# Illinois Defense Counsel Quarterly

Second Quarter 2026 | Volume 36, Number 2 | ISSN-2169-3668


## MONOGRAPH

**Where Construction Cases are Really Won: Risk Transfer, Insurance, and Illinois Law**

## FEATURE ARTICLES

**Do You Have a Permit for That? The Supreme Court of Illinois Says it Does Not Matter for Purposes of Interpreting a Commercial General Liability Pollution Exclusion**

**Forum Shopping and the "Deference Factor" in *Forum Non Conveniens* Jurisprudence**

**Rule 213 in 2026: Still Lost in Translation**

*Law | Equity | Justice*

## *Illinois Defense Counsel*

**WWW.IDC.LAW**

PRESIDENT
**R. MARK COSIMINI**
*Rusin Law, Ltd.*, Champaign

PRESIDENT-ELECT
**JOHN F. WATSON**
*Craig & Craig, LLC*, Mattoon

FIRST VICE PRESIDENT
**DONALD PATRICK ECKLER**
*Freeman Mathis & Gary, LLP*, Chicago

SECOND VICE PRESIDENT
**ADAM C. CARTER**
*Esp Kreuzer Cores LLP,* Wheaton

SECRETARY/TRESURER
**GREGORY W. ODOM**
*Baker Sterchi Cowden & Rice LLC*, Belleville

### *DIRECTORS*

**ANN BARRON**
*Heyl Royster Voelker & Allen, P.C.*, Edwardsville

**JUSTIN BRUNNER**
*Thomas Mamer LLP*, Champaign

**JULIE BLACK**
*Board of Veterans' Appeals*, Villa Park

**JAMES P. DuCHATEAU**
*HeplerBroom, LLC*, Chicago

**JILL K. ECKHAUS**
*Hinshaw & Culbertson, LLP*, Chicago

**JOHN EGGUM**
*Foran Glennon Palandech Ponzi & Rudloff, P.C.*, Chicago

**JONATHAN L. FEDERMAN**
*Gordon Rees Scully Mansukhani LLP*, Chicago

**MICHAEL D. GALLO**
*Michael D. Gallo & Associates*, Chicago

**JOHN P. HEIL, JR.**
*Heyl, Royster, Voelker & Allen, P.C.*, Peoria

**DAVID A. HERMAN**
*Giffin, Winning, Cohen & Bodewes, P.C.,* Springfield

**SEAN D. HURLEY**
*Cassiday Schade LLP*, Chicago

**MEGHAN KANE**
*Baker Sterchi Cowden & Rice LLC*, Belleville

**GLENN A. KLINGER**
*Leach King Klinger Law LLC*, Chicago

**TARA W. KUCHAR**
*HeplerBroom LLC*, Belleville

**ERICA S. LONGFIELD**
*Allstate*, Chicago

**SOMMER LUZYNCZYK**
*Pretzel & Stouffer, Chartered*, Chicago

**KIMBERLY A. ROSS**
*FordHarrison*, Chicago

**HOLLY WHITLOCK-GLAVE**
*College of Lake County*, Grayslake

**EXECUTIVE DIRECTOR**
**SANDRA J. WULF, CAE, IOM**


# COLUMNISTS

**Ann Barron** — *Heyl, Royster, Voelker & Allen, P.C.*, Peoria
**Alexeus E. Bender** — *Heyl, Royster, Voelker & Allen, P.C.*, Rockford
**Alex P. Blair** — *Goldberg Segalla LLP*, Chicago
**James K. Borcia** — *Tressler LLP*, Chicago
**Julie A. Bruch** — *IFMK Law, Ltd.*, Northbrook
**Amber D. Cameron** — *Heyl, Royster, Voelker & Allen, P.C.*, Edwardsville
**R. Mark Cosimini** — *Rusin Law, Ltd.*, Champaign
**Daniel A. Cotter** — *Aronberg Goldgehn Davis & Garmisa*, Chicago
**Thomas G. DiCianni** — *Ancel Glink, P.C.*, Chicago
**Irina Y. Dmitrieva** — *HeplerBroom LLC*, Chicago
**Donald Patrick Eckler** — *Freeman Mathis & Gary LLP*, Chicago
**Jonathan L. Federman** — *Gordon Rees Scully Mansukhani, LLP*, Chicago
**Henry W. Goldman** — *McCoy Leavitt Laskey, LLC,* Chicago
**Edward K. Grassé** — *Grassé Legal LLC*, Chicago
**John C. Hanson** — *HeplerBroom LLC*, Edwardsville
**Glenn A. Klinger** — *Leach King Klinger Law LLC*, Chicago
**Seth D. Lamden** — *Blank Rome LLP*, Chicago
**William R. Schubert, II** — *Hinshaw & Culbertson, LLP*, San Francisco
**Jennifer K. Stuart** — *Amundsen Davis LLC*, Chicago
**John F. Watson** — *Craig & Craig, LLC*, Mattoon
**Kevin H. Young** — *Cassiday Schade LLP*, Chicago

