement to an individual 60 years of age or older." The State argued that the defendants' conduct included two separate physical acts: the punch, and the taking of property. The defendants argued that the court should treat the punch and taking of the victim's property as a single act of culpable conduct. The court agreed with the State, holding that the "defendants' convictions for robbery and aggravated battery of a senior citizen were proper under the one-act, one-crime rule because they were based on separate acts of wrongful conduct and are not lesser-included offenses." The court reasoned that "to treat both offenses as being carved from a single act would require us to ignore the separate harms caused by defendants' conduct as well as the legislature's intent to punish those distinct harms–the great bodily harm involved in committing the battery to the person in the aggravated battery offense and the separate interference with a property right in the robbery offense."

CRIMINAL CODE OF 2012 – BURGLARY; INTERMODAL SHIPPING CONTAINER

An intermodal shipping container that is attached to a railroad car at the time of a theft is not a "railroad car" or "any part thereof" for purposes of the burglary statute.

In *People v. Hopkins*, 2020 IL App (1st) 181100, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that theft from an intermodal shipping container that was bolted onto a railroad car constitutes burglary of a railroad car. Subsection (a) of Section 19-1 of the Criminal Code of 2012 (720 ILCS 5/19-1(a) (West 2016)) provides, "A person commits burglary when without authority he or she knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft." The defendant, who aided in the unlawful removal of items from an intermodal shipping container on a train, argued that "railroad car, or any part thereof" does not include an intermodal shipping container bolted onto a railroad car because it is nothing other than a large box that can be transported by several modes of transportation in addition to railroad car. The State, relying on case law, argued that an intermodal shipping container is analogous to a semitrailer because it is designed to fit on a railroad car, and therefore should be considered "a part thereof" of a railroad car. The Illinois Appellate Court agreed with the defendant and reversed the conviction, holding that an intermodal shipping container attached to a railroad car at the time of a theft is not a "railroad car" or "any part thereof" for purposes of the burglary statute. The court first noted that the statute does not define the term "railroad car," and, because the dictionary definition of a "car," which includes "a

vehicle designed to move on rails (as of a railroad)," the court reasoned that an intermodal shipping container, which does not have wheels, does not fit the common definition of a "railroad car" or "any part thereof." The court rejected the State's argument comparing an intermodal shipping container to a semitrailer, finding that although a semitrailer, like a shipping container, is not capable of self-propulsion, it qualifies as part of a vehicle because it is designed to work as one vehicle with a truck when connected to it. The appellate court further reasoned that the rule of lenity applies and required the undefined term "railroad car" to be construed in favor of the accused.

CRIMINAL CODE OF 2012 – UNCONCEALED FIREARM IN A VEHICLE

Exception to unlawful use of a weapon statute for holders of concealed carry licenses does not permit the open carrying of firearms in a vehicle.

In *People v. Balark*, 2019 IL App (1st) 171626, the Illinois Appellate Court was asked to decide whether the defendant was properly convicted of unlawful use of a weapon by a felon after officers observed a semiautomatic pistol with an extended magazine protruding from the passenger side glove compartment of the vehicle in which the defendant was riding. Paragraph (4) of subsection (a) of Section 24-1 of the Criminal Code of 2012 (720 ILCS 5/24-1(a)(4) (West 2016)) provides that a person commits unlawful use of a weapon when the person knowingly carries or possesses in any vehicle a pistol. The offense contains several exceptions, including when the weapon is carried or possessed in accordance with the Firearm Concealed Carry Act (430 ILCS 66/ (West 2016)). The court, for the purpose of analyzing the meaning of the term "concealed" only, presumed that the defendant had a valid concealed carry license and addressed whether his conduct would be permitted under the Firearm Concealed Carry Act so as to make his possession of the firearm lawful. The defendant argued that the firearm was a concealed firearm before and after it was placed in the glove box, and that a firearm is considered a concealed firearm in a vehicle under the Firearm Concealed Carry Act even when visible to the public. The State argued that the defendant's position does not comport with other provisions of the Firearm Concealed Carry Act, such as subsection (h) of Section 10 of that Act (430 ILCS 66/10(h) (West 2016)), which provides that the licensee must identify the location of the concealed firearm when asked. The court agreed with the State and affirmed the defendant's conviction, holding that Illinois does not allow for open carry of firearms. The court reasoned that the term "concealed" cannot be read out of the Act where the term is, in essence, the entire purpose of the Act. The court reasoned that if the General Assembly did not intend for the concealment of firearms, it could have omitted the word from the statutory language. Each word of a statute must be given a reasonable meaning to avoid any interpretation that renders a word superfluous.

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

A firearm located in the vehicle of a felon that is not within his or her reach does not constitute unlawful possession of a weapon by a felon.

