# 2021 CASE REPORT

**Legislative Reference Bureau**
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**December 2021**

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State of Illinois
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December 2021

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.

Respectfully submitted,

James W. Dodge
Executive Director

## INTRODUCTION

This 2021 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 2020 through the summer of 2021.

## 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 – PUBLIC SAFETY RECORDS

*A record is exempt from disclosure if the public body can demonstrate that release of the record could reasonably be expected to jeopardize the security measures of the public body.*

In *Sun-Times v. The Chicago Transit Authority*, 2021 IL App (1st) 192028, the Illinois Appellate Court was asked to decide whether the circuit court erred when it ordered the disclosure of a surveillance video of a subway platform that showed one customer pushing another customer off the platform. Paragraph (v) of subsection (1) of Section 7 of the Freedom of Information Act (5 ILCS 140/7(v)(1) (West 2016)) provides that security measures are exempt from disclosure, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. The plaintiff argued that the video was subject to disclosure because the defendant did not show by clear and convincing evidence that disclosure would result would jeopardize the effectiveness of the surveillance system and would result in a terrorist attack or other criminal act. The defendant public body argued that the circuit court misconstrued and misapplied the law by requiring the public body to make such a showing in order to claim the exemption under Section 7. The court agreed with the defendant, holding that the General Assembly's use of the term "could" instead of "would" was dispositive. The court observed that the General Assembly used "would" in other Freedom of Information Act exemptions. When the General Assembly adopted the exemption in paragraph (v) of subsection (1) of Section 7 of the Freedom of Information Act in 2003, it was 17 years after Congress had replaced the word "would" with the phrase "could reasonably be expected to" in Section 7 of the federal Freedom of Information Act (5 U.S.C. 552). The court reasoned that the General Assembly was aware that federal courts consistently construed this amendment to provide for a more flexible, less onerous standard to invoke a Freedom of Information Act exemption. The Illinois Appellate Court concluded that the defendant met its burden under paragraph (v) of subsection (1) of Section 7 of the Freedom of Information Act to show that disclosing the surveillance footage could reasonably be expected to jeopardize the effectiveness of its camera surveillance system. The court concluded that the defendant had established by clear and convincing evidence that the surveillance footage was exempt from disclosure under the Freedom of Information Act. The Illinois Supreme Court denied a petition for leave to appeal on September 29, 2021.

**FREEDOM OF INFORMATION ACT – WITHHOLDING PUBLIC RECORDS**

*A trial court may not order a public body to disclose documents that were withheld pursuant to a court order that was later vacated.*

In *Green v. Chicago Police Department*, 2021 IL App (1st) 200574, the Illinois Appellate Court was asked to decide whether the trial court had jurisdiction to order the production of certain public records after it determined that the Chicago Police Department (defendant) did not improperly withhold those records at the time they were requested. At the time of the requested disclosure, the defendant had been issued a court order enjoining and ordering the defendant not to release the requested public records in connection with any Freedom of Information Act request. The court order was subsequently vacated. Subsection (d) of Section 11 of the Freedom of Information Act (5 ILCS 140/11(d) (West 2018)) provides that the trial court has "jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access." The plaintiff argued that the trial court had jurisdiction to order the production of the requested public records. The defendant argued that the trial court erred in ordering the defendant to produce the requested public records, because Section 11 only gives jurisdiction to order the production of records improperly withheld. The court agreed with the defendant, holding that the trial court erred in ordering the defendant to produce the public records. Citing case law, the court reasoned that "a lawful court order takes precedence over the disclosure requirements" of the Freedom of Information Act. Because the court issuing the injunction had proper jurisdiction over the matter at the time of the requested disclosure of public records and the "propriety of a response must be judged at the time the decision to deny" a request for disclosure of public records is made, the defendant was required to obey the injunction and not release the requested public records at the time the request was made. Since the defendant could not, by court order, release the public records at the time of the plaintiff's request, the defendant did not improperly withhold disclosure of the requested public records, and the trial court's order to produce the records was improper.

The dissenting opinion reasoned that while the defendant "correctly honored the injunction barring release of the records in question" at the time of the request, the injunction had been vacated by the time the trial court heard the lawsuit, and it no longer barred the release of the requested records. Citing the legislative intent provisions of the Freedom of Information Act, the dissent further reasoned that denying the release of the requested records is directly at odds with the purpose of the Act, which favors "expedient and efficient disclosure," and that denying such disclosure also construes the statute "to obtain an absurd result." Given the Act's "guiding principles promoting disclosure of public records," the dissent concluded that the plaintiff was entitled to a remedy under the Freedom of Information Act, and that the trial court did not err in requiring the defendant

to disclose the requested public records in question. The Illinois Supreme Court granted a petition for leave to appeal on September 29, 2021.

## ILLINOIS PUBLIC LABOR RELATIONS ACT – DUTY TO BARGAIN

*A municipality may not adopt a unilateral change to a rule without first giving the exclusive bargaining representative notice and an opportunity for bargaining.*

In *City of Springfield v. Policemen's Benevolent and Protective Association, Unit #5*, 2021 IL App (4th) 200164, the Illinois Appellate Court was asked to decide whether the decision of the Illinois Labor Relations Board was clearly erroneous when the Illinois Labor Relations Board found that the City of Springfield violated the Illinois Public Labor Relations Act by (i) adopting a rule amendment granting residency preference points on examinations for promotion without giving the policemen's union and the firefighter's union (the unions) an opportunity to bargain over the change and (ii) unilaterally altering the status quo during interest arbitration with the unions. Section 7 of the Illinois Public Labor Relations Act (5 ILCS 315/7 (West 2016)) provides that the public employer and the exclusive representative have "the duty to bargain collectively" over matters involving "wages, hours, and terms and conditions of employment." The City argued that "contract negotiations were open for [the unions] after the rule was adopted and before it applied to [union] members." However, the City also conceded that it did not give notice and an opportunity for bargaining prior to the date the amendment was adopted. The unions argued that the City committed an unfair labor practice in violation of the Act, and the Board's decision was not clearly erroneous. The court agreed with the unions, finding that the Board's determination that the City committed an unfair labor practice was not clearly erroneous. In doing so, the court reasoned that the unfair labor practice "is the unilateral change, and not its application to particular individuals."

## STATE OFFICIALS AND EMPLOYEES ETHICS ACT – COMPENSATION FROM PROHIBITED ENTITIES

*The Act prohibits both direct and indirect compensation from prohibited entities.*

In *Doyle v. Executive Ethics Commission*, 2021 IL App (2d) 200157, the Illinois Appellate Court was asked to decide whether the circuit court erred when it reversed the decision of the defendant, the Executive Ethics Commission, and held that the State Officials and Employees Ethics Act only prohibits direct compensation from prohibited entities. Subsection (a) of Section 5-45 of the State Officials and Employees Ethics Act (5 ILCS 430/5-45(a) (West 2014)) provides that no "former officer, member, or State

employee, or spouse or immediate family member living with such person, shall, within a period of one year immediately after termination of State employment, knowingly accept employment or receive compensation or fees for services from a person or entity if the officer, member, or State employee, during the year immediately preceding termination of State employment, participated personally and substantially in the award of State contracts, or the issuance of State contract change orders, with a cumulative value of $25,000 or more to the person or entity, or its parent or subsidiary." The plaintiff, who received payments from a subcontractor of a prohibited entity, argued that the Act prohibited only direct compensation from a prohibited entity. The defendant Commission argued that the plaintiff's interpretation of the Act was too narrow and would lead to absurd results. The court agreed with the defendant, holding that the "plain language of the statute does not indicate that it refers to only direct compensation [and that the] legislature's use of the word 'from,' without including any limitations on that term, suggests that the legislature intended the restrictions on receiving compensation or fees from a prohibited entity to be read more broadly." The court reasoned that "the purpose of revolving door statutes is to 'ensure that public officials adhere to the highest standards of conduct, avoid the appearance of impropriety, and do not use their positions for private gain or advantage.' The Commission's determination that a former state employee cannot do indirectly something that he cannot do directly is not unreasonable." The Illinois Supreme Court denied a petition for leave to appeal on September 29, 2021.

## ILLINOIS EMERGENCY MANAGEMENT AGENCY ACT – DISASTER PROCLAMATION

*The Act does not prohibit the Governor from issuing consecutive disaster proclamations and exercising emergency powers arising from an ongoing disaster.*

In *Fox Fire Tavern, LLC. v. Pritzker*, 2020 IL App (2d) 200623, the Illinois Appellate Court was asked to decide whether the circuit court erred when it granted a temporary restraining order blocking the enforcement of an executive order that, pursuant to the Governor's disaster proclamation related to the COVID-19 pandemic, restricted indoor dining and restaurant operations. Section 7 of the Illinois Emergency Management Agency Act (20 ILCS 3305/7 (West 2018)) provides that "[i]n the event of a disaster . . . the Governor may, by proclamation declare that a disaster exists. Upon such proclamation, the Governor shall have and may exercise [enumerated emergency powers] for a period not to exceed 30 days." The plaintiff argued that the Governor's disaster declaration and executive order were void because the Governor did not have the authority to issue consecutive emergency declarations. The Governor argued that nothing in Section 7 of the Act "precludes the Governor from issuing multiple disaster proclamations – each with its own 30-day grant of emergency powers – arising from an ongoing disaster." The court

agreed with the Governor, holding that the Governor has the authority to issue consecutive disaster proclamations and exercise emergency powers pursuant to the proclamation of a disaster. The court reasoned that Section 7 does not contain any language limiting the Governor's authority to issue consecutive disaster proclamations and other provisions of the Act pertaining to local officials' authority to proclaim disasters do contain such limitations. The court noted that, "it is plain to see that, where the legislature intended there to be a check on an official's powers to make consecutive disaster declarations, it explicitly provided as much." Further, the court reasoned that the General Assembly had recently passed legislation (Public Acts 101-632, 101-633, 101-634, and 101-642) that "explicitly refers to the Governor's authority to issue successive disaster proclamations." The Illinois Supreme Court denied a petition for leave to appeal on May 26, 2021.

## PROPERTY TAX CODE - WAIVABILITY OF SCHOOL PROPERTY TAX EXEMPTION

*The property tax exemption for a school may not be waived.*

In *Keystone Montessori School v. The Village of River Forest*, 2021 IL App (1st) 191992, the Illinois Appellate Court was asked to decide whether the trial court erred when it found an agreement made between the plaintiff and the defendant village to allow its school on property not zoned for schools, if the plaintiff would agree not to apply for tax exemption for the property was contrary to public policy. Section 15-35 of the Property Tax Code (35 ILCS 200/15-35 (West 2018)) provides that "all property of schools, not sold or leased or otherwise used with a view to profit, is exempt, whether owned by a resident or non-resident of this State or by a corporation incorporated in any state of the United States." The plaintiff argued that the agreement was contrary to public policy. The defendant argued that the school's property tax exemption was waivable, and therefore the agreement was not against public policy. The court agreed with the plaintiff, holding that the requirement in the agreement that the plaintiff not apply for or accept a property tax exemption for the parcel despite having a school on the parcel is contrary to public policy. The court reasoned that neither the plaintiff nor the defendant had the authority to waive the property tax exemption because the constitution gives only the General Assembly the power to create exemptions from uniform taxation.

**ILLINOIS PENSION CODE – RETIRE ON ANNUITY**

*In an opinion strongly advocating for a rewrite of the Code, particularly the general rule for cost-of-living adjustment payments, the Illinois Appellate Court found that "retired on annuity" means the date the person begins drawing annuity payments, not the date the person applies for annuity payments.*

In *Robbins v. County Employees' and Officers' Annuity and Benefit Fund of Cook County*, 2021 IL App (1st) 192142, the Illinois Appellate Court was asked to determine whether a Cook County employee who retired four days before her 60th birthday fell under the exception to the general rule for cost-of-living adjustment (COLA) payments, thereby making her eligible to receive her first COLA payment on the first January after her 60th birthday. The general rule for COLA payments is set forth in the first unnumbered paragraph under Section 9-133(a) of the Illinois Pension Code (40 ILCS 5/9-133(a) (West 2014)) and provides, "An employee who retired or retires . . . having attained age 60 or more . . . shall, in the month of January of the year following the year in which the first anniversary of retirement occurs, have his then fixed and payable monthly annuity increased by [3% per year]." The second unnumbered paragraph under Section 9-133(a) sets forth an exception to the general COLA rule and provides that "An employee who retires on annuity before age 60 . . . shall receive such [COLA] increases beginning with January of the year immediately following the year in which he attains the age of 60 years . . . ." The defendant argued that the plaintiff's COLA payment schedule fell under the general rule because the plaintiff "was first on annuity" [on] the first of June 2014, by which time she was 60 years old." Consequently, the defendant asserted that the plaintiff was not entitled to her first COLA payment until January 2016, the January after the first anniversary of the plaintiff's May 2014 retirement date. The plaintiff argued that her COLA payment schedule fell under the exception to the general rule because she was actually "on annuity" before reaching the age of 60 since she had applied for her annuity in April 2014 and retired one month later when she was still age 59. The plaintiff asserted that "retiring "on annuity" is not dependent on when she first started *receiving* her annuity (in June, after having turned 60) but when she became *entitled* to that annuity (on May 16, her date of retirement, at age 59)." The plaintiff further asserted that there was "no statutory basis for arguing that "on annuity" must mean actually receiving the annuity." Accordingly, the plaintiff argued that she was entitled to her first COLA payment in January 2015, the first January after the year she reached age 60.

The Illinois Appellate Court agreed with the defendant, and held that the plaintiff fell under the general rule for COLA payments set forth in the first paragraph of Section 9-133(a) and was therefore not entitled to her first COLA payment until January 2016. The court reasoned that the phrase "on annuity," though not defined in Section 9-133(a), is generally held to refer to "an employee who retired and is already receiving an annuity before age 60." The court noted that the plaintiff's scheduled May 16, 2014 retirement date,

just four days before her 60th birthday, required the court to "split hairs" when determining "the literal first moment that someone "retires on annuity."" The court rejected the plaintiff's assertion that she was "on annuity" the moment she applied for the annuity in April 2014. The court reasoned that the plaintiff had specifically requested that her annuity be calculated under the "minimum annuity" plan set forth in Section 9-134 of the Pension Code (40 ILCS 5/9-134 (West 2014)). According to the court, under Section 9-134, a retired employee's annuity "is pegged to the age of the employee on the date the "annuity is to begin." And [under Section 9-119 (40 ILCS 5/9-119 (West 2014))] . . . "the annuity "begins" . . . on the first of the month following the occurrence of the event that triggers the right to an annuity." For purposes of Section 9-134, the court noted that the "event upon which payment of the annuity depends" is when the employee has done the latter of two things required for an annuity: retiring and applying for annuity." Accordingly, the court found that "[f]or section 9-134 annuities, the date the employee chooses to start drawing her annuity in accordance with state law is–and really must be–the operative date for being "on annuity" under section 9-133(a)." Since the plaintiff scheduled her annuity payments to begin June 1, 2014, after she reached the age of 60, the plaintiff was first "on annuity" at the age of 60 and therefore did not qualify for the Section 9-133(a) exception to the general COLA payment rule.