# CONTRIBUTORS

**Austin Anderson** — *Freeman Mathis & Gary LLP*, Lexington, KY
**William G. Beatty** — Chicago
**Brian M. Dougherty** — *Gordon Rees Scully Mansukhani, LLP*, Chicago
**John M. Fitzgerald** — *Tabet DiVito & Rothstein LLC*, Chicago
**Howard L. Huntington** — *Franco Moroney Buenik*, Chicago
**Madeline M. Krolczyk** — *Freeman Mathis & Gary LLP*, Chicago
**Kathleen M. Kunkle** — *Ancel Glink, P.C.*, Chicago
**Sara Peal** — *Heyl, Royster, Voelker & Allen, P.C.*, Peoria
**Timothy S. Richards** — *Neville, Richards, Zittel & Siegel, LLC*, Belleville
**Tracy E. Stevenson** — *The Law Offices of Tracy E. Stevenson, P.C.*, Chicago
**Paula K. Villela** — *Foran Glennon Palandech Ponzi & Rudloff, P.C.*, Chicago


**PAST PRESIDENTS:** Royce Glenn Rowe • James Baylor • Jack E. Horsley • John J. Schmidt • Thomas F. Bridgman • William J. Voelker, Jr. • Bert M. Thompson • John F. Skeffington • John G. Langhenry, Jr. • Lee W. Ensel • L. Bow Pritchett • John F. White • R. Lawrence Storms • John P. Ewart • Richard C. Valentine • Richard H. Hoffman • Ellis E. Fuqua • John E. Guy • Leo M. Tarpey • Willis R. Tribler • Alfred B. LaBarre • Patrick E. Maloney • Robert V. Dewey, Jr. • Lawrence R. Smith • R. Michael Henderson • Paul L. Price • Stephen L. Corn • Rudolf G. Schade, Jr. • Lyndon C. Molzahn • Daniel R. Formeller • Gordon R. Broom • Clifford P. Mallon • Anthony J. Tunney • Douglas J. Pomatto • Jack T. Riley, Jr. • Peter W. Brandt • Charles H. Cole • Gregory C. Ray • Jennifer Jerit Johnson • Stephen J. Heine • Glen E. Amundsen • Steven M. Puiszis • Jeffrey S. Hebrank • Gregory L. Cochran • Rick Hammond • Kenneth F. Werts • Anne M. Oldenburg • R. Howard Jump • Aleen R. Tiffany • David H. Levitt • Troy A. Bozarth • R. Mark Mifflin • Michael L. Resis • Bradley C. Nahrstadt • William K. McVisk • Nicole D. Milos • Laura K. Beasley • Terry A. Fox • Tracy E. Stevenson • Denise Baker-Seal

# EDITORIAL BOARD

## *IDC QUARTERLY*

**Jennifer K. Stuart**, Editor in Chief
*Amundsen Davis LLC*

**David Warnick**, Associate Editor
*Johnson & Bell, Ltd.*

**Joshua W. Zhao**, Associate Editor
*Hinkhouse Williams Walsh, LLP*

**Rebecca Fozo**, Associate Editor
*Zurich North America*

**Rachel Brandt**, Associate Editor
*Livingston, Barger, Brandt & Schroeder*

**Bret Coale**, Associate Editor
*Hughes Tenney Postlewait Coale, LLC*

**Donald Patrick Eckler**, Managing Editor
*Freeman Mathis & Gary LLP*



The ***IDC Quarterly*** is the official publication of the Illinois Defense Counsel. It is published quarterly as a service to its members. Subscriptions for non-members are $125 per year. Single copies are $25 plus $5 for postage and handling. Requests for subscriptions or back issues should be sent to the Illinois Defense Counsel headquarters in Rochester, Illinois. Subscription price for members is included in membership dues.


### Manuscript Policy

Members and other readers are encouraged to submit manuscripts for possible publication in the *IDC Quarterly*, particularly articles of practical use to defense trial attorneys. Manuscripts must be in article form. A copy of the *IDC Quarterly* Stylistic Requirements is available upon request from ***The Illinois Defense Counsel*** office in Rochester, Illinois. No compensation is made for articles published, and no article will be considered that has been submitted simultaneously to another publication or published by any other publication. All articles submitted will be subjected to editing and become the property of the *IDC Quarterly*, unless special arrangements are made.

**Statements or expression of opinions in this publication are those of the authors and not necessarily those of the Association or Editors. Letters to the Editor are encouraged and welcome, and should be sent to the Illinois Defense Counsel headquarters in Rochester, Illinois.**

**Editors reserve the right to publish and edit all such letters received and to reply to them.** *IDC Quarterly*, Second Quarter 2026, Volume 36, No. 2, Copyright © 2026 ***Illinois Defense Counsel***. All rights reserved. Reproduction in whole or in part without permission is prohibited.


**ILLINOIS DEFENSE COUNSEL** • P.O. Box 588 • Rochester, IL 62563-0588 • 800-232-0169
217-498-2649 • www.idc.law

**SANDRA J. WULF, CAE, IOM,** *Executive Director*


# IN THIS ISSUE

## Monograph


M-I **Where Construction Cases are Really Won: Risk Transfer, Insurance, and Illinois Law**, *by Howard L. Huntington, Madeline M. Krolczyk, Brian M. Dougherty and John M. Fitzgerald*


## Feature Articles


4 **Do You Have a Permit for That? The Supreme Court of Illinois Says it Does Not Matter for Purposes of Interpreting a Commercial General Liability Pollution Exclusion,** *by Austin Anderson*

25 **Forum Shopping and the "Deference Factor" in *Forum Non Conveniens* Jurisprudence**, *by William G. Beatty*