In *People v. Wise*, 2019 IL App (3d) 170252, the Illinois Appellate Court was asked to decide whether the trial court erred when it found the defendant guilty of unlawful possession of a weapon by a felon because the defendant had a firearm in his car. Subsection (a) of Section 24-1.1 of the Criminal Code of 2012 (720 ILCS 5/24-1.1(a) (West 2014)) provides, "It is unlawful for a person to knowingly possess on or about his person . . . any firearm . . . if the person has been convicted of a felony under the laws of this State or any other jurisdiction." The defendant argued that the firearm was not "on or about his person" because, although it was in his vehicle, the firearm was outside of his reach. The State argued that the phrase "on or about his person" is not limited to possession within the defendant's reach but "expands the scope of possession in an area that is under the defendant's exclusive control." The court agreed with the defendant and held that the phrase "on or about his person" does not encompass the entirety of a vehicle. The court noted that other courts had reached a contrary result, but declined to follow those cases. The court reasoned that the General Assembly specifically listed certain places in which a felon is culpably in possession of a firearm and did not include a vehicle in that list. The court further reasoned that the phrase "on or about his person" in similar provisions of the Code had been construed as requiring a firearm to be "in such close proximity that it can be readily used as though on the person." A dissenting opinion argued that the State did not have to prove that the firearm was immediately or readily accessible to the defendant to secure a conviction. The dissenting opinion reasoned that this interpretation is "consistent with the purpose of the statute-to protect the public safety by prohibiting the possession of weapons by felons."

CODE OF CRIMINAL PROCEDURE OF 1963 – COLLATERAL EFFECTS OF GUILTY PLEA

The requirement that a trial court admonish defendants of collateral repercussions for a guilty plea at arraignment is not mandatory.

In *People v. Burge*, 2019 IL App (4th) 170399, the Illinois Appellate Court was asked to decide whether the trial court erred in accepting a guilty plea at the time of arraignment without admonishing the defendant that pleading guilty had a collateral consequence of potential loss of employment. Subsection (c) of Section 113-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-4(c) (West 2016)) provides that if a

defendant pleads guilty, the plea "shall not be accepted until the court shall have fully explained to the defendant" specified collateral repercussions that may occur as a result of the defendant's guilty plea. The State argued that a plea should not be withdrawn when collateral repercussions are not provided to a defendant, because the statutory language is directory and, therefore, there are no consequences stemming from noncompliance with the provision. The defendant argued that the provision is mandatory and, therefore, a failure on the part of a trial court to read the collateral repercussions requires the guilty plea to be withdrawn. The court agreed with the State, holding that informing defendants of potential collateral repercussions is directory, rather than mandatory. The court reasoned that because (1) the General Assembly did not create a consequence for failing to comply with the provision and (2) a directory reading would not injure the underlying right to waive a jury trial, failure to comply with the collateral repercussion provision does not invalidate a guilty plea. A concurring opinion agreed with the court's determination that the provision is directory, but disagreed with the court's reasoning. The concurring opinion argued that the use of the term "shall not" in the provision suggests that the provision should be interpreted as being mandatory. However, the concurring opinion argued that because interpreting the provision mandatory would render it unconstitutional as violating the separation-of-powers clause of the Illinois Constitution (ILL. CONST. art. II, § 1), the requirements must instead be interpreted as directory. On March 25, 2020, the Illinois Supreme Court granted leave to appeal the decision.

CODE OF CRIMINAL PROCEDURE OF 1963 – POSTCONVICTION PETITIONS

A court must grant leave for a petitioner to file successive postconviction petitions as long as the newly offered evidence supports a colorable claim of actual innocence.

In *People v. Robinson*, 2020 IL 123849, the Illinois Supreme Court was asked to decide whether the appellate court erred when it affirmed a circuit court ruling denying a petitioner leave to file a successive petition for postconviction relief after the petitioner offered several affidavits that asserted the petitioner did not commit the crime for which he had been convicted and sentenced. Subsection (b) of Section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(b) (West 2016)) provides, "Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that . . . in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." Subsection (f) of Section 122-1 (725 ILCS 5/122-1(f) (West 2016)) provides, "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court 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 that the standard for leave to file a successive postconviction petition does not require that the new evidence offered is

consistent with the evidence offered at trial, but rather that new evidence offered supports a colorable claim of actual innocence. He claimed that the affidavits he offered in his postconviction petition were sufficient to place the trial evidence in a different light and undermine confidence in the judgment of guilt. The State argued that the affidavits offered by the petitioner were inconsistent with the evidence in the trial record and were thus insufficient to justify granting leave to file a successive postconviction petition. The court agreed with the petitioner, holding that the petitioner had satisfied the pleading requirements for granting leave to file a successive postconviction petition by offering evidence that he was innocent of the crimes for which he had been convicted and sentenced. The court reasoned that new evidence supporting the postconviction petition need not be completely dispositive of the petitioner's innocence, but need only be of such a conclusive character that as to probably change the result upon retrial. The court concluded that leave of court should only be denied where it is clear, from a review of the successive petition and the documentation provided by the petitioner, that the petitioner cannot set forth a colorable claim of actual innocence. The court found that the circuit court erred in applying a conflicting evidence standard, rather than a colorable claim of innocence standard, when considering the petitioner's successive postconviction petition. A dissenting opinion argued that leave to file a successive postconviction petition should be granted only when the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The dissent argued that it is well settled that successive postconviction actions are disfavored by Illinois courts and that the standard adopted by the majority sets too low a threshold when considering postconviction actions.