The court noted that it did "not fault the plaintiff or anyone else for finding these [Pension] laws incredibly difficult to navigate." The court described the Pension laws as "at times incomplete and at times murky, at best." The court "strongly urged the General Assembly to consider a rewrite." As an aside, the court specifically criticized the general rule for COLA payments under the first paragraph of Section 9-133(a). The court described the rule as having "holes" in it because "some employees retire long before age 60, but [under the general rule] they are not entitled to a COLA until they turn 60." The court noted that these "employees could wait 10, 15 years for that first COLA at age 60. So it's not altogether accurate when the first paragraph pegs the first COLA at the January after "the first anniversary of retirement." An employee could be 42 or 48 or 54 on their first anniversary of retirement and be nowhere near their first COLA." The court acknowledged that this flaw in the language had no bearing on the plaintiff's case. However, the court noted the flaw "because this language might seem confusing otherwise" as it appears to create a "loophole."

## ILLINOIS PENSION CODE – DISABILITY BENEFIT

*An otherwise eligible employee is entitled to continue receiving disability benefits even after employment is terminated.*

In *O'Connell v. County of Cook*, 2021 IL App (1st) 201031, the Illinois Appellate Court was asked to decide whether the circuit erred when it dismissed a Cook County

employee's claim that his disability benefits were improperly stopped when he was terminated from employment. Section 9-157 of the Illinois Pension Code (40 ILCS 5/9-157 (West 2018)) provides that "[a]n employee . . . who becomes disabled after becoming a contributor to the fund as the result of any cause other than injury incurred in the performance of an act of duty is entitled to ordinary disability benefit during such disability." Section 9-157 further enumerates five events that trigger the termination of disability benefits, including the date the disability ceases, the date the employee attains a specified age, or the date the payments of the benefit exceed a specified amount when compared to the total service rendered. Section 9-159 of the Illinois Pension Code (40 ILCS 5/9-159 (West 2018)) lists three additional triggering events, including the refusal to submit to a medical examination, working for a tax-supported employer, or receipt of worker's compensation benefits. The plaintiff argued that Section 9-157 does not require that an employee who becomes disabled continue to be an employee to receive disability benefits, as long as the employee began receiving those benefits as an active employee. He also argued that none of the events that trigger the termination of benefits concern his termination as an employee. The defendant argued that under its common and ordinary meaning, the term "employed" refers only to non-terminated employees and the disability benefits should stop once the employee is terminated. The court agreed with the plaintiff, holding that the term "employed" is broad enough to encompass persons who began receiving disability benefits when they were actively working. The court reasoned that nothing in the language of Section 9-157 suggests that a disabled worker must continue to be employed to remain eligible for disability benefits. The court argued that when a statute lists specific conditions, all omissions should be understood as exclusions. The court concluded that since the employee's termination is not enumerated as a triggering event that stops disability benefits under Sections 9-157 or 9-159, it can be presumed that the General Assembly did not intend the termination of employment to affect these payments. The Illinois Supreme Court granted a petition for leave to appeal on September 29, 2021.

## ILLINOIS MUNICIPAL CODE – ELIGIBILITY FOR MUNICIPAL OFFICE

*An individual convicted of a federal felony is qualified to hold municipal office if issued a restoration of rights by the Governor.*

In *Walker v. Agpawa*, 2021 IL 127206, the Illinois Supreme Court was asked to decide whether an electoral board erred in finding that a mayoral candidate was duly qualified for office despite a federal conviction for mail fraud. Subsection (b) of Section 3.1-10-5 of the Illinois Municipal Code (65 ILCS 5/3.1-10-5 (West 2018)) provides that "[a] person is not eligible to take the oath of office for a municipal office if that person . . . has been convicted in any court located in the United States of any infamous crime, bribery, perjury, or other felony, unless such person is again restored to his or her rights of

citizenship that may have been forfeited under Illinois law as a result of a conviction, which includes eligibility to hold elected municipal office, by the terms of a pardon for the offense, has received a restoration of rights by the Governor, or otherwise according to law." The plaintiff argued that the General Assembly has no authority to alter the effect of a federal conviction. The defendant argued that by virtue of the Governor's restoration of his rights of citizenship, his federal conviction was no longer an impediment to holding municipal office. The court agreed with the defendant, holding that the plaintiff was qualified to hold office because he had received a restoration of rights by the Governor. The court reasoned that while the Governor has no constitutional authority to pardon a federal conviction, the Governor has statutory authority to mitigate the collateral electoral consequences of such a conviction by issuing a restoration of rights. The court declined to address the plaintiff's claim that the statute violates the special legislation clause of Section 13 of Article IV of the Illinois Constitution (ILL. CONST. 1970, art. IV, § 13).

## ILLINOIS MUNICIPAL CODE – POLICE OFFICER PERFORMANCE EVALUATIONS

*A police department may not consider citations as points of contact when evaluating a police officer's performance.*

In *Policemen's Benevolent Labor Committee v. City of Sparta*, 2020 IL 125508, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred when it reversed the circuit court, holding that the inclusion of traffic citations in the defendant City of Sparta's monthly minimum activity-points for police officers constitutes an unlawful ticket quota. Section 11-1-12 of the Illinois Municipal Code (65 ILCS 5/11-1-12 (West 2016)) provides, "[a] municipality may not require a police officer to issue a specific number of citations within a designated period . . . Nothing in this Section shall prohibit a municipality from evaluating a police officer based on the police officer's points of contact. For the purposes of this Section, 'points of contact' . . . shall not include either the issuance of citations or the number of citations issued by a police officer." The plaintiff argued Section 11-1-12 explicitly excludes traffic tickets from points systems. The defendant argued that the City's activity-point system doesn't violate Section 11-1-12 because it does not require a specific number of citations within a certain period or compare officers based on the number of citations issued. The court agreed with the plaintiff, holding that "the plain language of Section 11-1-12 prohibits municipalities from including the issuance of citations in a 'points of contact' system used to evaluate the job performance of police officers." The court reasoned that Section 11-1-12 is unambiguous and, therefore, the court may not interpret the Section in light of the legislative history or other aids of statutory construction. The court noted that the development of a fair points policy accounting for the full range of officer activity, including citations, is more properly addressed by the

General Assembly. The court concluded that Section 11-1-12, as currently written, expressly prohibits the practice at issue in the case and must be enforced as written.

## ILLINOIS MUNICIPAL CODE – EMINENT DOMAIN FOR ELECTRIC POWER LINES

*As an issue of first impression, the appellate court lacks jurisdiction to directly review certain orders of the Illinois Commerce Commission concerning municipal eminent domain.*

In *City of Mascoutah v. Illinois Commerce Commission*, 2021 IL App (5th) 200386, the Illinois Appellate Court was asked to decide whether it had jurisdiction to directly review a decision of the Illinois Commerce Commission under item (2) of Section 11-117-1 of the Illinois Municipal Code (65 ILCS 5/11-117-1(2) (West 2018)). That statute provides that any municipality may "acquire, construct, own, maintain and operate without the corporate limits of any municipality any electric power lines or substations necessary solely to provide power or a source of power for such municipality, and, when it is found necessary and in the public interest by the Illinois Commerce Commission, to acquire by eminent domain any property without the corporate limits of any municipality for such purposes . . . ." Section 11-117-1 does not set forth the method for review of the Commission's decision or expressly adopt the Administrative Review Law of the Code of Civil Procedure (735 ILCS 5/Art. III). The City both filed a petition for direct review of the Commission's decision by the appellate court and filed a complaint for administrative review or a writ of certiorari in the circuit court, arguing that the statute was ambiguous about the route of review and asking the appellate court to issue an order resolving whether it has jurisdiction over the appeal. The Commission argued from legislative history that its decision under the Illinois Municipal Code should be subject to review in a manner similar to that of its decisions under Sections 8-406(b)(1) and 8-509 of the Public Utilities Act (220 ILCS 5/8-406(b)(1), 220 ILCS 5/8-509 (West 2018)). Those Sections provide for direct review by the appellate court. The court disagreed with the Commission, holding that when an Act conferring power on an agency does not expressly adopt the Administrative Review Law and provides for no other form of review, a common-law writ of certiorari in the circuit court is the general method for obtaining review of administrative actions. The court noted that it has taken direct review of decisions of the Commission made pursuant to section 11-119.1-10 of the Illinois Joint Municipal Electric Power Act (65 ILCS 5/11-119.1-10 (West 1994)). However, the court found it dispositive that the General Assembly has not specified a form of review for decision-making authority of the Commission under Section 11-117-1 related to the approval of a municipality's decision to exercise its eminent domain authority outside of its city limits.

## ILLINOIS MUNICIPAL CODE – HOME RULE AUTHORITY

*Absent specific statutory language, a home rule unit may exempt itself from statutory water-utility billing requirements.*

In *Souza v. City of West Chicago*, 2021 IL App (2d) 200047, the Illinois Appellate Court was asked to decide whether a municipality has home rule authority to exempt itself from statutory water-utility billing requirements. Paragraph (1) of subsection (a) of Section 11-150-2 of the Illinois Municipal Code (65 ILCS 5/11-150-2(a)(1) (West 2018)) provides that a municipality shall bill for any utility service within either 12 or 24 months, including billing for "unpaid amounts that were billed to a customer." The plaintiffs argued that the defendant was prohibited from later exempting itself as a home rule unit because utility billing requirements are necessarily of a statewide, rather than local, interest in order to better effectuate public water-utility consumer protections. The defendant argued that it was entitled to exempt itself under language in Section 11-150-2, which grants home rule powers to municipalities within the 12-month or 24-month period. The court agreed with the defendant, holding that water-utility billing practices are a local government affair and therefore, as long as the home rule unit regulated the billing within the time period, are within the purview of a municipality's home rule powers. The court reasoned that, because the General Assembly has not added the specific statutory language to the relevant provisions of the Illinois Municipal Code to expressly preempt home rule units from imposing differing regulation, the regulation of water-utility billing is not a statewide interest but a local government affair capable of being regulated by home rule units. The Illinois Supreme Court denied a petition for leave to appeal on September 29, 2021.

## SCHOOL CODE – DISCIPLINARY ACTION IN A DISMISSAL PROCEEDING

*In dismissal proceedings against a teacher, a school board has implied authority to impose disciplinary sanctions other than dismissal from employment.*

In *Mohorn-Mintah v. Board of Education of the City of Chicago*, 2019 IL App (1st) 182011, the Illinois Appellate Court was asked to decide whether the School Code authorizes a disciplinary sanction other than outright dismissal from employment. Paragraph (2) of subsection (a) of Section 34-85 of the School Code (105 ILCS 5/34-85(a)(2) (West 2016)) provides that a tenured teacher may be suspended without pay pending the dismissal proceeding, but provides that if a teacher is not "dismissed based on the charges, he or she must be made whole for lost earnings." Section 10-20.5 of the School Code (105 ILCS 5/10-20.5 (West 2016)) provides that school boards may "adopt and enforce all necessary rules for the management and government of the public schools of their districts." The petitioner argued that she is entitled to back pay in full and that the

respondent did not have the authority to reduce her back pay as a disciplinary sanction. The respondent argued that the reduction of the petitioner's back pay amounted to an unpaid suspension for which it had authority. The court agreed with the respondent, holding that although Section 34-85 "clearly and unambiguously does not provide for any other type of sanction, such as a suspension without pay or a reduction in back pay," a school board does have the authority to impose such disciplinary action through its statutorily granted power to adopt and enforce rules. The court reasoned that since the board had the statutory authority to suspend a tenured teacher without pay, the General Assembly would not have intended "to require the Board to engage in separate procedures for each disciplinary action regarding the same conduct or to prohibit the Board from issuing a lesser sanction where misconduct occurred but dismissal was not warranted." The Illinois Supreme Court denied a petition for leave to appeal on March 24, 2021.

## PUBLIC COMMUNITY COLLEGE ACT – SENIORITY OF TENURED FACULTY MEMBERS

*Tenured faculty members dismissed as a result of a reduction in the number of faculty members or the discontinuation of certain teaching services or programs have priority for reappointment over the hiring of adjunct instructors.*

In *Barrall v. Board of Trustees of John A. Logan Community College*, 2020 IL 125535, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that, for the purposes of determining priority for the reappointment of tenured faculty members at a community college over the hiring of adjunct instructors, adjunct instructors are "employees with less seniority," and tenured faculty members must be given priority for teaching positions and for teaching individual courses. Section 3B-5 of the Public Community College Act (110 ILCS 805/3B-5 (West 2016)) provides, in part, 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 non-tenure 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 plaintiffs, several tenured faculty members of a community college who were laid off as part of a workforce reduction, argued that "enough work existed to employ them full-time for that school year, had the Board not hired adjunct instructors to teach their courses." The defendant argued that the plaintiffs' claim was barred by a settlement agreement and that Section 3B-5 did not prohibit the defendant from laying off the plaintiffs and employing part-time adjunct faculty to teach their courses. In support of its argument, the defendant relied on *Biggiam v. Board of Trustees of Community College District No. 516*, 154 Ill.App. 3d 627 (1987). In *Biggiam*, the court construed "other employee with less seniority" to mean "other *tenured* employee with less seniority," thus excluding adjunct instructors from the provisions of the statute. (Emphasis in original). In this case, the court expressly overruled *Biggiam*, finding that it was wrongly decided. In doing so, the court reasoned that an adjunct instructor, who never accrues any seniority, has "less seniority" than a

tenured faculty member. The court reasoned that the statutory language must be construed in a manner based on the plain meaning of the words and that the court must not add words or otherwise modify the language deliberately chosen by the General Assembly. The court reasoned further that Section 3B-5 must be read in a manner that furthers the General Assembly's intent "to ensure a degree of job stability for teachers with experience and ability."

While the dissent agreed with the majority that "position" refers to a full-time teaching position, the dissent disagreed with the majority's other conclusions. The dissent argued that the term "other employee with less seniority" means an employee who is employed in a "position" that accrues at least *some* seniority. The dissent concluded that the final sentence of Section 3B-5 exempts adjunct instructors because "the phrase 'other employee with less seniority' must refer to an employee who holds a 'position,' because it is only in a full-time position that a faculty member can acquire seniority." The dissent also noted that although *Biggiam* has been precedent for 3 decades, the General Assembly has yet to modify the language of Section 3B-5.

## ABUSED AND NEGLECTED CHILD REPORTING ACT – REQUIRED REPORTING

*A mandated reporter is not required to report any and all allegations of abuse to the Department of Children and Family Services.*

In *People v. Willigman*, 2021 IL App (2d) 200188, the Illinois Appellate Court was asked to decide whether the trial court erred when it held that the failure to report child abuse was a strict liability offense, thus finding the defendant guilty of failing to report child abuse. Subsection (a) of Section 4 of the Abused and Neglected Child Reporting Act (325 ILCS 5/4(a) (West 2016)) provides that specific persons are "required to immediately report to the Department [of Children and Family Services] when they have reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child." The defendant argued that the "reasonable cause" required by the statute requires a willful failure to report and that the duty to report arises not merely from an allegation of abuse, but by circumstances that cause one to "have reasonable cause to believe" that a child "may be an abused child." The State argued that the "trial court considered the statute and the evidence, and that it properly found [the defendant] guilty of the charged offense." The court agreed with the defendant, reversing the trial court and holding that a mandated reporter need not report any and all allegations of abuse to the Department. The court reasoned that case law provides that once school staff receive a credible report of abuse or suspected abuse, not merely any report, the staff must inform the Department. However, a mandated reporter may use his or her discretion in determining whether a report of abuse is credible.