45 **Rule 213 in 2026: Still Lost in Translation**, *by Timothy S. Richards*


## Columns


55 **Amicus Committee Report**, *by Edward K. Grassé*

16 **Appellate Practice Corner**, *by Irina Y. Dmitrieva*

32 **Arbitration Corner**, *by Daniel A. Cotter*

67 **Association News**

52 **Civil Practice and Procedure**, *by Donald Patrick Eckler*

40 **Civil Rights Update**, *by Alexeus E. Bender*

12 **Commercial Law**, *by James K. Borcia*

18 **Construction Law**, *by Kevin H. Young*

3 **Editor's Note**, *by Jennifer K. Stuart*

13 **Employment Law**, *by Julie A. Bruch*

8 **Evidence and Practice Tips**, *by Jonathan L. Federman and Paula K. Villela*

73 **IDC Membership and Committee Applications**

66 **IDC New Members**

10 **Insurance Law**, *by Seth D. Lamden*

58 **Legal Ethics**, *by William R. Schubert, II*

38 **Legislative Update**, *by Henry W. Goldman*

62 **Medical Malpractice/Healthcare Law**, *by Ann Barron and Sara Peal*

42 **Municipal Law**, *by Thomas G. DiCianni and Kathleen M. Kunkle*

64 **Practice Development**, *by Glenn A. Klinger*

2 **President's Message**, *by R. Mark Cosimini*

60 **Product Liability**, *by Alex P. Blair*

56 **Professional Liability**, *by John F. Watson and Tracy E. Stevenson*

36 **Supreme Court Watch**, *by John C. Hanson*

20 **Workers' Compensation Report**, *by Amber D. Cameron*

# President's Message

**R. Mark Cosimini**
*Rusin Law, Ltd.*, Champaign

As my one-year term as IDC president comes to a close, I find myself reflecting on the familiar tension between ambition and time. Like many who have had the privilege to serve in this role, I began with a list of goals—initiatives to launch, reforms to advance, and conversations to elevate within our profession. What has become clear, however, is that no single term is long enough to accomplish all that we envision.

The law, by its nature, is deliberate. Progress requires consensus, care, and persistence. These are not shortcomings; they are strengths. Yet they also remind us that meaningful change often extends beyond the horizon of any one presidency. There are projects we set in motion that will continue to evolve, ideas that will be refined by those who follow, and aspirations that remain for future leaders to realize.

And still, there is much to be proud of.

Over the past year, we have strengthened the foundations of this organization in both visible and subtle ways. We have fostered deeper engagement among our members, expanded opportunities for professional development, and contributed thoughtfully to the broader legal discourse. Perhaps most importantly, we have reaffirmed our shared commitment to integrity, collegiality, and the rule of law—principles that endure far beyond any individual initiative.

I am especially proud of the level of engagement achieved with our substantive seminars through the Defense Practice Series. Each of our committees has assumed the responsibility of putting on a seminar addressing timely issues within the committee's area of law. I am also thrilled with the level of involvement by the judiciary through the Bench and Bar Program. The idea of the program was to have judges and justices speak to younger lawyers about what to expect in the courtroom and provide advice as to how to be more comfortable and persuasive in the courtroom. We discovered that more experienced attorneys are also benefitting from the program.

The law, by its nature, is deliberate.
Progress requires consensus, care, and persistence.
These are not shortcomings; they are strengths.

Additionally, our Amicus and Legislative committees are stockpiling successes which not only benefit the defense bar but the legal industry as a whole. A recent success included a joint effort with ITLA addressing an issue with circuit clerks overstepping their authority by refusing to file a complaint rather than allowing the court to determine whether the pleading was appropriate.

From a community perspective, our service projects are aiding the Ronald McDonald House, the IL Chapter of the American Foundation for Suicide Prevention, and the Greater Chicago Food Depository.

None of these accomplishments were achieved alone. They are the result of a collective effort including the commitment of our sponsors, dedication of our members, insight of our executive committee, board of directors, and committee leaders, and especially the steady guidance of our Executive Director, Sandra Wulf. It has been a privilege to work alongside individuals who care deeply about IDC and the role it plays in the legal profession.

If there is a lesson I carry forward, it is this: progress in our field is not measured solely by completed checklists, but by the momentum we build and the standards we uphold. While there will always be more to do, and there should be, we can take confidence in knowing that we have moved forward with purpose.

Thank you for the opportunity to serve. I look forward to seeing how our achievements and our progress continue to grow in the years ahead.

# Editor's Note

**Jennifer K. Stuart**
*Amundsen Davis LLC.,* Chicago

It has been an honor to serve as your Editor-in-Chief over the past year. I want to extend my deepest gratitude to our dedicated membership, the editorial board, and our contributing authors. Your tireless commitment to rigorous legal scholarship, meticulous editing, and intellectual curiosity is what makes this publication a cornerstone of legal discourse. Thank you for trusting me with this privilege and for your unwavering support throughout my tenure.

We begin this edition with a comprehensive monograph by Howard Huntington, Madeline Krolczyk, Brian Dougherty, and John Fitzgerald, who explore the complex landscape of risk allocation in construction litigation. Our feature articles continue to dive deep into specialized fields: Austin Anderson analyzes critical insurance coverage issues specifically relating to environmental pollutants, William Beatty examines the application and standards of deference in *forum non conveniens* cases, and Timothy Richards provides a necessary practitioner's update on the application of Rule 213.

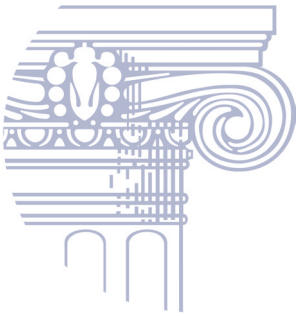
Our columnists have also provided an outstanding array of targeted practice updates. In the realm of procedure and civil practice, Pat Eckler breaks down the recent, pivotal changes impacting mailing, email receipt, and electronic filing rules. Irina Dmitrieva offers a practical guide in the Appellate Corner on half-sheet entries and critical deadlines for filing notices of appeal, while Glen Klinger offers a tactical guide to effectively drafting and utilizing privilege logs in his Practice Development column.