UNIFIED CODE OF CORRECTIONS – PROBATION CONDITIONS

A statutory condition of probation that imposes an absolute ban against the use of social media websites is overbroad and facially unconstitutional.

In *People v. Morger*, 2019 IL 123643, the Illinois Supreme Court was asked to decide whether a statutory condition of probation imposing a ban against the use of social media websites was unconstitutionally overbroad. Paragraph (8.9) of subsection (a) of Section 5-6-3 of the Unified Code of Corrections (730 ILCS 5/5-6-3(a)(8.9) (West 2016)) provides that a condition of probation, among other conditions, shall be that a person "convicted of a sex offense . . . refrain from accessing or using a social networking website." The State argued that the statutory condition of probation was not unreasonably overbroad. The defendant argued that a complete ban on accessing social networking websites as a condition of probation is an overbroad, and therefore impermissible, restriction on his freedom of speech under the First Amendment (U.S. CONST. amend. I). The court agreed with the defendant, holding that the probationary condition is overbroad and facially unconstitutional. The court reasoned that "the social media ban is absolute, admitting of no exceptions for legitimate use." The court noted, "A statute is overbroad on

its face if it prohibits constitutionally protected activity as well as activity that may be prohibited without offending constitutional rights." (*People v. Relerford*, 2017 IL 121094). As such, the court further reasoned that the statute in its current form "prohibits constitutionally protected activity as well as activity that may be prohibited without offending constitutional rights," and that "the protective value of the social media ban . . . does not manifestly outweigh the impairment to the probationer's constitutional rights.

SEX OFFENDER REGISTRATION ACT – PUNISHMENT

A dissenting opinion argued that application of the Act has become penal in nature, rather than civil.

In *People v. Kochevar*, 2020 IL App (3d) 140660-B, the Illinois Appellate Court was asked to decide, in accordance with the Illinois Supreme Court's opinion in *People v. Bingham*, 2018 IL 122008, whether it erred when it held that application of the Sex Offender Registration Act was unconstitutional as applied to the defendant. The Sex Offender Registration Act (730 ILCS 150/ (West 2012)) imposes various restrictions and registration requirements on persons who are convicted of certain sex offenses. In *Bingham*, the Illinois Supreme Court held that "a reviewing court has no power on direct appeal of a criminal conviction to order that defendant be relieved of the obligation to register as a sex offender" and reasoned that the obligation to register and the other restrictions imposed by the Act are collateral consequences of a conviction and not part of the judgment under review. The court held that, in accordance with *Bingham*, it did not have jurisdiction to review the defendant's as-applied constitutional challenge to the Act. A dissent distinguished *Bingham* and argued that *Bingham* did not preclude the court from reaching the merits of the defendant's as-applied constitutional challenge. The dissent also argued that there should be a change in the Act because "there are strong indications that the scheme has become penal," reasoning that "modifications in the implementation and reach of the registration itself and the increasingly burdensome and debilitating restrictions of the legislative program have gradually, but inexorably, transformed rationally based, protective consequences that into a statutory scheme that is indeed punitive." The dissent further noted that "the court has not actually and specifically addressed whether the sex offender statutes' punitive effects negate the legislature's expressed intent to deem the laws civil" and urged a finding that they do.

CODE OF CIVIL PROCEDURE – SERVICE OF PROCESS

If the summons was issued from a county with a population of less than 2,000,000, a licensed or registered private detective may serve process without a special appointment anywhere in the State.

In *Municipal Trust and Savings Bank v. Moriarty*, 2020 IL App (3d) 190016, the Illinois Appellate Court was asked to decide whether the trial court had personal jurisdiction over the defendant after the defendant was served with process by a private detective in Cook County. Subsection (a) of Section 2-202 of the Code of Civil Procedure (735 ILCS 5/2-202(a) (West 2016)) provides, "In counties with a population of less than 2,000,000, process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004." Subsection (a) of Section 2-202 of the Code requires a special appointment for private process servers in counties with a population of more than 2,000,000. Subsection (b) of Section 2-202 provides, "Summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve process." The plaintiff argued that the private detective was authorized to serve process in Kankakee County, where the case was pending, and therefore, could serve the defendant anywhere in this State. The defendant argued that the service of process was improper because the private detective did not have the authority to serve the defendant in Cook County, a county with a population of more than 2,000,000. The court agreed with the plaintiff, holding that "a duly licensed or registered private detective may serve process, "without special appointment," anywhere in the State as long as the summons was issued from a county "with a population less than 2,000,000."" The court reasoned that a registered private detective served the defendant "with process 14 days after the summons was issued from Kankakee County, a county "with a population less than 2,000,000,"" thereby authorizing the private detective to serve the defendant in Cook County and giving the trial court personal jurisdiction over the defendant. The court further reasoned that the General Assembly would not have provided "broad authority to "serve defendants wherever they may be found in this State" if it intended to limit" that authority based on the population of the county where the defendant is located at the time of service.

CODE OF CIVIL PROCEDURE – MOTION TO DISMISS FORFEITURE COMPLAINT

An argument that the facts presented in a forfeiture complaint do not support a felony charge constitutes an affirmative matter that may be raised in a motion to dismiss, before discovery.