**FIREARM OWNERS IDENTIFICATION CARD ACT – HOME RULE AUTHORITY**

*A home rule unit's regulation of assault weapons is not invalid under a home rule preemption if it is an amendment of an ordinance or regulation that was enacted within a statutory time frame and complies with other statutory requirements.*

In *Easterday v. Village of Deerfield*, 2020 IL App (2d) 190879, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that an ordinance adopted by the defendant banning the ownership or possession of assault weapons or large capacity magazines violated provisions of the Firearm Owners Identification Card Act regarding home rule preemption. Subsection (c) of Section 13.1 of the Firearm Owners Identification Card Act (430 ILCS 65/13.1(c) (West 2018)) provides that ordinances or regulations that regulate the ownership or possession of assault weapons or large capacity magazines in a manner inconsistent with the Act are invalid "unless the ordinance or regulation is enacted on, before, or within 10 days after" the provision's effective date of July 9, 2013. The plaintiff argued that because the defendant's regulation banning the ownership or possession of assault weapons or large capacity magazines occurred outside of the Act's excepted time frame the ban was invalid. The defendant argued that the regulation banning the ownership or possession of assault weapons or large capacity magazines was valid because it amended an ordinance that was enacted within the exception period. The court agreed with the defendant, holding that a home rule unit's regulation that is inconsistent with Section 13.1 is valid if it amends a provision enacted on, before, or within 10 days after July 9, 2013. The court reasoned that because the original ordinance was enacted within the required period of time, the home rule unit's power to regulate assault weapons under that provision was preserved and therefore the regulation was valid so long as it complied with other statutory requirements. A dissent argued, among other things, that because the 2013 ordinance did not regulate ownership of assault weapons, the addition of the ban on the ownership of assault weapons "indicates an attempt to write new legislation, not to amend an ordinance that did not regulate ownership." On November 18, 2021, an equally divided Illinois Supreme Court affirmed the decision. The opinion, *Easterday v. Village of Deerfield*, 2021 IL 126840, read, "In this case, one Justice of this court has recused himself, and the remaining members of the court are divided so that it is not possible to secure the constitutionally required concurrence of four judges for a decision (see ILL. CONST. 1970, art. VI, § 3). Accordingly, the appeal is dismissed. The effect of this dismissal is the same as an affirmance by an equally divided court of the decision under review but is of no precedential value."

**ILLINOIS VEHICLE CODE – MINIMUM FREIGHT TRAIN CREW SIZE**

*The Code's minimum freight train crew size is preempted by the Federal Railroad Administration's order withdrawing a proposed regulation for minimum train crew staffing.*

In *Indiana Rail Road Company v. Illinois Commerce Commission*, 491 F. Supp. 3d 344 (2020), the United States District Court of the Northern District of Illinois was asked to decide whether the Federal Railroad Administration's withdrawal of its proposed rule providing for minimum crew sizes for trains was an order and therefore preempted relevant crew size provisions of the Illinois Vehicle Code. Subsection (d) of Section 18c-7402 (625 ILCS 5/18c-7402(d) (West 2020)) provides, "No rail carrier shall operate or cause to operate a train or light engine used in connection with the movement of freight unless it has an operating crew consisting of at least 2 individuals." Section 20106(a)(2) of the Federal Railroad Safety Act (49 U.S.C. § 20106(a)(2)) provides that a State may "adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." The plaintiff argued that subsection (d) of Section 18c-7402 of the Code was preempted by the Federal Railroad Administration's order withdrawing a proposed regulation specifying a minimum crew size for trains. The withdrawal order provided that no regulation of train crew staffing was necessary or appropriate at that time and that the withdrawal was intended to preempt all state laws attempting to regulate train crew staffing in any manner." The defendant argued that the Federal Railroad Administration's order was not a preemption of subsection (d) of Section 18c-7402 of the Code and, even if the order is a preemption, the order was not valid. The court agreed with the plaintiff, holding that the Federal Railroad Administration's withdrawal of its proposed regulations on train crew staffing was an order under Section 20106(a)(2) of the Federal Railroad Safety Act, and it preempted the crew size provision of the Code. Citing case law, the court reasoned that in determining whether a final administrative agency decision can be considered an order, the important consideration is whether the agency considered a subject matter and made a decision regarding it. The court reasoned that because the Federal Railroad Administration issued a notice of proposed regulations, received public comment, and issued a withdrawal order deciding not to dictate a minimum crew size, the agency had considered the subject matter of the issue and made a final decision not to promulgate regulations so as to establish an order for proposes of preempting the crew size provision of the Code.

With regard to whether the order was valid, the court held that it did not have the jurisdiction to make a determination of the validity of the order because the federal Courts of Appeal have exclusive jurisdiction to make that determination. The court noted that "if the Ninth Circuit later holds that the [order] is invalid, then the Illinois Commerce Commission may move to vacate the judgment." On February 23, 2021, the Ninth Circuit

Court of Appeals held that the Federal Railroad Administration's order was not valid and did not preempt individual State's safety rules. *Transportation Division of the International Association of Sheet Metal, Air, Rail, & Transportation Workers v. Federal Railroad Administration*, 988 F.3d 1170 (9th Cir. 2021).

## ATTORNEYS FEES IN WAGE ACTIONS ACT – DISABILITY BENEFITS & DEMAND LETTER TIMING

*The Act encompasses benefits earned under the Public Employee Disability Act; wages are found due and owing is at the time of trial.*

In *Selmani v. Village of Bartlett*, 515 F. Supp. 3d 882 (2021), the United States District Court for the Northern District of Illinois was asked to decide whether a motion to dismiss should be granted with respect to a count of the plaintiff's complaint seeking attorney's fees under the Attorneys Fees in Wage Actions Act. Section 1 of the Attorneys Fees in Wage Actions Act (705 ILCS 225/1) provides that "[w]henever a mechanic, artisan, miner, laborer, servant or employee brings an action for wages earned and due and owing according to the terms of the employment, and establishes by the decision of the court or jury that the amount for which he or she has brought the action is justly due and owing, and that a demand was made in writing at least 3 days before the action was brought, for a sum not exceeding the amount so found due and owing, then the court shall allow to the plaintiff a reasonable attorney fee of not less than $10, in addition to the amount found due and owing for wages, to be taxed as costs of the action." The plaintiff argued that he was owed $80,639.20 under the Public Employee Disability Act for the period from May 22, 2019 to May 22, 2020. The defendant argued that the plaintiff could not recover attorney's fees in this action because Public Employee Disability Act benefits are statutory disability benefits rather than "wages earned and due and owing" for work under the Attorneys Fees in Wage Actions Act. The defendant further argued that the plaintiff's demand letter, which was sent on March 20, 2020, sought benefits continuing to the then-future date of May 22, 2020; therefore, it was not a demand for wages due and owing at the time of the letter. The court agreed with the plaintiff, however, allowing the action to proceed. In doing so, the court followed several previous cases, holding that benefits under the Public Employee Disability Act are wages under the Attorneys Fees in Wage Actions Act. The court further held that "the time when wages must be found 'due and owing' is at trial, not at the time the demand letter is sent." In reaching that conclusion, the court noted that the phrase "due and owing" is modified in the statute by the phrase "by the decision of the court or jury."

**JUVENILE COURT ACT OF 1987 – CONFLICT OF INTEREST**

*An attorney who has represented a child as a guardian ad litem in a child neglect proceeding does not operate under a per se conflict of interest when he or she subsequently represents the child's parent during a later Juvenile Court Act proceeding.*

In *In re Br. M.*, 2021 IL 125969, the Illinois Supreme Court was asked to decide whether the appellate court erred in reversing the trial court's decision to terminate the respondent's parental rights on the grounds that her private attorney had a per se conflict of interest because the attorney was previously appointed as guardian ad litem for one of the respondent's children. Subsection (1) of Section 1-5 of the Juvenile Court Act of 1987 (705 ILCS 405/1-5(1) (West 2016)) provides that "[t]he minor who is the subject of the [Juvenile Court Act] proceeding and his parents . . . have the right to be present, to be heard, to present evidence material to the proceedings, to cross examine witnesses, to examine pertinent court files and records and also . . . the right to be represented by counsel." The Sixth Amendment of the United States Constitution (U.S. CONST. amend. VI) provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense." Illinois precedent holds that the Sixth Amendment also "implies the right to effective assistance," which consists of assistance by an attorney "whose allegiance . . . is not diluted by conflicting interests or inconsistent obligations." The State argued that none of the three situations constituting per se conflicts of interests existed in this case, namely: (1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; or (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant. The respondent argued that there was a per se conflict of interest under the first scenario offered by the State because the children in the neglect petition were victims according to the official definition of the word in Black's Law Dictionary and that the respondent's attorney did have a prior association with them as their guardian ad litem. The respondent also argued that her attorney's cooperation with the State in the dispositional hearing on the neglect petition amounted to assistance to the prosecution. The court agreed with the State, holding that a per se conflict of interest did not exist. The court reasoned that on the neglect petition, the minor child was not a "victim" but instead a "subject of the proceeding," and therefore the respondent's attorney could not have had an association with a "victim" under the first scenario giving rise to a per se conflict of interest. The court also held that in the neglect petition hearings, the attorney was not assisting the State, but instead, acting as a guardian ad litem representing the best interests of the child and providing recommendations to the court, and as such, she was acting as an "arm of the court."

The dissenting opinion argued that the circumstances of the case did give rise to a per se conflict of interest. Specifically, the dissent argued that the majority's application of

the criminal per se conflict doctrine to the civil parental termination proceedings of this case was "illogical and improper." Instead, in the opinion of the dissent, a more proper measure would be to consider whether the "respondent's counsel, without the knowledgeable assent of respondent, might have been restrained in fully representing [the] respondent's interests due to counsel's prior commitment as [guardian ad litem]." Using such an analysis, the dissent concluded that a per se conflict of interest did exist in this case.

## CRIMINAL CODE OF 2012 – SEXUAL EXPLOITATION VIA VIRTUAL PRESENCE

*"Virtual presence," for the purpose of establishing the offense of sexual exploitation of a child, does not include sending sexually explicit pictures to a minor through Snapchat.*

In *People v. White*, 2021 IL App (4th) 200354, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that the defendant was guilty of sexual exploitation of a child after the defendant sent the minor pictures of the defendant's breasts through Snapchat, which is an app that allows a user to send pictures that will disappear from the recipient's electronic device upon exiting the app. Paragraph (2) of subsection (a) of Section 11-9.1 of the Criminal Code of 2012 (720 ILCS 5/11-9.1(a)(2) (West 2018)) provides that a person commits sexual exploitation of a child if the person exposes himself or herself for the purpose of sexual arousal or gratification in the presence or "virtual presence" of the child. The State argued that the requirements of the statute were satisfied through the defendant's use of Snapchat. The defendant argued that the facts did not satisfy the statutory element of committing her actions in the "virtual presence" of the minor in question. The court agreed with the defendant, and determined that the use of Snapchat to send pictures did not amount to "virtual presence" because the statute refers to the creation of an environment through the use of a webcam and video when defining the term, rather than photographs. The court reasoned that webcams and video may create a "you-could-be-there 'environment'" or "presence," but a picture would not create this same effect. According to the court, "Snapchat did not create the illusory environment of presence that the legislature had in mind by its use of the term 'virtual presence'." The court stated that the use of Snapchat would be analogous to handing a person a photograph, which would be unlikely to cause the person to feel as though she or he were present in the environment displayed in the photograph. The concurring opinion further noted that the "obvious intent of the statute is to prohibit the communication to minors of live images, either in person or through video, of either sex acts, or exposure of body parts with the intent to arouse," which a digital photograph fails to establish.

**CRIMINAL CODE OF 2012 – DOMESTIC BATTERY**

*A conviction for domestic battery requires the State to prove that physical contact was insulting or provoking to the victim.*

In *People v. Ward*, 2021 IL App (2d) 190243, the Illinois Appellate Court was asked to decide whether the trial court erred when it denied the defendant's motion for a directed verdict prior to his conviction for domestic battery. Subsection (a) of Section 12-3.2 of the Criminal Code of 2012 (720 ILCS 5/12-3.2(a) (West 2018)) provides that a person commits domestic battery if "he or she knowingly without legal justification by any means: (1) causes bodily harm to any family or household member; [or] (2) makes physical contact of an insulting or provoking nature with any family or household member." In this case, the defendant was accused of pushing his wife when she attempted to intervene during an altercation between the defendant and police. The defendant's wife was not physically injured, and she testified that she was not insulted or provoked. The defendant argued that the State presented no evidence that the victim was actually insulted or provoked. The State argued that the insulting nature of the defendant's conduct could be inferred from the factual context surrounding the encounter and from the testimony of witnesses, including the police officers who arrested the defendant and an impartial third party observer. The court agreed with the defendant and reversed his conviction. The court reasoned that it is well established that a conviction for domestic battery requires the State to prove that the defendant's physical contact "was insulting or provoking to the victim, not to some third party." The court further found that, although domestic battery can be proven by circumstantial evidence if the victim refuses to cooperate, in this case, the State failed to present sufficient evidence suggesting that the victim was provoked or insulted.

The dissent reasoned that victims of domestic violence "often feel a sense of loyalty to their abusers" and "may protect the abusive family member by denying, minimizing, or recanting their earlier reports of domestic violence." As a result, those denials "go to the weight and credibility that the trier of fact wishes to give the State's otherwise sufficient evidence." Furthermore, the dissent reasoned, if the General Assembly had intended the domestic violence statute to be read as the majority suggests, it "would have provided not that the contact be of an insulting or provoking 'nature,' but only that the contact insult or provoke the victim."

**CRIMINAL CODE OF 2012 – ELDER ABUSE OR NEGLECT – GOOD-FAITH EXEMPTION**

*The defense bears the burden to raise and prove that the defendant satisfies the good-faith exemption to the crime of elder abuse or neglect.*

In *People v. Bruemmer*, 2021 IL App (4th) 190877, the Illinois Appellate Court was asked to decide whether the defendant's trial counsel provided ineffective assistance for failing to request the court to include instructions to the jury concerning a statutory exemption to the offense of criminal abuse or neglect of an elderly person. Paragraph (2) of subsection (c) of Section 12-4.4a of the Criminal Code of 2012 (720 ILCS 5/12-4.4a(c)(2) (West 2016)) provides that "nothing in this [statute] imposes criminal liability on a caregiver who made a good-faith effort to provide for the health and personal care of an elderly person . . . but through no fault of his or her own was unable to provide such care." The defendant argued that although her defense counsel provided evidence to the jury that defendant intended to provide good care to her elderly father but simply did not have the necessary knowledge, experience, or resources to provide him with adequate health care, the failure of the defense to request that the jury be instructed on the statutory good-faith exemption may have resulted in her conviction. The defendant also argued that the State bears the burden to prove that the defendant is not exempt from criminal liability pursuant to the statutory exemption. The State argued that although the defense counsel presented evidence to the trial court that may have proved to the jury that the plaintiff acted in good faith in providing care to her father, the State did not bear the burden of proving that the statutory exemption did not apply to the defendant. The court agreed with the State, holding that the defense that "bears the burden of raising and then proving the statutory exemption . . . ." Assuming that the General Assembly "knows the common law and only changes it by express declaration" and referencing court decisions dating back to the 19th century, the court held that it is the defense who bears the burden of proof for a statutory exemption absent the express declaration by the General Assembly. The court concluded that the failure of the defense counsel to request that the good-faith exemption be included in the jury instructions constituted ineffective assistance of counsel.