Substantive litigation and liability issues are heavily featured as well. Timothy DiCianni and Kathleen Kunkle dissect the legal boundaries between mere inattentiveness and willful and wanton actions under the Tort Immunity Act. Edward Grassé delivers a focused amicus briefs column examining the implications of *Skarbeck* and *Musgrove*, while Daniel Cotter addresses the severe legal ramifications when parties fail to comply with binding arbitration clauses. In civil rights, Alexeus Bender explores the calculation and awarding of prejudgment interest. James Borcia discusses the evolving standards governing the enforcement of settlement agreements in commercial law, and Kevin Young tackles the recurring problem of handling ambiguity within construction contracts.

Looking at labor and specific injury frameworks, Julie Bruch tracks the judicial expansion of retaliatory discharge claims in employment law, and Amber Cameron outlines the scope of employer liability under Section 5(a) of the Illinois Workers' Compensation Act. On the evidence front, John Federman and Paula Villela provide valuable practice tips regarding the presentation and utility of certificates of good conduct. In the medical malpractice arena, Ann Barron and Sara Peal analyze the case of *Berk v. Choy* and the necessity of Section 2-622 reports in federal court. Alex Blair evaluates when district courts' analyses are entitled to deference in the U.S. Court of Appeals for the Seventh Circuit regarding product liability.

Finally, we address the evolving landscape of modern risk and practice management. Seth Lamden examines the modern operational threat of ransomware and its resulting payroll disruptions, while Tracey Stevenson and John Watson confront the ethical and liability minefields introduced by generative AI in professional liability. William Schubert balances the duty of client confidentiality against the procedural requirements of motions to withdraw as counsel in legal ethics. To wrap up the issue, Henry Goldman summarizes the latest civil justice reform measures moving through the legislature, and John Hanson offers a close reading of the Supreme Court's decision in *Schilling v. Quincy Physicians*.

I am confident that you will find these pieces as engaging and thought-provoking as we did during the editorial process. Thank you once again for an incredible year.



# Feature Article

**Austin Anderson**
*Freeman Mathis & Gary, LLP*, Lexington, KY

## Do You Have a Permit for That? The Supreme Court of Illinois Says It Does Not Matter for Purposes of Interpreting a Commercial General Liability Pollution Exclusion

What is a pollutant? The term itself has a generally negative connotation, likely triggering mental images of dark smoke billowing out of a factory in the early twentieth century, or perhaps toxic waste seeping into a river. But what if the "pollutant" in question is approved by a government agency—namely, the Illinois Environmental Protection Agency? If a government agency permits environmental dissemination of a potentially hazardous particle, is it still a pollutant in the traditional sense? Moreover, is it still a "pollutant" for purposes of interpreting a pollution exclusion included in a commercial general liability insurance policy? This is the question the Court of Appeals for the Seventh Circuit asked the Supreme Court of Illinois in *Griffith Foods Int'l Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 134 F. 4th 483, 485 (7th Cir. 2025), a case that highlights the complex interplay between regulatory approval, insurance coverage, and evolving definitions of environmental harm.

### Background and State Court Litigation

The winding, and tragic, journey which led to this question began in the early 1900s when Griffith Foods, then known as Griffith Laboratories, U.S.A., Inc., pioneered the use of ethylene oxide (EtO) as an effective medical supply sterilant. *Griffith Foods*, 134 F. 4th at 485. In 1984, Griffith sought a construction and operating permit from the Illinois Environmental Protection Agency to open a medical sterilization plant in Willowbrook, Illinois. *Id.* Griffith did not attempt to hide the fact that its sterilization plant would produce significant EtO emissions which would be discharged from the plant. *Id.* While the Illinois Environmental Protection Agency apparently expressed some concern over the projected emission levels, it ultimately granted Griffith's request for a permit. *Id.*

The Griffith plant operated continuously from 1984 to 2019, having been sold once in that time to a company named Sterigenics. *Id.* In 2018, the United States Department of Health and Human Services released a public report revealing that Willowbrook, Illinois was experiencing "staggering and disproportionate" rates of cancer. *Id.* The believed caused of the cancer was the EtO emissions from the Griffith plant. *Griffith Foods*, 134 F. 4th at 485. After the report was released, over 800 residents of Willowbrook filed suit against Griffith and others in Illinois state court. *Id.* at 485–86. The cases were consolidated into the now infamous *In re Willowbrook Ethylene Oxide Litigation* matter.

In 2021, Griffith tendered the ongoing state court litigation to its general liability insurance carrier for the years 1984 and 1985, National Union Fire Insurance Company of Pittsburgh, Pa. (National Union). *Id.* National Union denied coverage, asserting that the policy's pollution exclusion precluded coverage. *Id.* The pollution exclusion in the National Union policy provided as follows:

> [B]odily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental[.] *Id.* at 489.

### About the Author

**Austin Anderson** is an Associate in *Freeman Mathis & Gary, LLP's* Lexington office. He has experience representing defendants and insurers in a variety of matters, including catastrophic torts, contractual disputes, product liability claims, employment claims and construction disputes. Mr. Anderson was raised on a farm in rural Illinois before relocating to Kentucky. After earning a Bachelor's degree from Murray State University, he attended the University of Kentucky College of Law, where he served as a production editor for the Kentucky Law Journal. During law school, he clerked for the United States' Attorney's Office for the Eastern District of Kentucky, where he represented the United States against civil claims brought against it.