In *People v. $940 United States Currency*, 2019 IL App (3d) 180102, the Illinois Appellate Court was asked to decide whether the trial court erred in granting a defendant's motion to dismiss the State's complaint seeking forfeiture of $940 after the police recovered the currency, along with 4.5 grams of cannabis, while executing an arrest warrant. Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)) allows a litigant to obtain an involuntary dismissal of an action or claim based upon specific, enumerated defects or defenses. Among these defenses, subsection (a)(9) provides the defense "that the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." The defendant argued that the State is statutorily barred from bringing the forfeiture claim because the two Sections of the Cannabis Control Act under which the State sought forfeiture require that the underlying transaction be chargeable as a felony, and the facts presented in the complaint did not support a felony charge. The State argued that the defendant's motion to dismiss was not brought under any of the nine enumerated grounds for dismissal under Section 2-619, but merely denied a factual allegation in the complaint. The court agreed with the defendant, holding that the trial court did not err in finding the claimant's motion to dismiss was properly brought under Section 2-619. The court reasoned that a motion brought under subsection (a)(9) is procedurally appropriate for advancing the argument that the State had no authority under the statute for bringing an action to forfeit currency under circumstances in which no felony was involved. The court argued that such a basis for dismissal would constitute an affirmative matter defeating the forfeiture claim, making a Section 2-619(a)(9) claim procedurally appropriate for advancing that argument. A dissenting opinion argued that the issues raised in the defendant's motion to dismiss are a matter of proof, not pleading, and should be decided at trial.

CODE OF CIVIL PROCEDURE – POST-JUDGMENT RELIEF

A trial court cannot dismiss a petition for relief from judgment for untimeliness unless the issue is raised by a party.

In *People v. Cathey*, 2019 IL App (1st) 153118, the Illinois Supreme Court was asked to decide whether the trial court had the authority to dismiss the defendant's petition for relief from judgment for untimeliness. Subsection (c) of Section 2-1401 of the Code of

Civil Procedure (735 ILCS 5/2-1401(c) (West 2014)) provides that petitions for relief from final orders and judgments "must be filed not later than two years after the entry of the order or judgment." The State argued that the court "should affirm the trial court's dismissal of the defendant's petition because it was filed more than two years after entry of the order or judgment." The defendant argued that the trial court erred in dismissing his petition, and the court should reverse that decision. The court agreed with the defendant, holding that the trial court's dismissal of the defendant's petition was improper. Citing case law, the court reasoned that though the defendant's petition was filed more than two years after entry of the judgment, the statutory limitation is "an affirmative defense that a responding party may waive or forfeit by failing to raise the issue." As such, the "State forfeited its affirmative defense of timeliness by not filing a response to the petition." Therefore, the court reasoned that the trial court could not dismiss the petition for relief from judgment on the basis of untimeliness because that issue was never raised before the trial court, regardless of the statutory two-year filing limitation.

CODE OF CIVIL PROCEDURE – LIMITATIONS; LEGAL DISABILITY

The legal disability tolling exception to the statute of limitations of personal injury claims can be asserted by the legal representative or estate administrator of a decedent's estate.

In *Mickiewicz v. Generations at Regency LLC*, 2020 IL App (1st) 181771, the Illinois Appellate Court was asked to decide whether the trial court properly dismissed the plaintiff's personal injury claim on the basis of untimeliness. Section 13-202 of the Code of Civil Procedure (735 ILCS 5/13-202 (West 2018)) provides, “Actions for damages for an injury . . . shall be commenced within 2 years next after the cause of action accrued." Subsection (a) of Section 13-211 (735 ILCS 5/13-211(a) (West 2018)) further provides, "If the person entitled to bring an action . . . at the time the cause of action accrued . . . is under a legal disability, then he or she may bring the action within 2 years after . . . the disability is removed." Subsection (a) of Section 13-209 (735 ILCS 5/13-209(a) (West 2018)) provides that if “a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives," the action “may be commenced by his or her representative before the expiration of that time, or within one year from his or her death, whichever date is the later." The plaintiff, as representative of the deceased person entitled to bring the action, argued that the statute of limitations within which to file the personal injury claim commenced upon the decedent's death, and that the action was timely filed. The defendant argued that the trial court properly dismissed the plaintiff's claim as untimely because under *Giles v. Parks*, 2018 IL App (1st) 163152, the legal disability tolling exception to the statute of limitations is not applicable to a decedent's representative asserting the same claim as the person under a legal disability. The court agreed with the plaintiff, rejecting the *Giles* court's statutory interpretation, reversing the trial court, and holding that the statute of limitations on the plaintiff's claim had not expired

at the time the claim was filed. The court reasoned that because the decedent was under a legal disability at the time her injuries occurred and until her death, the statute of limitations was tolled until her death, when the legal disability was removed. The court concluded that the statute of limitations began to run on the day of the decedent's death, and the plaintiff's action was timely filed within the limitations period.