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

*A gun hidden inside a glove in the rear seat of a minivan did not constitute unlawful possession of a weapon by a felon when the defendant was not the owner or sole occupant of the minivan, did not own the gun, and could not reach the gun from the driver's seat.*

In *People v. Wise*, 2021 IL 125392, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred when it held that the defendant was not guilty of the offense of unlawful possession of a weapon by a felon, under subsection (a) of Section 24-1.1 of the Criminal Code of 2012 (720 ILCS 5/24-1.1(a) (West 2014)), after the minivan the defendant was driving was found to contain a gun hidden in a glove in the rear seat. Section 24-1.1(a) prohibits a person convicted of a felony from knowingly possessing a firearm or ammunition "on or about his person." The State argued that Section 24-1.1(a) should be interpreted in light of the Sections prohibiting unlawful use of weapons and aggravated unlawful use of weapons. The defendant argued that the State had not proved beyond a reasonable doubt that the gun was "on or about" his person. The court agreed with the defendant, holding that the State had not proven the gun was "on or about" his person and was not constructively possessed. The court reasoned that to prove constructive possession, the State had to show that the defendant knew the firearm was in the rear seat of the minivan and could have had "immediate and exclusive control" of this area. The court reasoned that whether the defendant knew about the presence of the gun or could exercise control was unclear because it was hidden in a glove in the rear seat of the minivan as the defendant drove, the defendant testified that he was unaware the gun was in the vehicle, the defendant could not reach the gun, the gun did not contain the defendant's fingerprints, the gun could have been accessed by the other passengers in the minivan or others who had access to the minivan, and the defendant did not own the gun or the minivan, among other factors. The dissent argued that "proximity to the weapon" should be only a factor in constructive possession, rather than treated as an element of the offense, and further argued that the State had proved the defendant guilty beyond a reasonable doubt. In support, the dissent reasoned that the defendant admitted to the arresting officer that he was aware the gun was in the minivan, had driven the minivan for several days, and had been sitting near the gun for approximately 20 minutes as another passenger drove.

**CRIMINAL CODE OF 2012 – UNLAWFUL POSSESSION OF A FIREARM BY A STREET GANG MEMBER**

*A dissenting opinion argues that statute prohibiting the possession of a firearm by a street gang member impermissibly enhances penalties for gun possession based solely on the possessor's association with a group.*

In *People v. Villareal*, 2021 IL App (1st) 181817, the Illinois Appellate Court, on appeal from the dismissal of the defendant's petition for post-conviction relief, was asked to decide whether a statute that criminalizes unlawful possession of a firearm by a street gang member violates the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution (U.S. CONST. amend. VIII). Subsection (a) of Section 24-1.8 of the Criminal Code of 2012 (720 ILCS 5/24-1.8 (West 2014)) provides that "a person commits unlawful possession of a firearm by a street gang member when he or she knowingly (1) possesses, carries, or conceals on or about his or her person a firearm and firearm ammunition while on any street, road, alley, gangway, sidewalk, or any other lands, except when inside his or her own abode or inside his or her fixed place of business, and has not been issued a currently valid Firearm Owner's Identification Card and is a member of a street gang; or (2) possesses or carries in any vehicle a firearm and firearm ammunition which are both immediately accessible at the time of the offense while on any street, road, alley, or any other lands, except when inside his or her own abode or garage, and has not been issued a currently valid Firearm Owner's Identification Card and is a member of a street gang." The defendant argued that Section 24-1.8 is facially unconstitutional because it enhances a criminal penalty based on the defendant's status as a street gang member. In support of his argument, the defendant pointed to *Robinson v. California*, 370 U.S. 660, a United States Supreme Court case invalidating a California statute that criminalized the status of narcotic addiction. The Illinois Appellate Court distinguished the case at hand from *Robinson,* however, finding that the Section 24-1.8 of the Criminal Code of 2012 is not unconstitutional because it punishes the voluntary conduct of weapon possession, rather than the defendant's status as a gang member. The court also reasoned that "[the State] must prove substantially more than mere gang member status; it must prove specific criminal offenses directly related to or in furtherance of the gang's objectives and, therefore, an explicit nexus is required between illegal firearm possession and gang-related activity."

In a dissenting opinion, one justice argued that the statute is facially unconstitutional because its purpose "is to enhance the penalties for gun possession based solely on the possessor's association with others whose activities make the group meet the statutory definition of a street gang." The justice was not persuaded by the court decision that the majority relied on and instead was persuaded by courts in other states that have found laws unconstitutional for gang membership. The dissent reasoned that, because no elements of the statute require a nexus between criminal acts that qualify the group for

street gang status and the individual's possession of the firearm, the enhancement punishes a person based solely on his or her association with a group. The Illinois Supreme Court granted a petition for leave to appeal on September 29, 2021.

## CRIMINAL CODE OF 2012 – OBSTRUCTING JUSTICE

*A conviction for obstruction of justice requires the State to prove beyond a reasonable doubt that the false information provided by the defendant materially impeded the administration of justice.*

In *People v. Casler*, 2020 IL 125117, the Illinois Supreme Court was asked to decide whether the appellate court erred when it affirmed the defendant's conviction for obstructing justice by furnishing false information. Subsection (a) of Section 31-4 of the Criminal Code of 2012 (720 ILCS 5/31-4(a)(1) (West 2014)) provides that a person obstructs justice "when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he or she knowingly commits any of the following acts: (1) destroys, alters, conceals, or disguises evidence, plants false evidence, or furnishes false information . . ." The State argued that the statute does not require that the false information furnished materially impede the investigation, only that an individual provided false information to the authorities. The defendant argued that, to obstruct justice by furnishing false information, the authorities must have relied on the information to carry out the investigation. The court agreed with the defendant, holding that a person obstructs justice when he or she knowingly provides or supplies false information that is necessary or useful to prevent the apprehension or obstruct the prosecution or defense of any person. The false information must constitute a material impediment to the administration of justice. The court reversed the defendant's conviction and remanded the case to the lower courts for further proceedings. In reaching its conclusion, the court looked to several dictionary definitions of the word "furnish." It also extended its reasoning in *People v. Comage*, 241 Ill.2d 139, to this case. In *Comage*, the court reasoned that ". . . in enacting Section 31-4, the [General Assembly] intended to criminalize behavior that actually interferes with the administration of justice, i.e., conduct that 'obstructs prosecution or defense of any person.'" The court noted that the General Assembly had ten years to amend Section 31-4 in light of the *Comage* decision, but did not.

In dissenting opinions, two justices argued against the majority decision. Justice Kilbride argued that the holding in *Comage* was a narrow interpretation of the statute as relating to concealing evidence, not of furnishing false information. He stated that none of the justifications or concerns the court relied on in *Comage* support extending the requirement for material impediment to furnishing false information. Justice Karmeier argued that the plain and unambiguous language of the statute does not support the "judicial

grafting of an additional element – material impediment – onto that statute" and agreed that the holding of *Comage* was a narrow interpretation that should not be extended in this case.

## ILLINOIS CONTROLLED SUBSTANCES ACT – IMMUNITY FROM PROSECUTION

*A person seeking limited immunity from prosecution for seeking medical assistance for an overdose has the burden to prove that the person was acting in good faith.*

In *People v. O'Malley*, 2021 IL App (5th) 190127, the Illinois Appellate Court was asked to decide whether the trial court erred when it granted the defendant's motion to dismiss charges for unlawful possession of a controlled substance. Subsection (b) of Section 414 of the Illinois Controlled Substances Act (720 ILCS 570/414(b) (West 2016)) provides that "[a] person who, in good faith, seeks or obtains emergency medical assistance for someone experiencing an overdose shall not be arrested, charged, or prosecuted for a violation of Section 401 or 402 of the Illinois Controlled Substances Act . . . if evidence for the violation was acquired as a result of the person seeking or obtaining emergency medical assistance and providing the amount of substance recovered is within . . ." a specified amount. Further, subsection (e) of that Section narrows the immunity by providing that "[t]he limited immunity . . . shall not be extended if law enforcement has reasonable suspicion or probable cause to detain, arrest, or search the person . . . for criminal activity and the reasonable suspicion or probable cause is based on information obtained prior to or independent of the individual . . . taking action to seek or obtain emergency medical assistance and not obtained as a direct result of the action of seeking or obtaining emergency medical assistance . . . ." The State argued that the trial court erred when it dismissed the charges because the defendant failed to prove to the trial court that she was a person seeking medical assistance for someone experiencing an overdose and that the evidence provided supported the opposite conclusion. The defendant argued the trial court correctly dismissed the charges because the drug evidence found was as a result of emergency medical assistance being obtained for an individual who was experiencing a drug overdose. The court agreed with the State, holding that the burden fell on the defendant to prove that she qualified for the immunity against prosecution and doing so would not have required her to waive her Fifth Amendment rights under the Fifth Amendment of the United States Constitution (U.S. CONST. amend. V). Based on the evidence provided to the trial court, the court found that the defendant did not meet the burden and was not entitled to immunity. The court reasoned the language of Section 414 does not provide immunity to individuals witnessing a drug overdose or being present when medical assistance is sought or obtained, but rather for a good faith effort to seek or obtain emergency medical assistance. However, the court noted that the narrow protections of the statute may deter an individual from seeking or obtaining emergency medical assistance if

there are other individuals at the scene that could potentially be charged and that only the General Assembly has the power to extend the protections of the statute beyond those for reporting and obtaining medical assistance for an overdose victim. The Illinois Supreme Court denied a petition for leave to appeal on September 29, 2021.

## CODE OF CRIMINAL PROCEDURE OF 1963 – JOINDER OF OFFENSES

*Joinder is proper for aggregating the value of the property stolen if a defendant fraudulently claims the right of adverse possession over five separate real estate properties.*

In *People v. Moore*, 2021 IL App (1st) 172811, the Illinois Appellate Court was asked to decide whether the defendant's actions were "in furtherance of a single intention and design," so as to allow joinder of the offenses into one crime for the purpose of aggregating the value of the property stolen, where the defendant took possession of five different properties and fraudulently claimed the right of adverse possession over those properties. Subsection (c) of Section 111-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-4(c) (West 2014)) provides that certain specified offenses involving theft or fraud may be charged as a single offense in a single count if those acts "are in furtherance of a single intention and design." The defendant argued that the State failed to meet its burden of proof as to whether the defendant's actions were part of a single intention and design. He further argued that (i) no evidence of his mental state was introduced and (ii) his various motives (a protest against the banks, a lack of housing, profit) indicated multiple intentions, not a single intention. Although the appellate court ultimately reversed the defendant's conviction and remanded the matter for a new trial because it found that the trial court failed to properly admonish the defendant under Supreme Court Rule 401(a) prior to accepting his waiver of counsel, the court also found that joinder under Section 111-4 of the Code of Criminal Procedure of 1963 was proper in this case. In doing so, the court first looked to the dictionary definitions of the words "intent" and "intention," finding that those terms are synonymous for the purposes of statutory analysis in this case. The court also examined the dictionary definition of the word "design." That definition, when coupled with previous case law, indicates that the phrase "in furtherance of a single intention and design" means "two or more acts undertaken to further (1) a single intent to steal of defraud and (2) employing a single scheme or plan throughout, no matter the number of different victims." The court then found that a jury could have reasonably found that the defendant's conduct met that standard.

## CODE OF CRIMINAL PROCEDURE OF 1963 – GUILTY PLEAS

*Requirements that the trial court admonish criminal defendants of certain possible negative consequences of a guilty plea apply only to guilty pleas entered at arraignment.*

In *People v. Burge*, 2021 IL 125642, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred when it held that the trial court did not abuse its discretion by denying the defendant's motion to withdraw her guilty plea. The defendant's guilty plea was entered after arraignment, and the trial court did not specifically inform the defendant of the possible negative consequences of the guilty plea on her ability to obtain 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 the defendant's guilty plea shall not be accepted "until the court shall have fully explained to the defendant . . . as a consequence of a conviction or a plea of guilty, there may be an impact upon the defendant's ability to . . . retain or obtain employment." The defendant argued that she should be allowed to withdraw her guilty plea because Section 113-4 creates a mandatory requirement for the trial court to admonish the defendant of the particular consequences of her guilty plea any time the defendant pleads guilty, not just at arraignment. In the alternative, she argued that accepting a guilty plea without the proper admonishments resulted in a manifest injustice. The State argued that Section 113-4, when read in its entirety and in context with other Sections of the Code, applies only when the defendant pleads guilty at arraignment. The court agreed with the State, holding that the admonishments under Section 113-4 apply only to guilty pleas entered at arraignment. In doing so, the court examined the plain language of the statute, finding that subsection (a) of Section 113-4 contains general provisions that apply "at arraignment." Subsection (b) of that Section, which concerns silent defendants, makes reference to subsection (a) and applies only to situations that occur at arraignment. In contrast, subsection (e) provides that certain information shall be given to the defendant at arraignment "or at any later court date." Therefore, the court reasoned, if the General Assembly had intended for the other provisions of that Section to have broader application, then it could have easily done so by adding language to that effect. The court further reasoned that the defendant's suggested interpretation of Section 113-4 would render subsection (a) of Section 115-2 of the Code (725 ILCS 5/115-2(a) (West 2016)), which applies to guilty pleas accepted before or during trial, superfluous. As a final note, although the Illinois Appellate Court suggested, in dicta, that the admonishments set forth in Section 113-4 are directory rather than mandatory, the Illinois Supreme Court did not address that issue.

## CODE OF CRIMINAL PROCEDURE OF 1963 – HEARSAY EXCEPTIONS

*Whether a witness who refuses to testify after being served with process is unavailable depends on the facts of the particular case.*

In *People v. Busch*, 2020 IL App (2d) 180229, the Illinois Appellate Court was asked to decide whether the trial court erred when it admitted hearsay statements by an alleged victim of domestic battery, holding that she was unavailable as a witness because she refused to come to court despite being served with process and a court order to do so. As interpreted by the United States Supreme Court decision *Crawford v. Washington*, 541 U.S. 36 (2004), under the Sixth Amendment to the United States Constitution (U.S. CONST. amend. VI), a testimonial statement of a witness absent from trial is never admissible unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination. Paragraph (5) of subsection (c) of Section 115-10.2a of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.2a(c)(5) (West 2016)) provides that unavailability as a witness includes circumstances in which the declarant "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means." The defendant argued that "or other reasonable means" should be interpreted as "and other reasonable means." The State argued that the victim was unavailable as a witness because the State served the victim with process, yet she failed to appear at the hearing. The court agreed with the defendant, holding that whether the service of process alone would be reasonable turns on the individual facts of the case. The court reasoned that in some cases, process alone would be reasonable while in others it would not be. The court observed that service of process alone would be reasonable if the witness affirmatively indicated that she had no interest in attending the trial, but would not be sufficient if the witness has not demonstrated a desire not to attend and other factors existed, such as the inability to attend trial due to transportation issues that could interfere with her ability to be present. The Illinois Supreme Court denied a petition for leave to appeal on May 26, 2021.