> If a government agency permits environmental dissemination of a potentially hazardous particle, is it still a pollutant in the traditional sense? Moreover, is it still a "pollutant" for purposes of interpreting a pollution exclusion included in a commercial general liability insurance policy?

### District Court Declaratory Judgment Action

Griffith and its successor company, Sterigenics, filed an action for declaratory judgment against National Union in the district court for the Northern District of Illinois. *Sterigenics U.S., LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, 619 F. Supp. 3d 852 (N.D. Ill. 2022). Griffith sought a declaration that National Union owed it a defense and indemnity in the state court litigation. National Union again asserted that the pollution exclusion in the policy precluded coverage.

The district court ruled that Griffith was entitled to a defense from National Union, applying the long-standing principle of insurance law that the duty to defend arises when the allegations in the underlying complaint *potentially* assert a claim that may fall within liability coverage. *Sterigenics*, 619 F. Supp. 3d at 860, 869. The court identified two bases for determining that the pollution exclusion might not apply.

First, the court found the pollution exclusion ambiguous as to whether it applied to "permitted emissions" such as the EtO at issue. It noted that Illinois courts had typically restricted pollution exclusions to "hazards traditionally associated with environmental pollution." *Id.* at 862 (citing *AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co.*, 37 F.4th 440, 444 (7th Cir. 2022)). The court, relying heavily on the Illinois Court of Appeals decision in *Erie Insurance Exchange v. Imperial Marble Corporation*, 2011 IL App (3d) 100380, agreed that Griffith's emissions "did not qualify as traditional environmental pollution because those emissions were made pursuant to a permit issued by the Illinois Environmental Protection Agency." *Sterigenics*, 619 F. Supp. 3d at 863.

Second, the court focused on the exception language at the end of the pollution exclusion, which stated that the exclusion did not apply "if such discharge, dispersal, release or escape is sudden and accidental." *Id.* at 864. The court noted that the use of "sudden" in a pollution exclusion had previously been determined to be ambiguous by the Supreme Court of Illinois. *Id.* However, most of its analysis centered on whether the release of EtO was "accidental." In the context of a commercial general liability policy in Illinois, "accidental" means "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden, or unexpected event of an inflictive or unfortunate character." *Id.* The court interpreted the underlying complaint literally; it alleged that Griffith's negligence led to "unintended leaks, spills, or emissions." *Id.* National Union countered that, when read as a whole, the complaint depicted intentional conduct rather than an "accident." The court ruled that the underlying plaintiffs could proceed under both theories—intentional and negligent conduct—and that "[t]he latter theory is all that is needed to trigger the 'sudden and accidental' exception." *Id.*

### The Seventh Circuit Appeal

After the district court's decision in *Sterigenics*, National Union appealed to the Seventh Circuit Court of Appeals. *Griffith Foods*, 134 F. 4th 483.

The Seventh Circuit first disagreed that the "sudden and accidental" exception to the exclusion applied. It determined that while "some emissions may have been the result of frequent accidental spills or other negligent business acts," the focus of the underlying complaint was on intentional conduct. The court noted that the complaint "repeatedly" alleged that the EtO was released into the air intentionally and as expected.

The court then turned to the pollution exclusion itself. Griffith, National Union, and the court all agreed that the case "turned on how to apply the Illinois Supreme Court's reasoning" in *American States Insurance Company v. Koloms*, 177 Ill. 2d 473 (Ill. 1997). *Griffith Foods*, 134 F. 4th at 490.

In *Koloms*, the question before the court was whether injuries caused by carbon monoxide emissions from a defective furnace in a residential home fell within a pollution exclusion in a commercial general liability policy. *Griffith Foods*, 134 F. 4th at 490. *Koloms* observed that courts were divided on how

to interpret pollution exclusions in such policies. *Id.* If the policy language was strictly applied, the exclusion could bar coverage "in a wide range of scenarios that would not normally be thought of as environmental pollution." *Griffith Foods*, 134 F. 4th at 490. However, a strict reading of the exclusion could lead to what the Seventh Circuit described as "absurd results," such as "excluding coverage when a person slips and falls on the spilled contents of a bottle of Drano or has an allergic reaction to chlorine in a swimming pool." *Id.*

The *Koloms* court ultimately declined to interpret the exclusion broadly. *Griffith Foods*, 134 F. 4th at 490. It recounted the history of pollution exclusions, considered the intent behind the language, and concluded that "to give true meaning to the intent of its drafters, the [*Koloms* court] read the pollution exclusion as applying only to 'injuries caused by traditional environmental pollution.'" *Griffith Foods*, 134 F. 4th at 490–91. According to the Seventh Circuit, "if *Koloms* stood in the Illinois Reports as the only pertinent authority on the question presented, we would hold that the pollution exclusion in the CGL policies at issue here applies to exclude the possibility of coverage for the bodily injuries alleged in the Master Complaint" because EtO was an environmental pollutant in the traditional sense. *Griffith Foods*, 134 F. 4th at 491.