BIOMETRIC INFORMATION PRIVACY ACT – THIRD-PARTY VENDORS

A third-party technology vendor violates the Act if it collects and stores biometric information without providing notice and obtaining consent.

In *Neals v. PAR Technology Corporation*, 419 F. Supp.3d 1088 (2019), the United States District Court for the Northern District of Illinois was asked to decide whether the defendant, as a third-party vendor, violated the Biometric Information Privacy Act by collecting and storing the plaintiff's biometric information without providing written notice and without receiving a written release from the plaintiff. Subsection (b) of Section 15 of the Biometric Information Privacy Act (740 ILCS 14/15(b)) provides that no "private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first complies with certain notice and consent requirements, including the requirement to obtain a "written release." Section 10 of the Act (740 ILCS 14/10) defines "written release" as "informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." The plaintiff argued that the defendant, as a private entity, violated the Act by never informing her (1) that her biometric information was being collected and stored, (2) of the purpose and length of time for which the information was collected, and (3) of the applicable biometric data retention policy. The plaintiff further argued that the defendant violated the Act by failing to obtain a written release to collect and store her biometric information. The defendant argued that because the plaintiff's biometric information was collected as part of the course of her employment, her complaint should be dismissed because the requirements of the Act in an employment context "do not apply to entities other an employer," and that the General Assembly did not intend the Act to apply to third-party technology vendors such as the defendant. The court agreed with the plaintiff, holding that the requirements of the Act apply to entities other than an employer, and that the defendant may be found liable for violating the Act. The court reasoned that "the fact that the statute defines "written release" in a more particularized way for employment situations has no bearing on which entities face liability under the statute." The court further reasoned that the "statute obligates any private entity that collects a person's biometric information to comply with its requirements" and that the relevant relationship is created by the collection of information.

ILLINOIS CIVIL RIGHTS ACT OF 2003 – MANDATORY ATTORNEY FEES

A prevailing party is entitled to recover reasonable attorney's fees regardless of whether the prevailing party incurred such fees or paid for an attorney's services.

In *Kirk v. Arnold*, 2020 IL App (1st) 190782, the Appellate Court was asked to decide whether the trial court erred in denying the plaintiffs' request for attorney's fees. Paragraph (2) of subsection (c) of Section 5 of the Illinois Civil Rights Act of 2003 (740 ILCS 23/5(c)(2) (West 2008)) provides that a court shall award reasonable attorney's fees to a plaintiff "who is a prevailing party in any action brought . . . to enforce a right arising under the Illinois Constitution." The plaintiffs argued that fee shifting under the statute is mandatory, and as such, they are entitled to attorney's fees. The opposing argument is that because the plaintiffs' attorney represented them without charge, "the plaintiffs cannot recover fees they did not incur," and the denial of attorney's fees was proper. The court agreed with the plaintiffs, holding that the trial court erred in denying the plaintiffs' request for attorney's fees. The court reasoned that the use of the word "shall" in the statute "indicates a legislative intent that an award of fees is mandatory," and that, absent contradicting statutory language, reasonable attorney's fees are not limited to those actually incurred or paid by the plaintiffs. Because the statute contains no such language indicating that the fees must have actually been incurred by the plaintiffs, the awarding of reasonable attorney's fees is mandatory, regardless of whether attorney services were provided without charge.

ILLINOIS STREETGANG TERRORISM OMNIBUS PREVENTION ACT – DEFINITION OF STREETGANG

An expert witness must provide evidence that an organization has engaged in a course or pattern of criminal activity in order to prove that the organization is a street gang.

In *People v. Murray*, 2019 IL 123289, the Illinois Supreme Court was asked to decide whether the appellate court erred when it found that State met its burden in proving that the Latin Kings are a "gang" under the Illinois Streetgang Terrorism Omnibus Prevention Act. Section 10 of that Act (740 ILCS 147/10 (West 2012)) defines "streetgang" or "gang" as an organization that "through its membership or through the agency of any member engages in a course or pattern of criminal activity." The defendant argued at trial that the evidence presented by the State that the Latin Kings are a "gang" was insufficient because the State's gang expert did not testify to a relevant time period or to any specific historical crimes committed by the Latin Kings, failing to demonstrate that the Latin Kings were engaged in a course or pattern of criminal activity. The State argued that because an expert witness may provide an opinion on the ultimate issue in a case, the expert testimony it presented was sufficient to establish that the Latin Kings are a street gang. The State

argued, in the alternative, that if proof of specific crimes is required, it presented that evidence through the defendant's own crimes. The court agreed with the defendant, holding that the State failed to prove that the Latin Kings are a "gang" because it did not present evidence proving the elements codified in the statute. The court reasoned that the State never satisfied the first condition of Rule 705 of the Illinois Rules of Evidence (Ill. R. Evid. 705 (eff. Jan. 1, 2011)), which requires testimony explaining the reasoning for an expert's opinion. The State's expert witness testified to his experience and familiarity with several criminal and gang databases, but never explained how the information available in these databases established that the Latin Kings were a street gang engaged in a course or pattern of criminal activity. The court noted that by failing to satisfy Rule 705, the State violated the Defendant's constitutional rights by shifting the burden to the defendant to disprove an element of the offense without first proving that the element had been satisfied. The court also rejected the State's argument that the defendant's own criminal behavior is sufficient to prove the Latin Kings are a street gang. The court reasoned that the crimes of which the defendant was convicted cannot serve as evidence to establish an element of one of those charged crimes. The court noted that, at the time the evidence was presented to the jury, there had yet to be any determination as to whether the defendant committed the offenses as charged or that the offenses related in any way to his involvement with the Latin Kings.