## CODE OF CRIMINAL PROCEDURE OF 1963 – PRIOR IDENTIFICATION

*The exception to the hearsay rule for certain statements of identification is not limited to statements made by victims or eyewitnesses.*

In *People v. Neal*, 2020 IL App (2d) 170356, the Illinois Appellate Court was asked to decide whether the trial court erred when it allowed third-party testimony concerning the defendant's stepfather's prior identification of the defendant to be admitted as substantive evidence at trial. Section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12 (West 2016)) provides that a statement "is not rendered inadmissible

by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." The defendant argued that the phrase "after perceiving him" in that Section means "after perceiving him committing the crime." The State argued that the plain language of Section 115-12 does not contain a requirement that the person making the identification be a victim or an eyewitness. The court agreed with the State, holding that Section 115-12 does not limit the universe of persons whose prior identification of the defendant may be admitted as substantive evidence. In doing so, the court reasoned that, if the General Assembly had intended to limit the scope of Section 115-12 to only witnesses and victims, it would have done so in the plain language of the statute. At the same time, the court noted that other legislatures have restricted their evidentiary rules about prior identifications so that those rules apply only to victims or eyewitnesses.

## SEXUALLY DANGEROUS PERSONS ACT – LIABILITY FOR ATTORNEY'S FEES

*The county in which a proceeding under the Act is held is responsible for the cost of both preadjudication and postadjudication representation of an indigent respondent.*

In *People v. Sharp*, 2021 IL App (5th) 190190, the Illinois Appellate Court was asked to decide whether the trial court erred when it entered an order directing the Department of Corrections to pay the costs of representation of a respondent, who had been committed to the Department as a sexually dangerous person, in a proceeding seeking discharge from the commitment order. Section 5 of the Sexually Dangerous Persons Act (725 ILCS 205/5 (West 2018)) provides that the respondent in any proceedings under the Act shall have the right to demand a trial by jury and to be represented by counsel. An Amendment to Section 5, effective July 15, 2013, specifies, "The cost of representation by counsel for an indigent respondent shall be paid by the county in which the proceeding is brought." The Department of Corrections argued that Section 5 is unambiguous and establishes that the General Assembly intended for the county to pay for the cost of representation for an indigent respondent in all proceedings under the Act, regardless of whether they are preadjudication or postadjudication. The trial court, in denying the Department's motion, relied on case law and guardianship statutes to find that the Department, as guardian of the respondent, was responsible for costs incurred during postadjudication proceedings. The Illinois Appellate Court agreed with the Department, reversing the trial court and holding that there is no ambiguity in the plain language of the Act that the county in which the proceeding is held is responsible for the costs of representation of an indigent respondent. The court reasoned that when the General Assembly amended Section 5 of the Sexually Dangerous Persons Act, it did not make any

corresponding changes to the Probate Act of 1975 to add an exception for the Department of Corrections when serving as a guardian of a sexually dangerous person. The court further noted that the General Assembly has the power to amend the language of the statute so to relieve some of the financial burden for postadjudicatory proceedings that the language of the Act creates for small or rural counties and balance the cost of representation for indigent respondents, especially when the indigent respondent continues to be denied release, despite filing multiple petitions for release under the Act.

## SEXUALLY DANGEROUS PERSONS ACT − DUTY OF GUARDIAN

*The Director of Corrections must provide financial assistance for the care and treatment of conditionally released sexually dangerous persons until they have recovered.*

In *People v. Kastman*, 2021 IL App (2d) 210158, the Illinois Appellate Court was asked to decide if the trial court erred when it granted the defendant's injunction compelling the Director of Corrections to pay for the defendant's sex offender treatment and housing after his conditional release. Section 8 of the Sexually Dangerous Persons Act (725 ILCS 205/8 (West 2018)) provides that "[the Director] as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery." The defendant argued that he was unemployed, disabled, and unable to afford his rent and treatment costs. The Director argued that his statutory duty to provide care and treatment for sexually dangerous persons as their guardian under Section 8 extends only to individuals committed to custody in an institutional setting, not those on conditional release. The Director also argued that there is no provision in the Act requiring him to provide financial assistance for conditionally released sexually dangerous persons. The court disagreed with the Director. The court reasoned that, although the appellee was conditionally released, the trial court did not find that he was "recovered" from his mental disability, therefore the defendant and the Director had not been discharged from the guardianship relationship. Also, the appellate court has held repeatedly that the Director as legal guardian must pay for a sexually dangerous person's necessary expenses, including attorney's fees, and the court reasoned that the fact that the General Assembly had not amended the Act to prohibit payments for necessary expenses was an indication that the court's interpretation of the statute was consistent with the legislature's intent. The appellate court therefore upheld the court order compelling the Director to pay for the defendant's treatment and housing expenses.

**UNIFIED CODE OF CORRECTIONS – MANDATORY SUPERVISED RELEASE**

*A condition of mandatory supervised release that prohibits a convicted sex offender from residing with another convicted sex offender is unconstitutional.*

In *Barnes v. Jeffreys*, 529 F. Supp. 3d 784 (2021), the United States District Court for the Northern District of Illinois was asked to decide whether statutory mandatory supervised release conditions that prohibit a person convicted of a sex offense from residing at the same address or in the same condominium or apartment complex as another person who has been convicted of a sex offense violate the plaintiffs' rights under the Eighth Amendment of the United States Constitution and the equal protection clause of the Fourteenth Amendment of the United States Constitution (U.S. CONST. amend. VIII; U.S. CONST. amend. XIV). Paragraph (7.6) of subsection (a) of Section 3-3-7 of the Unified Code of Corrections (730 ILCS 5/3-3-7(a)(7.6) (West 2018)) provides that the "conditions of every parole and mandatory supervised release are that the subject if convicted of a sex offense . . . , refrain from residing at the same address or in the same condominium unit or apartment unit or in the same condominium complex or apartment complex with another person he or she knows or reasonably should know is a convicted sex offender or has been placed on supervision for a sex offense . . . ." The plaintiffs argued that the conditions imposed under paragraph (7.6) were "virtually insurmountable" for indigent persons who cannot afford compliant housing and, therefore, were a violation of their rights against cruel and unusual punishment under the Eighth Amendment of the United States Constitution and their rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution. With regard to the plaintiffs' Eighth Amendment argument, the defendant argued that the restrictions did not criminalize involuntary conduct or status as indigent because there was no criminal charge based on the plaintiffs' status as homeless. With regard to the plaintiffs' equal protection argument, the defendant argued that the prohibition "does not implicate the equal protection clause because it does not obligate [p]laintiffs to pay a fee directly to the state." The court agreed with the plaintiffs, holding that, as applied, the condition "operates to keep indigent and homeless sex offenders incarcerated beyond their term of imprisonment and is unconstitutional under the Eighth Amendment." The court further held that the restrictions violate the equal protection clause because they create "an illegal classification based on wealth which deprives [p]laintiffs of their liberty as a result of their inability to pay." The court reasoned that only sex offenders "with access to funds to pay for their own accommodations at an approved location will be free from incarceration."

**UNIFIED CODE OF CORRECTIONS – MANDATORY SUPERVISED RELEASE CONDITIONS**

*A mandatory supervised release condition that imposes an absolute ban against the use of social media by a convicted sex offender is overbroad and facially unconstitutional.*

In *People v. Galley*, 2021 IL App (4th) 180142, the Illinois Appellate Court was asked to decide whether the circuit court's imposition of a statutory condition of mandatory supervised release that prohibits a defendant who has been convicted of a sex offense from accessing or using a social networking website is a violation of the defendant's rights under the First Amendment of the United States Constitution (U.S. CONST. amend. I). Paragraph (7.12) of subsection (a) of Section 3-3-7 of the Unified Code of Corrections (730 ILCS 5/3-3-7(a)(7.12) (West 2018)) provides that one condition of parole and mandatory supervised release for a person convicted of a sex offense is that the person "refrain from accessing or using a social networking website." The defendant argued that paragraph (7.12) violated his rights under the First Amendment in light of the Illinois Supreme Court's decision in *People v. Morger*, 2019 IL 123643, which held that a similar prohibition with regard to persons on probation who were convicted of a sex offense was overbroad and facially unconstitutional under the First Amendment. The State argued that *Morger* only concerned probation and not mandatory supervised release, and that the court in *Morger* limited its holding to the specific provision before the court. The court agreed with the defendant, holding that the prohibition violated the defendant's right to free speech under the First Amendment. After analyzing the differences and similarities between mandatory supervised release and probation, the court reasoned that the Illinois Supreme Court's reasoning in *Morger* applied because "probationers and persons on [mandatory supervised release] share the same status for purposes of this particular First Amendment issue." The court noted that "persons on [mandatory supervised release] may still be subject to more specific limitations placed on their Internet access or use . . . all of which would serve a legitimate public interest without violating a person's First Amendment rights." A dissenting opinion argued that the case should have been dismissed for not being justiciable because the defendant's expected release date is in 2046 and the prohibition was not a current condition.

**MURDERER AND VIOLENT OFFENDER AGAINST YOUTH REGISTRATION ACT – MERGED OFFENSES**

*A finding of guilt for a merged lesser offense that would otherwise require registration under the Act is not a conviction requiring registration.*

In *People v. Profit*, 2021 IL App (1st) 170744, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that the defendant was required to register under the Murderer and Violent Offender Against Youth Registration Act after the defendant was convicted for armed robbery and found guilty of unlawful restraint, which was merged into the charge of attempted robbery. Subsection (a) of Section 5 of the Act (730 ILCS 154/5(a) (West 2018)) provides that a "violent offender against youth means any person who is charged pursuant to Illinois law" with certain enumerated offenses or the attempt to commit certain enumerated offenses "and is convicted of such offense or an attempt to commit such offense." The State argued that the defendant is required to register under the Act because the defendant was found guilty of unlawful restraint and that it was merged into the charge of attempted robbery. The defendant argued that he is not required to register under the Act because although he was found guilty of unlawful restraint, he was only convicted of and sentenced for attempted robbery, which is not an enumerated offense under the Act. The court agreed with the defendant, holding that the defendant was not convicted of unlawful restraint and was therefore not required to register under the Act. The court reasoned that, although the Act does not define the term "convicted," the definition of "conviction" in the Unified Code of Corrections (730 ILCS 5/5-1-5 (West 2018)) is "a judgment of conviction or sentence entered . . . upon a verdict or finding of guilty of an offense, rendered . . . by a court of competent jurisdiction authorized to try the case without a jury." Using this definition, the court reasoned that a finding of guilt without a judgment of conviction or sentence is not a conviction for purposes of the Act's registration requirement. The court noted that "[w]hile the legislature may have intended that a defendant who was found guilty of a violent offense against youth should be required to register even if that defendant was not ultimately sentenced on the otherwise qualifying charge, we cannot speculate as to legislative intent."

**CODE OF CIVIL PROCEDURE – CERTIFICATE OF INNOCENCE**

*A person who pleads guilty is ineligible for a certificate of innocence with respect to that offense.*

In *People v. Washington*, 2020 IL App (1st) 163024, in petition for a certificate of innocence proceeding, the Illinois Appellate Court was asked to decide whether the trial court properly held that the petitioner failed to prove by a preponderance of the evidence

that his guilty plea did not cause or bring about his conviction. After the petitioner had completed his prison sentence, the State vacated the petitioner's conviction and declined to prosecute the petitioner at a new trial and did not participate in the petition for a certificate of innocence proceeding. Section 2-702 of the Code of Civil Procedure (735 ILCS 5/2-702 (West 2016)) provides that a person who was wrongly convicted and imprisoned for one or more felonies may request and receive a certificate of innocence if, among other conditions, the court finds by a preponderance of evidence that the person "did not by his or her own conduct voluntarily cause or bring about his or her conviction." The petitioner argued that he plead guilty to crimes he did not commit because he believed that he was likely to be found guilty and reasoned that he may receive a lesser term of imprisonment by pleading guilty. The court agreed with the trial court, holding that by a plain language interpretation of the statute, a person who pleads guilty does in fact voluntarily bring about or cause his or her own conviction. A dissenting justice argued that the petitioner did prove by a preponderance of the evidence that he did not voluntarily cause his conviction. Contrary to the majority's opinion that the very act of pleading guilty is the cause of a conviction, the dissenting opinion noted that "it is well accepted that the decision to plead guilty may be based on factors that have nothing to do with [a] defendant's guilt." The dissent argued that one such factor in a plea of guilty is the hope for a lesser punishment if a defendant is convinced that he or she will be convicted at trial. The dissent noted that the stated intent of the General Assembly in enacting the legislation was to provide relief for persons unjustly convicted and imprisoned. The dissent also argued that neither the legislative history nor the statutory language provide that a plea of guilty shall automatically bar a petitioner from proving that the petitioner did not voluntarily cause or bring about a conviction. In conclusion, the dissent stated that "because the record shows that [the petitioner] committed no culpable conduct and never misled the police nor the Assistance State's Attorney, he has shown by a preponderance of the evidence that he did not cause or bring about his arrest or conviction."

**CODE OF CIVIL PROCEDURE – CERTIFICATE OF INNOCENCE**

*In an uncontested proceeding for the issuance of a certificate of innocence, the court may not rely on prior sworn testimony at the underlying criminal trial unless offered or placed in evidence.*

In *People v. Hood*, 2021 IL App (1st) 162964, the Illinois Appellate Court was asked to decide whether the circuit court erred when it denied the petitioner's petition for a certificate of innocence, finding that the defendant did not meet his burden of proof. That petition was uncontested. Paragraph (3) of subsection (g) of Section 2-702 of the Code of Civil Procedure (735 ILCS 5/2-702(g)(3) (West 2016)) provides that "[in] order to obtain a certificate of innocence the petitioner must prove by a preponderance of evidence that

the petitioner is innocent of the offenses charged in the indictment or information or his or her acts or omissions charged in the indictment or information did not constitute a felony or misdemeanor against the State." Subsection (f) of Section 2-702 of the Code of Civil Procedure (735 ILCS 5/2-702(f) (West 2016)) provides that "[in] any hearing seeking a certificate of innocence, the court may take judicial notice of prior sworn testimony or evidence admitted in the criminal proceedings related to the convictions which resulted in the alleged wrongful incarceration, if the petitioner was either represented by counsel at such prior proceedings or the right to counsel was knowingly waived." The petitioner argued that the circuit court required the petitioner to "satisfy a standard of innocence that is dramatically higher than what is required to obtain a certificate of innocence" because the use of the word "innocent" requires "only that a petitioner establish by a preponderance of the evidence" that the plaintiff did not commit the crime, and that the circuit court erred when relying on prior sworn testimony at the plaintiff's "underlying criminal trial in reaching its decision because that testimony was not offered or placed in evidence." The circuit court determined that the plaintiff failed to establish the plaintiff's innocence of the offenses charged. The appellate court agreed with the petitioner, holding that the petitioner's petition "met the pleading requirements to state a claim for the issuance of a certificate of innocence." The court noted that while Section 2-702 proceedings are "adversarial in nature," the statute "does not contain well-defined procedural instructions on how to proceed in a case where the State, although it intervenes, does not object to the proceedings and does not present any evidence to rebut a petitioner's claim for a certificate of innocence." The court reasoned that "the Act requires the petitioner to prove by a preponderance of the evidence that he or she did not commit the charged offense or offenses", and that where there is not an adverse party, "the circuit court, as trier of fact, does not assume the additional role of advocate and Section 2-702(f) does not grant the court authority to independently research the record and history of the original criminal proceedings to inform and influence its judgment in the certificate of innocence proceeding." The court concluded that when a petition for a certificate of innocence is not contested, a petitioner need only establish a prima facie case for relief.