However, *Koloms* was not the only pertinent authority in Illinois. At Griffith's urging, the court considered *Erie Insurance Exchange v. Imperial Marble Corporation*, 2011 IL App (3d) 100380. In *Imperial Marble*, a marble manufacturer emitted chemicals pursuant to a permit issued by the Illinois EPA but allegedly discharged more than was authorized. *Griffith Foods*, 134 F. 4th at 491. The trial court held that the exclusion applied to bar coverage because the emissions were "traditional environmental pollution." *Id.* The Illinois Court of Appeals reversed, ruling that the exclusion was "arguably ambiguous as to whether the emission of hazardous materials in levels permitted by an IEPA permit constitute traditional environmental pollution excluded under the [CGL] policy." *Id.* The Imperial Marble decision thus introduced additional ambiguity into the interpretation of pollution exclusions under Illinois law.

The interaction between *Koloms* and *Imperial Marble* was described as follows: "*Imperial Marble* could be read to suggest that legally authorized emissions—those that occur pursuant to a regulatory permit—may not constitute the type of traditional environmental pollution that *Koloms* envisioned." *Griffith Foods*, 134 F. 4th at 491–92. In short, the Seventh Circuit was presented with two Illinois cases that were seemingly compatible but offered little guidance on how to resolve the Griffith appeal. For this reason, the Seventh Circuit certified the following question to the Illinois Supreme Court:

> In light of the Illinois Supreme Court's decision in *American States Insurance Co. v. Koloms*[], and mindful of *Erie Insurance Exchange v. Imperial Marble Corp.*[], what relevance, if any, does a permit or regulation authorizing emissions (generally or at particular levels) play in assessing the application of a pollution exclusion within a standard-form commercial general liability policy?

*Griffith Foods*, 134 F. 4th at 493 (internal citations omitted).

### Illinois's Response to the Seventh Circuit's Certified Question

Over a dozen *amici* briefs were filed regarding the question posed by the Seventh Circuit, underscoring its significance to both policyholders and insurance carriers. *Griffith Foods Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2026 IL 131710, ¶ 12.

The Illinois Supreme Court first discussed *Koloms, Imperial Marble*, and an additional case that followed, *Imperial Marble*. *Griffith Foods*, 2026 IL 131710, ¶¶ 18–20. The court began its analysis by stating that its primary objective in interpreting an insurance policy is to "ascertain and give effect to the intention of the parties, as expressed in the policy language." *Id.* ¶ 24. The court opined that the discharge of EtO emissions "fits squarely within [the] plain language" of the National Union policy and the plain and ordinary meaning of "traditional environmental pollution" set forth in *Koloms*. *Id.* ¶ 25. Thus, the only remaining question was whether the Illinois Environmental Protection Agency permit altered the analysis in any way.

The court unequivocally ruled that the permit did not alter its analysis. Its reasoning was straightforward and threefold. First, the exclusion itself did not contain any language about "permitted or authorized" pollution. *Id.*

¶ 25. Second, the pollution exclusion was drafted in response to the insurance industry's concerns about increasingly frequent and costly litigation, as noted by *Koloms*. *Id.* ¶ 26. Declining to enforce the exclusion simply because an agency had permitted the pollution would, in the Court's estimation, undermine the purpose of the exclusion. *Id.* Finally, the Court brilliantly noted that the very fact Griffith had to seek a permit probably meant that the EtO was, in fact, a pollutant in the traditional sense:

> Indeed, if the EtO emissions were not pollution, there would have been no need for the policyholders to obtain a permit from IEPA in the first place. In other words, the permit allowing the policyholders to emit EtO did not, in some manner, render those emissions no longer pollution in the plain and ordinarily understood meaning of the word.

*Griffith Foods*, 2026 IL 131710, ¶ 25.

The court ultimately responded to the Seventh Circuit as follows: "a permit or regulation authorizing emissions (generally or at any particular levels) has no relevance in assessing the application of a pollution exclusion within a standard-form commercial general liability policy." *Id.* ¶ 31. Based upon this response, it is extremely likely that the Seventh Circuit applies *Koloms* and overturns the District Court's ruling.

The immediate impact of the *Griffith Foods* decision is clear: if a "pollutant" as traditionally understood causes bodily injury, a standard pollution exclusion in a commercial general liability policy bars coverage, regardless of whether the pollutant was authorized for release.

**The Impact of *Griffith Foods***

The immediate impact of the *Griffith Foods* decision is clear: if a "pollutant" as traditionally understood causes bodily injury, a standard pollution exclusion in a commercial general liability policy bars coverage, regardless of whether the pollutant was authorized for release. More broadly, the decision sends a strong signal to insureds that pollution exclusions in commercial general liability policies will often preclude coverage, even in cases where emissions are permitted by regulatory authorities.

Another interesting note from this saga comes from the Seventh Circuit's ruling that the exception to the pollution exclusion did not apply. Although the underlying complaint included allegations of negligence, accidental discharge, as well as claims for intentional conduct, the Seventh Circuit considered the complaint as a whole and determined that the predominant focus was on intentional conduct. While it was likely not the intent of the Seventh Circuit, one must consider whether there is now an argument that in the Seventh Circuit, the overall "gist" of a complaint can or should be considered alongside the actual four corners of same.

Policyholders should consider alternative forms of insurance coverage to mitigate environmental risk given the expected outcome of the Seventh Circuit *Griffith Foods* case. For example, companies operating in industries that routinely handle potentially hazardous substances may wish to explore specialized environmental liability policies or endorsements that provide coverage for permitted emissions. Insurers, on the other hand, may revisit their policy language or underwriting practices in light of the decision, seeking to clarify the scope of exclusions or adjust premiums to reflect the heightened risk of litigation in a post *Griffith Foods* world.