UNIFORM COMMERCIAL CODE – REVOCATION OF ACCEPTANCE

The purchaser of a substantially defective product who was unaware of the defect at the time it was purchased may revoke acceptance without giving the seller an opportunity to cure the defect.

In *Accettura v. Vacationland, Inc.*, 2019 IL 124285, the Illinois Supreme Court was asked to decide whether the Appellate Court erred when it held that the purchasers of a defective recreational vehicle could not recover their purchase price and other damages because they did not give the seller a reasonable opportunity to cure the defect. Subsection (1)(b) of Section 2-608 of the Uniform Commercial Code (810 ILCS 5/2-608(1)(b) (West 2014)) provides, "The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it . . . without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or the seller's assurances." The plaintiff argued that, unlike subsection (1)(a) of Section 2-608 of the Uniform Commercial Code, which provides a cure by allowing a buyer to modify a contract to account for a defect, subsection (1)(b) does not provide a cure and instead allows a buyer to return the defective product and revoke acceptance of the contract. The defendant argued that in a majority of jurisdictions the seller has a right to cure the defect before a buyer revokes acceptance under subsection (1)(b), and that the buyer can only revoke acceptance after other attempts

at modifying the contract have failed. The court agreed with the plaintiff, holding that subsection (1)(b) does not require that the buyer give the seller an opportunity to cure a substantial defect of a product before revoking acceptance. The court reasoned that the language in subsection (1)(b) is plain and does not include any statement that requires a buyer give the seller an opportunity to cure the defect before revoking acceptance. Since the court found the language plain, it declined to look at how other jurisdictions have interpreted subsection (1)(b). However, the court noted that while courts in several other states have ruled to the contrary, it did not find a case in which a court found that subsection (1)(b) required that the buyer give the seller an opportunity to cure the defect; rather, the decisions rested on policy grounds.

EMPLOYEE CREDIT PRIVACY ACT – EXEMPTION TO THE PROHIBITION ON CREDIT HISTORY CHECKS

A prospective employee is not exempted from a credit history check if the position requires the employee to obtain or view unencrypted personal information at any time in order to facilitate the performance of job duties.

In *Rivera v. Commonwealth Edison Company*, 2019 IL App (1st) 182676, the Illinois Appellate Court was asked to determine if the circuit court erred in granting summary judgment in favor of the defendant after finding that the defendant did not violate the prohibition against credit history checks under Section 10(a) of the Employee Credit Privacy Act (820 ILCS 70/10(a) (West 2016)). Section 10(a) of the Employee Credit Privacy Act provides that "an employer shall not . . . (1) [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment . . . because of the individual's credit history or credit report . . . (2) [i]nquire about an applicant's or employee's credit history . . . [or] (3) [o]rder or obtain an applicant's or employee's credit report from a consumer reporting agency." Section 10(b) provides that this prohibition "does not prevent an inquiry or employment action if satisfactory credit history is an established bona fide occupational requirement of a particular position or a particular group of employer's employees." That Section further provides that a satisfactory credit history is not a "bona fide occupational requirement" unless the position meets at least one of several specified circumstances, including that the position involves access to personal or confidential information, financial information, trade secrets, or State or national security information. Section 5 of the Act (820 ILCS 70/5 (West 2016)) defines "personal or confidential information" as "sensitive information that a consumer or client of the employing organization gives explicit authorization for the organization to obtain, process, and keep; that the employer entrusts only to managers and a select few employees; or that is stored in secure repositories not accessible by the public or low-level employees." The plaintiff argued that the customer service position for which she applied was not exempt from the Act's prohibition on credit history checks because (1) the position would not have required her to handle personal or confidential information, as defined in the Act,

and (2) the position was an entry level position with no managerial duties. In support of her argument, the plaintiff asserted that the defendant's customer service representatives were "merely conduits whose sole responsibility was to enter the customers' personal information into the defendant's data system before passing such information along to other departments." As such, the customer service representatives had no real access to sensitive customer information. The defendant argued that its customer service representatives were not "low-level employees" because they "were highly paid; had access to customers' Social Security numbers, driver's license numbers, bank account information, and credit card information; and had "a much higher level of responsibility for handling the sensitive information of customers than nearly all [of the defendant's] other employees." The defendant also asserted that "the question of whether an employee is 'low-level' does not hinge on whether the employee has managerial or supervisory responsibilities."

In support of its argument, the defendant relied on the court's holding in *Ohle v. The Neiman Marcus Group*, 2016 IL App (1st) 141994, where the court found that Neiman Marcus sales associates did not have access to their customers sensitive credit card application information within the meaning of Section 10(b)(5) because they could not later obtain or review such information after initially entering it into an encrypted database at a Neiman Marcus point-of-service register.