**CODE OF CIVIL PROCEDURE – CERTIFICATE OF INNOCENCE**

*A petition for a certificate of innocence is not authorized for an improper conviction if the petitioner was also incarcerated for a proper conviction.*

In *People v. Moore*, 2020 IL App (1st) 190435, the Illinois Appellate Court was asked to decide whether the trial court erred when it granted a certificate of innocence for one offense when the plaintiff was also properly convicted of three other offenses. Paragraph (3) of subsection (g) of Section 2-702 of the Code of Civil Procedure (735 ILCS 5/2-702(g)(3) (West 2018)) provides that "In order to obtain a certificate of innocence the

petitioner must prove by a preponderance of evidence that the petitioner is innocent of the offenses charged in the indictment or information or his or her acts or omissions charged in the indictment or information did not constitute a felony or misdemeanor against the State." Subsection (h) of Section 2-702 of the Code (735 ILCS 5/2-702(h) (West 2018)) provides that "If the court finds that the petitioner is entitled to a judgment, it shall enter a certificate of innocence finding that the petitioner was innocent of all offenses for which he or she was incarcerated." Subsection (b) of Section 2-702 of the Code (735 ILCS 5/702(b) (West 2018)) provides that "Any person convicted and subsequently imprisoned for one or more felonies by the State of Illinois which he or she did not commit may . . . request a certificate of innocence finding that the petitioner was innocent of all offenses for which he or she was incarcerated." A person who is issued a certificate of innocence is eligible to make a monetary claim for unjust imprisonment under the Court of Claims Act (705 ILCS 505/8). The petitioner argued that because the offense of armed habitual criminal had been vacated, he should be issued a certificate of innocence for that offense. The State argued that the armed habitual criminal statute was not declared unconstitutional and that the indictment in the case "was based on multiple statutes." The court agreed with the State, holding that the issuance of a certificate of innocence is not permitted "unless the petitioner is deemed innocent of all charges in the indictment for which the petitioner was convicted." The court reasoned that the "legislature's use of the plural when the use of singular would have been just as easy, cannot be ignored," that a circuit judge has no authority to find a petitioner innocent of some of the offenses that led to the petitioner's imprisonment but not others, and that a petitioner may only request a certificate of innocence that finds the petitioner "innocent of all offenses for which he or she was incarcerated."

## CODE OF CIVIL PROCEDURE – PHYSICIAN-PATIENT PRIVILEGE

*Evidence of a defendant's diagnosis of a sexually transmitted disease is inadmissible in a trial for predatory criminal sexual assault of a child.*

In *People v. Bons*, 2021 IL App (3d) 180464, the Illinois Appellate Court was asked to decide whether the trial court erred when it admitted evidence that the defendant had contracted chlamydia from a victim of predatory criminal sexual assault of a child. Section 8-802 of the Code of Civil Procedure (735 ILCS 5/8-802 (West 2016)) provides, "No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient." Item (4) of Section 8-802 provides an exception to physician-patient privilege "in all actions brought by or against the patient . . . wherein the patient's physical or mental condition is an issue." The State argued that evidence of the defendant's medical condition was admissible because it was relevant in determining

whether the defendant committed the elements of the offense for which he was charged. The defendant argued that evidence of his medical condition was inadmissible because he had not waived the physician-patient privilege, nor had he raised the issue of his medical or mental state. The court agreed with the defendant, holding that the defendant's medical records were inadmissible under the physician-patient privilege. Citing case law, the court reasoned that the physician-patient privilege belongs to the patient and only the patient can waive that privilege by putting his or her medical condition at issue. The court further reasoned that though the defendant's physical or mental condition may be relevant to the case at hand, such conditions were not an element to establish the crime for which he was charged. As such, the defendant's medical condition was not placed at issue in the case for purposes of the exception to the physician-patient privilege, and the trial court erred in admitting such evidence of his medical condition.

The court noted an Illinois Supreme Court opinion observing that the General Assembly's intent in enacting item (4) of Section 8-802 as an exemption to the physician-patient privilege is not clear, and that cases interpreting that Section are inconsistent in applying the privilege. The court further reasoned that a broad application of item (4) of Section 8-802 "allowing disclosure in every case in which a patient's medical condition is relevant would render" the other exceptions of Section 8-802 unnecessary. In concluding that evidence of the defendant's medical condition was inadmissible because of physician-patient privilege, the court also noted that other criminal cases have found item (4) of Section 8-802 as an applicable exception to privilege when the case involves criminal charges in which the defendant's physical or mental state is an element of the offense.

## BIOMETRIC INFORMATION PRIVACY ACT – HEALTH CARE WORKERS

*The definition of "biometric identifiers" does not exclude biometric data collected from health care workers.*

In *Heard v. Becton*, 524 F. Supp. 3d 831 (2021), the United States District Court for the Northern District of Illinois was asked to decide whether a producer of an automated medication dispensing system, used by health care workers in the treatment of patients, falls under a health care exemption of the Biometric Information Privacy Act. Section 10 of the Biometric Information Privacy Act (740 ILCS 14/10 (West 2020)) provides that the definition of "biometric identifiers" does not include "information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996" ("HIPAA"). The defendant argued that since the first clause of this exemption applies to patients and not health care workers, the second clause "must be read to reach information other than that collected from a patient to avoid rendering it superfluous" and argued that the General Assembly intended for the second clause of this exemption to apply

to health care workers. The plaintiff argued that both parts of the exemption should be read to exclude the biometric information of patients and was not intended to exclude health care workers or providers. The plaintiff also argued that since the defendant did not collect or store biometric data for health care treatment under HIPAA, it cannot claim an exemption. The court agreed with the plaintiff, holding that biometric data collected from health care workers is not exempt under the Biometric Information Privacy Act. The court reasoned that if the General Assembly intended to exclude health care workers from the Act, it would have included such language in the list of exclusions contained in Section 25 of the Act (740 ILCS 14/25 (West 2020)), which provides explicit exemptions for financial institutions and government contractors, or could have excluded health care institutions from the Act's definition of "private entity", but chose not to do so. The court also reasoned that because HIPAA protects patient health information, not medical provider information, it would "be odd for the legislature to exclude biometric data that is not even protected under HIPAA." The court further reasoned that "it seemed unlikely that the legislature intended to deprive health care workers of privacy rights "merely because they are using their biometric information for the purpose of patient treatment."

## JOINT TORTFEASOR CONTRIBUTION ACT – UNCOLLECTIBLE OBLIGATIONS

*The obligation of a joint tortfeasor who settles with a claimant is not subject to reallocation among the remaining joint tortfeasors.*

In *Roberts v. Alexandria Transportation, Inc.*, 2021 IL 126249, the Illinois Supreme Court was asked, via certified question, to determine if the obligation of a joint tortfeasor who settles with a claimant is "uncollectible" within the meaning of Section 3 of the Joint Tortfeasor Contribution Act (740 ILCS 100/3 (West 2018)). Section 3 provides that the "pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rate share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro rata liability." Section 2 of the Act (740 ILCS 100/2 (West 2018)) specifies that, while "[n]o tortfeasor is liable to make contribution beyond his own pro rata share of the common liability," under subsection (d), "the tortfeasor who settles with a claimant . . . is discharged from all liability for any contribution to any other tortfeasor." In this case, "E-K", one of three joint tortfeasors, settled for $50,000 and obtained an order under Section 2(d) releasing the E-K from contribution claims. Another joint tortfeasor, "the Alex Parties," settled for $1.85 million and sought contribution from "Safety," a third joint tortfeasor. The trial court found that E-K was 75% at fault, the Alex Parties were 15% at fault, and Safety was 10% at fault,

and ordered Safety to contribute $190,000, or 10% of the total damages paid to the plaintiff. The Alex Parties argued that the court should reallocate the fault without considering E-K, because Section 2(d) renders the obligation of E-K, a settling tortfeasor, uncollectible. The Alex Parties also asserted that the legislative history of Section 3 indicates that the General Assembly intended for the phrase "uncollectible obligation" to include a settling tortfeasor's obligation. The Alex Parties noted that the introduced language for Section 3 originally only required the reallocation of shared liability in situations where a joint tortfeasor could not pay his or her obligation due to insolvency. However, before the language was passed, the General Assembly amended the language to instead use "uncollectible" in place of "insolvent," and the Alex Parties argued that this indicated a legislative intent that a settling tortfeasor, who is insulated from liability under Section 2(d), be included within the meaning of "uncollectible" under Section 3. Accordingly, the Alex Parties concluded that E-K's share of the liability should be subject to reallocation among the remaining joint tortfeasors. Safety argued that E-K's settlement payment of $50,000 contributed to the total common liability owed to plaintiffs and, therefore, E-K's obligation "'was not uncollectible—it was collected.'"

The Illinois Supreme Court disagreed with the Alex Parties' interpretation of the Act, holding that the obligation of a joint tortfeasor who settles with a claimant is not "uncollectible" within the meaning of Section 3 and is therefore not subject to reallocation. The court reasoned that Sections 2(d) and 3 must be read in isolation as they refer to two different topics. The court found that while "Section 2(d) plainly refers to the effect of settlement on the settling tortfeasor and the other joint tortfeasors . . . [Section 3] plainly addresses the separate topic of the nature of a joint tortfeasor's obligation, that is, its collectability." Moreover, the court rejected the defendant's assertion that the "discharge from liability" language under Section 2(d) renders a settling tortfeasor's obligation uncollectible. Instead the court found that the word "[d]ischarge . . . does not necessarily mean uncollectible" but rather "to free from an obligation that burdens [or] to get rid of (as a debt or duty) by paying or performing." Accordingly, the court found that Section 2(d) does not grant settling tortfeasors absolute immunity from contribution claims. The court further noted that the plain language of Section 3 requires the remaining tortfeasors to share "the *unpaid portions* of the uncollectible obligation in accordance with their pro rata liability." Consequently, the court found that "the legislature could not have intended to include a settlement as an "uncollectible" obligation because there is no "unpaid portion" of a settlement." The court also found that a joint tortfeasor's settlement amount is actually collectible for purposes of Section 3 because Section 2(c) of the Act provides that the settlement amount of a joint tortfeasor "reduces the recovery [amount] on any claim against the other joint tortfeasors." The court likewise rejected the defendant's argument that the legislative history of Section 3 indicates that the General Assembly intended for the Act to include the obligation of a settling tortfeasor when reallocating liability among joint tortfeasors. Instead, the court noted that "this court has consistently viewed the statutory references to collectability as referring to insolvency or immunity."

A dissenting opinion argued that a settling tortfeasor's obligation is in fact uncollectible within the meaning of Section 3. The dissent noted that an "obligation is "uncollectible" [when] it is considered "not capable of or suitable for being collected." Invoking the language of Section 2(d), the dissent asserted that that Section provides a settling tortfeasor with "absolute immunity from contribution claims" thereby making "a settling tortfeasor's obligation for contribution to a joint tortfeasor . . . "uncollectible" for purposes of Section 3." The dissent rejected the court's finding that Sections 2(d) and 3 must be read in isolation, noting that it is "a cardinal rule of statutory construction that this court must construe a statute in its entirety and consider the language in light of other relevant provisions." Consequently, the dissent argued that the "most reasonable construction of the plain statutory language is that a settling tortfeasor's obligation or liability to other joint tortfeasor's is "uncollectible" for purposes of Section 3 because the legislature plainly stated that a settling tortfeasor "is discharged from all liability for any contribution to any other tortfeasor" in Section 2(d)."

The dissent also rejected the court's finding that the term "uncollectible" in Section 3 only applies to insolvent tortfeasors. Echoing the defendant's argument, the dissent noted that the General Assembly amended Section 3 by specifically replacing the word "insolvent" with "uncollectible." The dissent opined that "it would be quite a feat for a . . . court to construe a statute to mean only a word or term that the legislature deliberately removed." The dissent therefore "would not limit Section 3 to insolvent tortfeasors when the legislature chose to remove any reference to insolvent tortfeasors in the provision." The dissent furthermore argued that the court's finding that Section 2(d) does not provide absolute immunity to settling tortfeasors from contribution claims has the potential to undermine the Act's overall goal of encouraging settlements. The dissent surmised that the court's decision would likely prompt the General Assembly "to revisit the Contribution Act."

## WHISTLEBLOWER ACT – DEFINITION OF "EMPLOYEE"

*Medicaid payments to private nursing home facilities qualify as receiving partial State funding for purposes of the Act's definition of "employee."*

In *Oommen v. Glen Health and Home Management Inc.*, 2020 IL App (1st) 190854, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that the plaintiff lacked standing to bring a claim under the Whistleblower Act. Section 5 of the Whistleblower Act (740 ILCS 174/5 (West 2014)) provides that an "employee" includes "a licensed physician who practices his or her profession, in whole or in part, at a hospital, nursing home, clinic, or any medical facility that is a health care facility funded, in whole or in part, by the State." The defendant argued that Medicaid payments are payments for services and not State funding for the purpose of establishing employee status

within the meaning of the Act, and cited *Larsen v. Provena Hospitals*, 2015 IL App (4th) 140255, which held that Medicaid payments are mere payments for services and not State "funding" designed to advance a specific project in the public interest. The plaintiff argued that he was an "employee" within the meaning of the Act because Medicaid payments amounted to being funded by the State. The court agreed with the plaintiff, holding that the plaintiff was an employee within the meaning of the Act. The court reasoned that the State of Illinois makes payments on such a large and systemic scale that payments for services can be considered the equivalent of long-term funding. The court further reasoned that Medicaid payments are not only direct exchanges of money for services, but also compensate providers for their general administrative costs, reimburse for the cost of compliance with regulations, and ensure each facility's profitability in the public interest. The court disagreed with the analysis in *Larsen*, which was based on a plain language analysis without the use of legislative history, finding that the phrase "funded, in whole or in part, by the State" is ambiguous and subject to more than one reasonable interpretation. The court reasoned that the legislative history indicated that the General Assembly intended for a private healthcare facility to be included "if that facility accepts even one payment from a State-funded program like Medicaid." A concurring opinion agreed with the court's analysis and noted that the "use of the Oxford comma after "clinic" and applying the well-accepted last antecedent rule further broadens and supports" the court's holding that the legislative intent was to consider physicians in plaintiff's position "employees" for the purposes of the Act.

## LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT – EMERGENCY SERVICES IMMUNITY

*Immunity granted by the Act supersedes partial immunity under the Emergency Telephone System Act.*

In *Schultz v. St. Clair County*, 2020 IL App (5th) 190256, the Illinois Appellate Court was asked to decide whether the circuit court erred in granting the defendants' motion to dismiss based on immunity provided under the Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act"). Section 4-102 of the Tort Immunity Act (745 ILCS 10/4-102 (West 2016)) provides, "Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service." Subsection (a) of Section 15.1 of the Emergency Telephone System Act (50 ILCS 750/15.1(a) (West 2016)) provides, "In no event shall a public agency . . . be liable for any civil damages or criminal liability that directly or indirectly results from, or is caused by, any act or omission in the development, design, installation, operation, maintenance, performance, or provision of 9-1-1 service" unless the conduct "constitutes gross negligence, recklessness, or intentional misconduct." The plaintiff argued that the

immunity provision of the Emergency Telephone System Act "should control because it applies specifically to the provision of 9-1-1 services," and as such, the circuit court erred in granting the defendants' motion to dismiss because there still remains a question of whether the defendants' alleged conduct constituted gross negligence, recklessness, or intentional misconduct. The defendants argued that they are immune from liability under the Tort Immunity Act and that the circuit court did not err in granting their motion to dismiss on that basis. The court agreed with the defendants, holding that the Tort Immunity Act "applies to the conduct at issue" and was properly applied by the circuit court to dismiss the plaintiff's claim. The court reasoned that the General Assembly intended the immunity provision of the Emergency Telephone System Act to provide limited tort immunity for agencies responsible for creating and running emergency telephone systems in Illinois. The court further reasoned that the statute only provides immunity for failures of the infrastructure and technology of the 9-1-1 system itself, including misconduct by dispatchers, but does not supersede the broader immunity provided under the Tort Immunity Act provision, which applies when "a 9-1-1 call requests police intervention and liability is premised on the failure of a dispatcher to dispatch police in a timely fashion." Therefore, there remained no question of whether the defendants' alleged conduct constitutes gross negligence, recklessness, or intentional misconduct, and the circuit court did not err in granting the defendants' motion to dismiss.