Ultimately, the *Griffith Foods* case serves as a reminder that insurance coverage for environmental risks is a complex and evolving area of law. Staying informed about judicial trends and proactively managing insurance portfolios will be essential for organizations seeking to safeguard against unforeseen liabilities in the wake of this precedent. As the legal landscape continues to shift, adaptability and vigilance will be key for both insurers and policyholders.

# Evidence and Practice Tips

**Jonathan L. Federman**
*Gordon Rees Scully Mansukhani, LLP*, Chicago

**Paula K. Villela**
*Foran Glennon Palandech Ponzi & Rudolph, P.C.*, Chicago

## Proof of Conviction of Crime Versus a Certificate of Good Conduct: Which Controls in Impeachment?

Factual disputes in civil cases often come down to the credibility of each party's witnesses. What is the degree of the plaintiff's pain and suffering? Is their experience typical? Were they observed performing activities that would be impossible if the plaintiff was telling the truth? If a testifying plaintiff is discovered to have a past criminal conviction involving a crime of dishonesty, such as being convicted of embezzlement of funds, evidence of that crime can go a long way in discrediting their testimony.

While Illinois Rule of Evidence 609 allows evidence of criminal convictions to be used in challenging a witness's credibility, a plaintiff may attempt to preclude this evidence by producing a Certificate of Good Conduct, entered in the criminal matter and raising an argument that it effectively nullifies the evidentiary value of the conviction. The issue then becomes whether a Certificate of Good Conduct is the equivalent of a certificate of rehabilitation such that the conviction should be barred from evidence?

This is the exact issue the Court considered in *Kozik v. Union Pacific Railroad Company*, 2025 IL App (1st) 242219. The plaintiff in *Kozik* was injured in the head when a piece of concrete fell from a bridge while he was working. *Kozik*, 2025 IL App (1st) 242219, ¶ 2. The plaintiff had entered a guilty plea within the previous 10 years for felony theft of property from his previous employer. *Id.* ¶ 3. The plaintiff characterized his felony conviction as an act of embezzlement. *Id.* During discovery in his personal injury claim, the plaintiff filed a "Request for Certificate of Good Conduct" in the criminal division under the case number related to his felony theft conviction. *Id.* ¶ 5. That request was granted. *Id.* ¶ 7.

Illinois Rule of Evidence 609 is titled "Impeachment by Evidence of Conviction of Crime" and provides:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or (2) involved dishonesty or false statement regardless of the punishment unless (3), in either case, the court determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.
>
> . . .
>
> Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and (2) the procedure under which

### About the Authors

**Jonathan L. Federman** is a partner at *Gordon Rees Scully Mansukhani, LLP*. His practice focuses on insurance coverage litigation, appeals, commercial litigation, and general litigation defense. Mr. Federman's practice includes representation of insurance company clients in disputes arising out of commercial general liability, professional liability, business auto, directors and officer and many other types of policies of insurance. Mr. Federmen earned his J.D., *summa cum laude*, from the John Marshall Law School, and served as a judicial law clerk for Justice Thomas L. Kilbride at the Illinois Supreme Court.

**Paula K. Villela** of *Foran Glennon Palandech Ponzi & Rudolph PC* in Chicago is a seasoned insurance litigator and appellate advocate, focusing her practice on challenges involving commercial general liability, professional liability and first-party property insurance disputes. Ms. Villela earned her J.D., with High Honors, from Chicago-Kent College of Law, and served as a law clerk for Justices Joseph Gordon and William H. Taylor, II at the Appellate Court for the First District of Illinois.

> the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.

Ill. R. Evid. 609 (a), (c).

The plaintiff sought a Certificate of Good Standing pursuant to 730 ILCS 5/5-5.5-25. However, § 5/5-5.5-25(b)(ii) specifies that a "certificate of good conduct shall not limit or prevent the introduction of evidence of a prior conviction for purposes of impeachment of a witness in a judicial or other proceeding whether otherwise authorized by the applicable rules of evidence."

The trial court found that the Certificate of Good Standing was equivalent to a certificate of rehabilitation, that there was a conflict between Rule 609 and § 5/5-5.5-25, and held that Illinois Supreme Court Rules control over statutes when there is a conflict, barring evidence of the conviction. *Kozik*, 2025 IL App (1st) 242219, ¶¶ 16, 20.

The appellate court disagreed. In doing so, it first noted that statutory interpretation requires a court to attempt to reconcile a supreme court rule with a statute before finding an irreconcilable conflict. *Id.* ¶ 39. The court focused on § 5/5-5.5-2.5(b)(ii), which "makes clear that it is not intended to nullify the conviction *or consequences*. [Emphasis added]. *Kozik*, 2025 IL App (1st) 242219, ¶ 51. As the court further recognized:

> The statute also specifies several ways in which the certificate does *not* amount to a nullification of an offender's criminal record. Among other things, the statute provides that the certificate "shall not limit or prevent the introduction of evidence of a prior conviction for purposes of impeachment," that the offender's conviction may still be "consider[ed]" in a judicial proceeding, and that the certificate "does [not] hide, alter, or expunge the record."

*Id.* (quoting 730 ILCS 5/5-5.5-25).

Accordingly, the statute governing certificates of good standing is aimed only at relieving certain eligible offenders from specific disadvantages related to employment, occupational licensing or housing. *Kozik*, 2025 IL App (1st) 242219, ¶ 51. It is *not* meant to limit evidence of a prior conviction for impeachment of a witness. *Id*. Therefore, the court held the certificate of good conduct is not the equivalent to a pardon, or annulment, nor a certificate of rehabilitation. *Kozik*, 2025 IL App (1st) 242219, ¶ 69.