The court ultimately agreed with the defendant, holding that the customer service position was exempt from the Act's prohibition against credit history checks by prospective employers. The court found that the defendant's customer service representatives were not low-level employees with limited access to sensitive customer information. The court reasoned that, because the term "low-level employees" is not defined in the Act, the term must be interpreted "in the context of the statute as a whole." Consequently, the court found that the use of the term "low-level employees" in conjunction with the term "the public" indicates a level of employee whose need or ability to access sensitive information stored in secure repositories is of a level similar to that of the public in general." In this case, "it is undisputed that their need and ability to obtain and use the [customers'] information to perform their job duties is much greater than that of the general public." The court also found that the defendant's customer service representatives did have access to sensitive customer information within the meaning of Section 10(b)(5) because, unlike the Neiman Marcus sales associates in *Ohle*, the defendant's customer service representatives had the ability to obtain and view at any time a customer's partial social security number, credit card number, address history, and other identifying information to facilitate the performance of their job duties.

A specially concurring opinion argued that the court in *Ohle* should have adopted a more expansive interpretation of the word "access," finding "that "access" exists from the moment confidential information is given to any employee for the purpose of furthering that employer's ability to provide service to a customer." Applying this expansive interpretation of the word "access," the specially concurring opinion found that both the Neiman Marcus sales associates in *Ohle* and the defendant's customer service representatives had access to sensitive customer information within the meaning of Section 10(b)(5).

ILLINOIS WAGE PAYMENT AND COLLECTION ACT – SIGN-ON BONUS

Nondiscretionary sign-on bonuses are "earned bonuses" within the meaning of the Act.

In *Ragan v. BP Products North America, Inc.*, 2020 WL 127954, the United States District Court for the Northern District of Illinois was asked to reconsider its order denying the defendant's motion for summary judgment, finding that the $500,000 in stock options granted to the plaintiff as a sign-on bonus was compensable as an earned bonus under Section 2 of the Illinois Wage Payment and Collection Act (820 ILCS 115/2 (West 2018)). That Section provides, "Payments to separated employees shall be termed "final compensation" and shall be defined as wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between 2 parties." The defendant argued that the sign-on bonus was not an earned bonus as contemplated under Section 2 because the term "earned" excludes all sign-on bonuses. The defendant also asserted that the sign-on bonus was discretionary because it was "granted in consideration of [the plaintiff] accepting employment, so [it] was not service-related." The court disagreed with the defendant's interpretation of Section 2, holding that the term "earned bonus" includes nondiscretionary sign-on bonuses similar to the sign-on bonus the defendant offered the plaintiff. In reaching its holding, the court acknowledged that the terms "earned bonus" and "any other compensation owed" are not defined under the Act. However, the court observed that under the Illinois Department of Labor's definition of "earned bonuses" in Section 300.500 of Title 56 of the Illinois Administrative Code (56 Ill. Adm. Code 300.500 (2019)), an employee: "[1] has a right to an earned bonus when there is an unequivocal promise by the employer and the employee has performed the requirements set forth in the bonus agreement between the parties and all of the required conditions for receiving the bonus set forth in the bonus agreement have been met; and [2] shall be entitled to a proportionate share of a bonus earned by length of service, regardless of any provision in the contract or agreement conditioning payment of the bonus upon employment on a particular day." Relying on the Illinois Department of Labor's definition, the court dismissed the defendant's assertion that a sign-on bonus could never be considered a service-related or earned bonus under Section 2, reasoning that "a bonus paid for signing on is a bonus paid for services rendered, at least where the bonus agreement *connects the vesting of the options to services rendered*." (Emphasis in original). Moreover, the court found that "rendering specific services may not be a requirement under [Section 2, as evidenced by the fact] that the "earned" modifier does not appear in the catch-all provision of the . . . definition of "final compensation," which covers "any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the parties."" The court also observed that even if the defendant's interpretation of "earned bonus" was correct, the plaintiff's sign-on bonus would still be compensable under Section 2 because under the terms of the sign-on bonus, the plaintiff's receipt of the $500,000 in stock options was conditioned on the plaintiff remaining employed by the defendant for at least three years. The court found that this "length of

service condition . . . renders the bonus nondiscretionary . . . and [s]ince nondiscretionary bonuses are termed "earned bonuses" under the Illinois Department of Labor definition, that same definition arguably entitles [plaintiff] to a [pro rata] share of her stock options based on the length of service she served."

WORKERS' COMPENSATION ACT – DELAYED AUTHORIZATION OF MEDICAL TREATMENT

Neither an arbitrator nor the Commission is authorized to impose penalties on an employer who delays or fails to authorize an injured employee's reasonable and necessary medical treatment.