The dissenting opinion disagreed with the majority on the application of the immunity provisions. The dissent reasoned that under Section 15.1 of the Emergency Telephone System Act, limited immunity applies to and includes liability resulting from the "performance or provision of 9-1-1 service," and as such, "the statute applies to the performance or provision of 9-1-1 services in this case." The dissenting opinion further argued that the failure of the dispatcher to properly dispatch police officers in this case could be considered a "failure within the infrastructure and technology of the 9-1-1 system" for which the immunity provision of the Emergency Telephone System Act would apply. On March 24, 2021, the Illinois Supreme Court granted a petition for leave to appeal.

## ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – MODIFIABILITY OF MAINTENANCE TERMS

*A settlement agreement need not specify non-modifiability of maintenance as to amount, duration, or both to be sufficient to render maintenance non-modifiable.*

In *In re Marriage of Dynako*, 2021 IL 126835, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred when it held that a maintenance obligation was not modifiable under subsection (f) of Section 502 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/502(f) (West 2016)). That Section provides that "[t]he parties may provide that maintenance is non-modifiable in amount, duration, or

both. If the parties do not provide that maintenance is non-modifiable in amount, duration, or both, then those terms are modifiable upon a substantial change in circumstances." The party owing maintenance argued that the agreement was modifiable because he no longer had the income he once had, and the agreement "did not expressly state that his maintenance obligation was non-modifiable in amount, duration, or both." The party collecting maintenance argued that the marital settlement agreement was not modifiable because the terms of the agreement provided that it was non-modifiable. The court agreed with the party collecting maintenance, holding that the agreement expressly provided that the obligation was non-modifiable and that there was no evidence that non-modifiability was intended to apply to only one aspect of the maintenance obligation. The court reasoned that if the General Assembly intended that parties be required to specifically state whether the non-modifiability provision applied to maintenance amount, duration, or both, it could have included that requirement in the law, but it did not. Therefore, the court concluded that the appellate court properly affirmed the determination of the circuit court that the parties intended that the entire maintenance obligation be non-modifiable.

## ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – APPLICABILITY

*A motion to enforce the terms of an existing agreed order is a continuation of dissolution proceedings in which a judgment has already been entered, not a new proceeding.*

In *In re Marriage of Andres*, 2021 IL App (2d) 191146, the Illinois Appellate Court was asked to decide if the trial court should have applied a version of Section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/505 (West 2018)), concerning child support, that became effective after the entry of a court order. The appeal arose from a dissolution of marriage between Nick and Alissa Andres. The judgment incorporated a marital settlement agreement, and an agreed order later modified the agreement to include calculations for child support and maintenance payments. There was a later dispute over the payment calculations, and Alissa brought a motion to enforce the terms of the agreed order. Section 505 of the Act did not provide any reduction to gross income for maintenance payments owed to the ex-spouse at the time the order was entered; however, Section 505 was subsequently amended by Public Act 98-961 to include that reduction. Alissa's calculation did not deduct maintenance payments from Nick's net income before calculating child support. Nick argued that, in accordance with the current Section 505, maintenance payments should be deducted from his net income for the purpose of determining child support. The trial court ruled in favor of Alissa, and Nick appealed.

Section 801 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/801 (West 2018)) provides three circumstances in which the current version of the Act applies retroactively. The court held that two of the exceptions did not apply to the motion and considered whether the motion to enforce was a proceeding commenced on or after the effective date of the Act. The court found that the phrase "all proceedings commenced on or after its effective date" is ambiguous because it can be read to broadly apply to any motion, petition, or claim filed on or after the effective date of the Act, or it can be read to narrowly apply only to new claims or causes of action. The court reasoned that interpreting subsection (a) of Section 801 as applicable to all motions, petitions, or claims would render another subsection meaningless, therefore it must apply to a narrower subset of proceedings. The court also noted that when Section 505 of the Act was amended to alter the guideline calculations for child support, Section 510 (750 ILCS 5/510 (West 2018)) was amended simultaneously to clarify that an order entered prior to the amendment of Section 505 could be modified only upon a finding of a substantial change in circumstances, and that the amendment itself did not constitute such a change in circumstances. The court found that this decision by the General Assembly demonstrated a consistent policy of not disturbing child support judgments once they have been entered. The appellate court held that because the motion only enforced the terms of the existing agreed order, it was a continuation of dissolution proceedings in which judgment had already been entered and not a new proceeding for the purposes of subsection (a) of Section 801. Therefore, the court concluded that the trial court did not err when it applied the former version of Section 505 and did not deduct maintenance payments from net income.

## ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT – DEFINITION OF "STEP-PARENT"

*"Step-parent" includes a civil union partner because "a person married to a child's parent" includes a party to a civil union pursuant to the Illinois Religious Freedom Protection and Civil Union Act.*

In *Sharpe v. Westmoreland*, 2020 IL 124863, the Illinois Supreme Court was asked to decide whether the Illinois Appellate Court erred when it held that, for purposes of standing to seek visitation or an allocation of parental responsibilities, a civil union partner is not a "step-parent" as defined by Sections 600 and 602.9 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/600; 750 ILCS 5/602.9 (West 2016)). Those Sections define a "step-parent" as "a person married to a child's parent, including a person married to the child's parent immediately prior to the parent's death." The parties of this case, Sharpe and Westmoreland, had their marriage dissolved in January 2013. The parties agreed to a joint parenting agreement for their child, A.S., in which the child's legal residence was with Sharpe. In November 2013, Sharpe entered into a civil union with

Fulkerson, after which A.S. continued to reside with Sharpe and the Fulkerson family. After Sharpe's death, Westmoreland did not allow A.S. to live with or visit the Fulkerson family anymore, so Fulkerson filed petitions seeking visitation and an allocation of parental responsibilities for A.S. The circuit court granted a motion to certify a question of law to the appellate court and stay proceedings. The court certified two questions: whether a party to a civil union has standing to request visitation with a deceased partner's child as a step-parent, and whether that party has standing to request parental responsibilities. The appellate court answered both questions in the negative, then the Illinois Supreme Court granted leave to appeal.

The Illinois Religious Freedom Protection and Civil Union Act states that a party to a civil union means, and shall be included in, "any definition or use of the terms 'spouse', 'family', 'immediate family', 'dependent', 'next of kin', and other terms that denote the spousal relationship as those terms are used throughout the law." (750 ILCS 75/10 (West 2016)). Westmoreland argued that the legislative intent of the language equating civil union partners to spouses was that they be deemed equivalent only for purposes of their own relationships, and therefore, because a party to a civil union is not a step-parent as defined by the Illinois Marriage and Dissolution of Marriage Act, Fulkerson lacked standing under the Act to petition for visitation and allocation of parental responsibilities. The Illinois Supreme Court reversed the appellate court, holding that a party to a civil union has standing to petition for both visitation and the allocation of parental responsibilities. The court reasoned that the General Assembly stated that the purpose of the Civil Union Act was to provide persons entering into a civil union with the obligations, responsibilities, protections, and benefits afforded to spouses under Illinois law, and had expressed its intent that the Civil Union Act be liberally construed to promote that purpose. The court also found that there was no statutory provision in either Act that excludes a civil union partner from any obligation, responsibility, protection, or benefit to which a spouse is entitled. The court therefore held that the Civil Union Act changed the definition of the word "spouse" and any "other terms that denote the spousal relationship" throughout the Illinois Compiled Statutes to include a party to a civil union.

## INCOME WITHHOLDING FOR SUPPORT ACT – EMPLOYER PENALTIES

*The Act's penalties for an employer that knowingly fails to withhold income for child support do not apply if the employer mistakenly fails to withhold the proper amount.*

In *Burns v. Delta Airlines, Inc.*, 2021 IL App (2d) 200313, the Illinois Appellate Court was asked to decide whether the circuit court erred when it found that the defendant, the employer of a person who owed child support, knowingly failed to withhold the correct amount of child support and was, therefore, required to pay a penalty. Subsection (a) of Section 35 of the Income Withholding for Support Act (750 ILCS 28/35(a) (West 2018))

requires an employer to deduct and pay over an obligor's income for child support after being served with an income withholding notice and provides a penalty if "the payor knowingly fails to withhold the amount designated in the income withholding notice or to pay any amount withheld . . . ." The plaintiff argued that because the amount withheld by the defendant was only 50% of the obligor's income, instead of the 65% required under the income withholding notice, the defendant was required to pay a penalty under Section 35. The defendant argued that the income withholding notice was ambiguous regarding whether the proper amount to withhold was 50% or 65% and that it substantially complied with the requirements of Section 35 by withholding 50% of the obligor's income and later paying the difference between the 50% of the income withheld and the 65% required. The court agreed with the defendant, holding that the defendant's failure to withhold the proper amount was not a "knowing" failure because the income withholding notice was ambiguous and that the defendant's failure was, at most, negligent and not knowing. The court, after considering the debate in the General Assembly when the penalty provision was added, reasoned that the penalty provisions "were enacted to ensure that child support is paid in a timely manner." Accordingly, the court reasoned that the defendant "consistently turned over its withholdings and, therefore, did not violate the purpose of ensuring the timely payment of child support."

**ADOPTION ACT – PARENTAL UNFITNESS - NOTICE**

*State's notice provision in its petition to terminate mother's parental rights was sufficient even though the notice specified a period of more than nine months.*

In *In re S.A.M.*, 2021 IL App (3d) 210066, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held a mother unfit and terminated her parental rights. Paragraph (m) of subsection (D) of Section 1 of the Adoption Act (750 ILCS 50/1(D)(m) (West 2018)) provides that "unfit person" means "any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption." The grounds of unfitness include "failure by a parent (i) to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent during any 9-month period following the adjudication of a neglected or abused minor under Section 2-3 of the Juvenile Court Act of 1987 (705 ILCS 405/2-3) or dependent minor under Section 2-4 of that Act (705 ILCS 405/2-4), or (ii) to make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglected or abused minor under Section 2-3 of the Juvenile Court Act of 1987 or dependent minor under Section 2-4 of that Act." The respondent, the mother, argued that the State failed to show that she is an unfit person within the meaning of paragraph (m) of subsection (D) of Section 1 because it did not file with the court or serve the respondent with a pleading that specified the 9-month period at issue. Rather, the

petition to terminate her parental rights initially identified a 12-month period and the amended petition alleged a 10-month period. The court agreed with the State, holding that the notice provision in the petition properly set forth more than one nine-month period and that the mother was given adequate notice of the time frames to consider when preparing her defense. The court reasoned that, in light of the Illinois Supreme Court's decision in *In re S.L.*, 2014 IL 115424, the State's petition was not deficient, since the wording "during any 9-month period (August 2019–July 2020)" complies with the statutory requirement that the notice must specify the nine-month period or periods relied on. The petition set forth a specific period that exceeded nine months, but which encompassed more than one nine-month period from August 2019 through July 2020. A concurring opinion argued that the Illinois Supreme Court should revisit its findings in *In re S.L.*, because, rather than enforcing the procedural requirements of (D)(m)(iii), *S.L.* holds that the State need not comply with them to properly maintain a termination proceeding.

## ILLINOIS DOMESTIC VIOLENCE ACT OF 1986 – LAW ENFORCEMENT LIABILITY

*An emergency call in which the 9-1-1 operator who answered the call did not receive any response from the caller does not create law enforcement duties under the Act.*

In *Wendling v. Milner*, 2021 IL App (5th) 190532, the Illinois Appellate Court was asked to decide whether the circuit court erred when it held that an emergency call in which the 9-1-1 operator who answered the call did not receive any response from the caller (an "open-line 9-1-1 call") does not create law enforcement liability under Section 305 of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/305 (West 2018)) with respect to an officer who failed to respond to an open-line call by the decedent. Section 305 subjects law enforcement officers to civil liability for acts of omission or commission in enforcing the Act that result from willful or wanton misconduct. The plaintiff argued that Section 305 contains no requirement of subjective knowledge by law enforcement that a person is a victim of domestic violence. The plaintiff also claimed that the complaint contained sufficient allegations to invoke Section 305 because when an open-line 9-1-1 call is made from a landline and the 9-1-1 operator receives a busy signal upon calling back the landline, a responding officer should reasonably conclude that the call involves a domestic situation, that the caller is in distress and unable to speak, and that an urgent response is necessary. The defendant argued that the plaintiff failed to allege any facts indicating that the defendant knew or had reason to believe that the 9-1-1 call made from the decedent's landline involved domestic violence, and therefore, the duty to render assistance under Section 305 of the Act was not implicated. The court agreed with the defendant, holding that the plaintiff failed to allege facts that demonstrate the defendant acted with willful and wanton misconduct. The court reasoned that willful and wanton misconduct by a law

enforcement officer within the meaning of Section 305 cannot be shown absent facts establishing that the law enforcement officer had some knowledge or reason to believe that the person in need of assistance was a victim of domestic violence. The court reasoned that there were no allegations that law enforcement officers had been called to the decedent's residence on a prior occasion because of an incident involving domestic violence or a violation of an order of protection, and that an open-line call is insufficient to give rise to an inference that the caller is experiencing domestic violence.

## ILLINOIS POWER OF ATTORNEY ACT – POWER OF ATTORNEY

*A trust amendment by an agent under a power of attorney is invalid when the agent is not granted specific authority and the trust is not referenced in the power of attorney document.*

In *Centrue Bank v. Voga*, 2020 IL App (2d) 190108, the Illinois Appellate Court was asked to decide whether the circuit court erred when it gave effect to a trust amendment by an agent under a power of attorney, even though the power of attorney document did not specifically reference the trust. Section 2-9 of the Illinois Power of Attorney Act (755 ILCS 45/2-9 (West 2006)) provides, "[a]n agent may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority and specific reference to the trust in the agency." The plaintiff argued that, given the circumstances surrounding the creation of the agency and the amendment of the trust, it was clear that the principal intended to create a power of attorney for the specific purpose of amending the trust, even though the power of attorney did not specifically reference the trust. The plaintiff further argued that under Section 2-4 of the Act (755 ILCS 45/2-4 (West 2006)), which provides that "the provisions of the [power of attorney] will control notwithstanding [the] Act," the court should give effect to the intent of the principal under the power of attorney. The defendant argued that the amendment was invalid because it did not comply with the plain language of Section 2-9, and that Section 2-9 should control over Section 2-4 because it is a specific exception to the general mandate of Section 2-4. The court agreed with the defendant, reversing the circuit court and holding that the amendment to the trust is invalid. The court reasoned that Sections 2-4 and 2-9 conflict with one another and applied the rule favoring the application of a specific statute over a conflicting, general statute, concluding that Section 2-9 controls and consequently invalidates the trust amendment.

**SECURITY DEPOSIT RETURN ACT – CARE RESIDENCY AGREEMENT**

*An entrance fee for residency and services at a continuing care facility is not a security deposit within the meaning of the Act or the Security Deposit Interest Act.*

In *Wolff v. Bethany North Suburban Group*, 2021 IL App (1st) 191858, the Illinois Appellate Court was asked to determine whether the circuit court erred when it found that the plaintiff was not entitled to statutory interest on the entrance fee for residency and services at a continuing care facility because the agreement was not a lease and the paid entrance fee was not a security deposit within the meaning of the Security Deposit Return Act or the Security Deposit Interest Act. Section 1(a) of the Security Deposit Return Act (765 ILCS 710/1(a) (West 2014)) provides that "a lessor of residential real property . . . who has received a security deposit from a lessee to secure the payment of rent or to compensate for damage to leased premises may not withhold any part of that deposit as reimbursement for property damage unless the lessor . . . furnished to the lessee an itemized statement of the damage allegedly caused . . . and the estimated or actual cost for replacing or repairing [such damage]." Section 1 of the Security Deposit Interest Act (765 ILCS 715/1 (West 2014)) provides that "a lessor of residential real property . . . who receives a security deposit from a lessee to secure the payment of rent or compensation for damage to property shall pay interest to the lessee . . . ."

The plaintiff argued that the entrance fee she paid was a security deposit because under the agreement with the facility, the resident was granted the exclusive right to occupy an apartment within the facility in exchange for the payment of a monthly fee. The plaintiff further argued that the defendant was not a licensed life care facility and was therefore subject to the Security Deposit Return Act and the Security Deposit Interest Act. The defendant argued that the entrance fee was not a security deposit because "it was not held for property damage." The defendant further argued that the fee was not a security deposit "because [the defendant] provided services beyond a landlord-tenant relationship, provided guaranteed residency, and used the entrance fee to fund its services."

The Illinois Appellate Court agreed with the defendant and affirmed the circuit court's ruling, holding that the parties' residency and services agreement was not a lease within the meaning of the Security Deposit Return Act and the Security Deposit Interest Act. The court reasoned that the agreement "created more than a simple landlord-tenant relationship [and therefore] was not a lease subject to the provisions of [those Acts]." The court reasoned that "[f]or a lease to be valid in Illinois, there must be agreement as to the extent and bounds of the property, the rental price and time and manner of payment, and the term of the lease." The court acknowledged that the parties' residency and services agreement "contained certain aspects normally associated with leases such as the reference to a specific apartment." However, the court noted that, under the agreement, a resident was allowed to "change units upon request, there was no rental price specified, the monthly service fee . . . covered personal care and some assisted living services, the term [of the

agreement] was indefinite, and a resident could terminate the agreement on notice . . . or could relocate to another facility operated by the defendant or be assisted in moving to a health facility." The court likewise found that the entrance fee the plaintiff paid was not a security deposit within the meaning of the Acts. The court reasoned that "the entrance fee was not held to secure payment for rent or as compensation for damage of property, [but rather] to cover the [plaintiff's] continued residency and the various services provided by [the defendant] during such occupancy, regardless of whether the resident was able to pay the monthly service fee." The court further noted that "while there is no current statutory enactment related to continuing care facilities, [the] court has previously recognized such facilities that provide less care than a life care facility, including those that required the transfer of a resident's assets to the facility." Consequently, continuing care residency agreements are not subject to the Security Deposit Return Act and the Security Deposit Interest Act because they create more than a simple landlord-tenant relationship and cannot be classified as leases. The Illinois Supreme Court denied a petition for leave to appeal on September 29, 2021.

**WORKERS' COMPENSATION ACT – BIOMETRIC PRIVACY DAMAGES**

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

In *McDonald v. Symphony Bronzeville Park LLC*, 2020 IL App (1st) 192398, the Illinois Appellate Court was asked to decide whether the exclusivity provisions of the Workers' Compensation Act bar a claim for statutory damages under the Biometric Information Privacy Act when an employer is alleged to have violated an employee's statutory privacy rights. Subsection (a) of Section 5 of the Workers' Compensation Act (820 ILCS 305/5(a) (West 2018)) provides that "[N]o common law or statutory right to recover damages from the employer . . . is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury." The plaintiff argued that the defendant had violated various statutory requirements of the Biometric Information Privacy Act by negligently collecting biometric data and sought liquidated, statutory damages for each of the violations. The defendant argued that any claims alleging a violation of the Biometric Information Privacy Act are barred under the exclusivity provisions of the Workers' Compensation Act. The court agreed with the plaintiff, holding that the exclusivity provisions of the Workers' Compensation Act do not bar a claim for statutory damages under the Biometric Information Privacy Act. The court reasoned that a claim under the Biometric Information Privacy Act for statutory damages is available without any further compensable actual damages being alleged or sustained. The court found that such a claim does not represent the type of injury that falls under the

Workers' Compensation Act, which is a remedial statute designated to provide financial assistance for workers that have sustained an actual injury. The court further reasoned that, aside from the private right of action provided for in Section 20 of the Biometric Information Privacy Act (740 ILCS 14/20 (West 2018)), there are no other enforcement mechanisms available in the Act. The court reasoned that the General Assembly intended this provision to have substantial force and that the Biometric Information Privacy Act was designed in part to have a preventive and deterrent effect that would be undermined by requiring such a claim to be brought under the Workers' Compensation Act. On January 27, 2021, the Illinois Supreme Court granted the defendant's petition for leave to appeal.

## PUBLIC SAFETY EMPLOYEE BENEFITS ACT – HEALTH INSURANCE BENEFITS

*A law enforcement officer who slips and falls while investigating a secured crime scene is entitled to health insurance benefits under the Act.*

In *Talerico v. Village of Clarendon Hills*, 2021 IL App (2d) 200318, the Illinois Appellate Court was asked to decide whether the trial court erred when it ruled that the plaintiff, a police officer who slipped on snow and ice while unloading evidence-technician equipment from his vehicle, was not entitled to health benefits for an injury sustained in the line of duty. Subsection (a) of Section 10 of the Public Safety Employee Benefits Act (820 ILCS 320/10(a) (West 2014)) provides that an employer employing a full-time law enforcement officer who suffers a catastrophic injury in the line of duty "shall pay the entire premium of the employer's health insurance plan for the injured employee." Subsection (b) of that Section further provides that the injured law enforcement officer is eligible for health insurance coverage under the Act if the injury occurred "during the investigation of a criminal act." The plaintiff argued that he was entitled to health insurance benefits under the Act "because (1) he suffered a 'catastrophic injury' and (2) the injury occurred 'during the investigation of a criminal act.'" The defendant, citing case law, argued that because the plaintiff was performing his duties at a secured crime scene, he was not entitled to health insurance benefits under the Act because Section 10(b) limits recovery to "injuries sustained in an emergency situation," and "an 'emergency' under the Act occurs when the incident 'is urgent and calls for immediate action.'" The Illinois Appellate Court agreed with the plaintiff, reversing the trial court and holding that the plaintiff was injured during the investigation of a criminal act. The court noted that although the General Assembly made the application of the Act contingent on the injury occurring "during the investigation of a criminal act," among other contingencies, that the "Act nowhere defines what any of the terms in that phrase mean." Analyzing the plain meaning of the phrase, the court determined, "From the moment of his initial dispatch to the crime scene until he left to return after his injury, the plaintiff was clearly involved in a continuous course of conduct

to gather evidence," and those actions were sufficient to establish "injury during the investigation of a criminal act" for purposes of receiving health insurance coverage under the Act. Therefore, the court concluded that the plaintiff was entitled to health insurance benefits for his injury sustained in the line of duty. The Illinois Supreme Court denied a petition for leave to appeal on September 29, 2021.

## UNEMPLOYMENT INSURANCE ACT – MANDATORY RETIREMENT

*An individual subject to mandatory retirement age is ineligible for unemployment benefits.*

In *Prospect Heights Fire Protection District v. Department of Employment Security*, 2021 IL App (1st) 182525, the Illinois Appellate Court was asked to determine whether a retired firefighter was precluded from seeking unemployment benefits under the Unemployment Insurance Act after reaching the statutorily mandated retirement age for firefighters. Section 601(A) of the Unemployment Insurance Act (820 ILCS 405/601(A) (West 2016)) provides that an "individual shall be ineligible for benefits for the week in which he or she left work voluntarily without good cause attributable to the employing unit." Section 16.13b of the Fire Protection District Act (70 ILCS 705/16.13b (West 2016)) provides that the "age for mandatory retirement of firemen in the services of any department of such district is 65 years."

The plaintiff, a fire protection district, argued that the retired firefighter was precluded from applying for unemployment benefits because the mandatory retirement age set forth in the Fire Protection District Act is "a term of employment" that the firefighter "voluntarily agreed to and accepted when he commenced his career as a firefighter." Consequently, the firefighter's retirement at the statutorily mandated retirement age "was a voluntary act" within the meaning of Section 601(A) of the Unemployment Insurance Act. The defendant, the Department of Employment Security, argued that the firefighter's retirement "was not a voluntary separation from . . . employment" because it was not of his own volition. In support of its argument, the defendant relied on case law holding that the Unemployment Insurance Act "does not disqualify workers whose separation from work was compulsory under the terms of their employment contract or as a result of mandated policy adopted by the employer." Accordingly, the defendant argued that "separation is not voluntary under Section 601(A) . . . where the employment terms imposed by the employer allow the employee no alternative but to relinquish her position." Both parties acknowledged that "no Illinois court has examined whether an individual's statutorily mandated retirement constitutes a 'voluntary act without good cause attributable to [the] employer' pursuant to the Unemployment [Insurance] Act."

The court ultimately agreed with the plaintiff, holding that "an Illinois firefighter who leaves his or her place of employment upon reaching the mandatory retirement age of

65 does so voluntarily absent good cause attributable to the employer and is [therefore] not eligible to seek unemployment benefits pursuant to the Unemployment [Insurance] Act." The court reasoned that the retired firefighter knew when he accepted his position that his term of employment was finite as set forth under the Fire Protection District Act's mandatory retirement provision. The firefighter's subsequent retirement was therefore "in accordance with the terms of his employment [which] he accepted when he commenced his career as a firefighter." Invoking the rationale advanced by courts in other jurisdictions, the court found that "employees who leave their places of employ due to a mandatory retirement policy or provision do so voluntarily absent good cause attributable to their employers."

The court distinguished the case from other case law, reasoning that the employee in the other case was subject to an employment contract that contained a specific termination date. In contrast, the court noted that "the mandatory retirement provision [for Illinois firefighters] is not a policy set by individual fire departments; rather it is set by statute and is applicable to [all] Illinois fire departments and firefighters." Consequently, the court found that the retired firefighter was "bound to abide by the mandatory retirement age set forth in the Fire Protection [District] Act; and that "neither [the retired firefighter] nor the District had the ability to disregard the statutorily mandated retirement age . . . without violating the law."

## UNITED STATES CONSTITUTION – FREEDOM OF SPEECH

*A school's decision to suspend a student from the cheerleading team for vulgar language and gestures criticizing the school and the school's cheerleading team violated the First Amendment.*

In *Mahanoy Area School District v. B.L.*, 141 S.Ct. 2038, the Supreme Court of the United States was asked to decide whether the United States Court of Appeals for the Third Circuit erred when it held that the school's decision to suspend the student from the cheerleading team for vulgar language and gestures criticizing the school and the school's cheerleading team violated the First Amendment. The First Amendment of the United States Constitution (U.S. CONST. amend. I) provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The student argued that the suspension violated the student's First Amendment rights because the student's remarks were made off campus and after school hours. The defendant argued that public schools may "regulate speech that would materially and substantially disrupt the work and discipline of the school" including student speech that occurs off campus. The court agreed with the student, holding that "while public schools may have a special interest in

regulating some off-campus student speech" certain special interests offered by a school are not sufficient to overcome free expression. The court reasoned that, despite the doctrine of *in loco parentis*, "off-campus speech will normally fall within the zone of parental, rather than school-related responsibility;" "courts must be more skeptical of a school's efforts to regulate off-campus speech;" and the school has "an interest in protecting a student's unpopular expression."

## UNITED STATES CONSTITUTION – FREEDOM OF ASSEMBLY

*A requirement mandating the filing of major charitable donors' identifying information violates the First Amendment.*

In *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, the Supreme Court of the United States was asked to decide whether the United States Court of Appeals for the Ninth Circuit Court erred when it held that a California regulation, requiring tax-exempt charities that solicit contributions to disclose IRS forms containing the names and addresses of major donors, was not a violation of the First Amendment right to free association. Section 301 of the California Code of Regulations (Cal. Code Regs. tit. 11, § 301) requires charitable entities that meet specified revenue thresholds to annually file forms containing major charitable donors' names and addresses with the California Attorney General. The First Amendment of the United States Constitution (U.S. CONST. amend. I) prohibits the government from infringing upon "the right of the people peaceably to assemble." The plaintiff argued that donors whose names and addresses were released were susceptible to suffering threats and harassment for association with any given charitable donation. The plaintiff further argued that releasing the forms would result in receiving fewer donations from donors who do not want their names and addresses potentially available to the public. The defendant argued that the regulation was necessary for the state to efficiently and effectively prevent charitable fraud and self-dealing, and, although some forms were inadvertently available to the public, the regulation required that only the Attorney General could access them. The Court agreed with the plaintiff, holding that the filing requirement was unconstitutional because it imposed a risk of chilling the free association of people. The Court reasoned that the importance of the First Amendment right to assemble, in particular, as it is affected by concerns for the safety of individuals whose charitable contributions may become publicly discoverable, far outweighed the state's interest in preventing potentially fraudulent practices of charitable foundations.

**UNITED STATES CONSTITUTION – TAKINGS**

*A state regulation allowing labor organizations to enter into and remain on the property of another for limited times and for the purpose of soliciting unionization is a per se taking requiring just compensation under the Fifth Amendment.*

In *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, the Supreme Court of the United States was asked to decide whether the United States Court of Appeals for the Ninth Circuit Court erred when it held that a California regulation allowing labor organizations to physically enter an agricultural employer's property for three hours a day, 120 days a year to solicit unionization was not a per se physical taking under the Fifth Amendment of the United States Constitution (U.S. CONST. amend. V). The regulation (Cal. Code Regs., tit. 8, § 20900(e)(1)(C)) allowed labor organizations to "take access" to an agricultural employer's property. The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The plaintiff argued that because the regulation conveyed a right of others to physically enter and remain on an owner's property, it "took" the right of enjoyment of the property away from the owner and therefore required just compensation to be constitutional. The defendant argued that because the regulation (1) limited access to the properties to certain times and only for the purpose of promoting unionization; and (2) did not convey a transferable right or apply to any specific, particular property, it was not a "taking" within the meaning of the Fifth Amendment. The Court agreed with the plaintiff, holding that the regulation was an unconstitutional per se taking under the Fifth Amendment. The Court reasoned that the regulation provides third parties with a right to invade, to literally "take access" to, another's property, negating the owner's right to exclude.

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