In *O'Neil v. Illinois Workers' Compensation Commission*, 2020 IL App (2d) 190427WC, the Illinois Appellate Court was asked to determine if the circuit court erred when it confirmed the Illinois Workers' Compensation Commission's decision to reverse an arbitrator's decision to impose penalties under of Section 19(l) of the Workers' Compensation Act (820 ILCS 305/19(l) (West 2016)) after the plaintiff's employer revoked authorization for the plaintiff's knee surgery. Section 19(l) of the Act provides, "In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or 8(b) have been so withheld or refused, not to exceed $10,000." The Commission argued that its reversal of the Section 19(l) penalties assessed by the arbitrator was proper because the arbitrator and the Commission lacked the statutory authority under Section 19(l) to impose penalties based on an employer's failure or delay in authorizing medical treatment. The plaintiff argued that the Commission did have the authority under Section 19(l) to impose penalties on employers who fail or unreasonably delay authorizing necessary medical treatment because Section 8(a) of the Act requires employers to "provide and pay . . . for all of the necessary medical and surgical services incurred" by an injured employee. The court agreed with the Commission, holding that Section 19(l) "contains no language authorizing an arbitrator or the Commission to assess penalties for an employer's failure, neglect, refusal, or unreasonable delay in authorizing medical treatment." The court reasoned that the plain language of Section 19(1) provides that penalties are to be assessed against employers who "without good and just cause . . . *unreasonably delay the payment* of benefits under Section 8(a) or 8(b) of the Act." (Emphasis in original). The court dismissed the plaintiff's assertion that penalties for employers who unreasonably delay or fail to authorize necessary medical treatment are allowable under Section 19(l) by virtue of the "provide and pay" requirement under Section 8(a). Noting the plain language of Section 8(a), the court found that "neither Section 8(a) nor any other provision of the Act allows the Commission to assess penalties against an employer based on a failure or delay in authorizing medical treatment." The court acknowledged that, as written, Section 19(l) could embolden employers to "refuse to timely authorize, with impunity, reasonable and

necessary medical treatment that had not yet been awarded by the Commission." However, the court refused to "read into the statute any exceptions, limitations, or conditions that the legislature did not intend," instead affirming that the General Assembly is the appropriate authority to resolve any harmful consequences of the Act. A dissenting opinion argued that the court's interpretation of Section 19(l) was too narrow and that Section 19(l) does authorize an arbitrator or the Commission to penalize an employer who, without good or just cause, delays or fails to authorize necessary medical treatment for an injured employee.

WORKERS' COMPENSATION ACT – SETTLEMENT PROCEEDS EXEMPT FROM COLLECTION

The proceeds of a workers' compensation settlement are exempt from the claims of medical-care providers who treated the illness or injury associated with that settlement.

In *In re Hernandez,* 2020 IL 124661, the Illinois Supreme Court was asked to determine whether Sections 8, 8.2, and 21 of the Workers' Compensation Act, taken together, exempt the proceeds of a workers' compensation settlement from the claims of medical-care providers who treated the illness or injury associated with that settlement. Section 21 (820 ILCS 305/21 (West 2016)) provides, "No payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages." Section 21 qualifies this language by allowing a beneficiary under certain provisions of the Illinois Pension Code to assign any benefits to the State Employees' Retirement System. Section 8 of the Act (820 ILCS 305/8 (West 2016)) provides compensation amounts for employees who suffered an accidental workplace injury that did not result in death. Section 8.2 (820 ILCS 305/8.2 (West 2016)) provides certain fee schedule amounts that medical providers are allowed to collect and employers are required to pay under the Act. The appellee argued that 2005 amendments to Section 8 and the enactment of Section 8.2 "had no bearing on the exemption created by Section 21" and, therefore, the proceeds of her settlement were exempted from collection under Section 21. The appellants, who were medical-care providers seeking payment on the plaintiff's outstanding medical debts, argued that the 2005 amendments to Section 8 and the enactment of Section 8.2 had greatly "altered" the exemption under Section 21 by creating an "implicit exception" for claims by medical-care providers that must be read into the statute. The court disagreed with the medical-care providers' interpretation of the interplay between Sections 21, 8, and 8.2 of the Act, holding that, absent explicit statutory language stating otherwise, Section 21 exempts the proceeds of a workers' compensation settlement from the claims of medical-care providers who treated the illness or injury associated with that settlement. The court reasoned that the language of Section 21 is unambiguous, and observed that Section 21 already explicitly provides an exception for beneficiaries under the Illinois Pension Code. The court also noted that the General Assembly provided a second exception to Section 21 under subsection (d) of Section 15 of the Income Withholding for Support Act (750 ILCS 28/15(d) (West 2016)). The court opined that the existence of those exceptions indicate

that the General Assembly knows how to explicitly express an exception to Section 21, and noted that the General Assembly has not enacted such an exception for healthcare providers. Consequently, the court refused to read an implicit exception for medical-care providers into the Section 21 exemption, noting that "the repeal or amendment of statutes by implication is not favored." The court further found that Sections 8 and 8.2 "can operate as written without any qualification at all to the express terms of Section 21," and observed that Section 21 does not prohibit medical-care providers from reaching a debtor's other assets to satisfy an outstanding claim. The court concluded by acknowledging that, as written, Section 21 "may make it more difficult for medical providers to obtain full recovery of the amounts they are owed," such a consequence is a matter for the General Assembly to resolve, not the court.

CASE INDEX

ACT INDEX

STATUTE INDEX