The court further concluded that there was little risk of unfair prejudice by permitting the trial court to allow the impeachment evidence. *Id.* ¶ 85. As such, the court reversed the trial court and remanded for a new trial. *Id.* ¶ 89.

While the overall fairness surrounding the use of a prior criminal conviction for impeachment of a witness may be up for debate, Illinois recognizes that outside of specific circumstances, such evidence should be available for the fact finder to consider when determining the credibility of a witness.

While the overall fairness surrounding the use of a prior criminal conviction for impeachment of a witness may be up for debate, Illinois recognizes that outside of specific circumstances, such evidence should be available for the fact finder to consider when determining the credibility of a witness. As such, knowing the status of a conviction and the type of certificate that the witness at issue has obtained is a crucial step in the preparation for cross-examination of a witness before a finder of fact. *Kozik* supports following the Rules of Evidence to permit such evidence, so that a jury can determine credibility based on the relevant, admissible evidence.

# **Insurance Law** Update

**Seth D. Lamden**
*Blank Rome LLP*, Chicago

## Ransomware Payroll Disruption and the Limits of Cyber Extra-Expense Coverage

Many cyber insurance policies cover business income losses and extra expenses necessarily incurred to continue business operations in the wake of a cyber-attack. The court in *Villa Financial Services, LLC v. Underwriters at Lloyd's of London*, 2025 IL App (1st) 250754-U, held that more than $1 million in payroll overpayments made during a ransomware outage of the insured's payroll processor were not recoverable under a cyber insurance policy's extra-expense coverage. The court reasoned that payments exceeding wages actually earned were not expenses "necessarily incurred" to continue operations, even though they resulted directly from a cyberattack and the insured's effort to maintain payroll continuity. The decision construes cyber extra-expense coverage narrowly and raises important questions about how courts characterize emergency mitigation costs in the wake of a cyber event.

### The Ransomware Cyber Losses and Insurance Claim

The plaintiff-insured served as the management company for multiple nursing facilities, and relied on Ultimate Kronos Group ("Kronos") for payroll compliance services. *Villa Fin. Svcs.*, 2025 IL App (1st) 250754-U, ¶ 4. In December 2021, Kronos suffered a ransomware attack that rendered its systems unavailable. As a result, the plaintiff could not access current payroll data for its employees but still had to meet its payroll obligations. To avoid missing payroll, the plaintiff paid employees using data from prior payroll periods. That temporary solution produced both underpayments and overpayments, with a net overpayment exceeding $1.2 million. *Id*. After failing to resolve the loss with Kronos, the plaintiff made a claim for coverage under the "Cyber Private Enterprise" insurance policy that it had purchased from the defendant through Lloyd's of London. *Id*. ¶ 5.

Section B of the cyber policy covered losses caused by business interruption and extra-expense coverage for cyber-related downtime. The policy covered business income loss and extra expense resulting from damage to the plaintiff's own computer systems, and also provided "Dependent Business Interruption" coverage, which covered the plaintiff's business income loss and extra expense resulting from computer system outages affecting supply chain partners. *Id*. ¶¶ 6-7. Specifically, this coverage required the insurer to reimburse the plaintiff for its "income loss and extra expense sustained during the indemnity period as a direct result of an interruption to [its] business operations arising directly out of any sudden, unexpected and continuous outage of computer systems used directly by a supply chain partner." *Id*. ¶ 7. The policy defined "extra expense" as reasonable sums necessarily incurred . . . to mitigate an interruption to and continue your business operations." *Id*.

An insurance coverage dispute arose when the defendant denied plaintiff's claim for extra expense coverage for payroll overpayments it made as a result of the ransomware attack on Kronos. Defendant rejected the insurance claim on the basis that the payroll overpayments made by plaintiff did not constitute "extra expense" losses, and the policyholder filed a declaratory judgment action. *Id*. ¶ 10. The trial court upheld the coverage denial, holding that the overpayments were not "extra expense" losses as a matter of law because "it was not essential, indispensable, or requisite for plaintiff to pay its employees more than they were owed in order to continue its business operations." *Villa Fin. Svcs.*, 2025 IL App (1st) 250754-U, ¶ 15.

### About the Author

**Seth D. Lamden** is a partner with *Blank Rome LLP*'s insurance recovery practice group, and he practices out of the firm's Chicago office. For more than 20 years, Mr. Lamden has focused his practice exclusively on helping policyholders understand and enforce their rights to insurance coverage. He is a past member of the IDC's Board of Directors and two-time chair of the IDC's Insurance Law Committee. He is a fellow of the American College of Coverage Counsel. He also maintains an AV Preeminent® rating with Martindale-Hubbell® and is listed in the area of insurance coverage law in Best Lawyers in America, Illinois Super Lawyers, and the Leading Lawyers Network.

### The Court's Interpretation of "Extra Expense"

The appellate court framed the dispute as a matter of contract interpretation that could be resolved as a matter of law, noting that under Illinois law, insurance policies are construed according to their plain language, and unambiguous terms are enforced as written. The court focused its analysis on whether the overpayments were "necessarily incurred" to continue the plaintiff's business. *Id.* ¶ 24. It adopted the ordinary meaning of "necessary" as expenses that are "essential, indispensable, or requisite." *Id.* ¶¶ 29-30 (quoting *Chatham Corp. v. Dann Ins.*, 351 Ill. App. 3d 353, 358 (2004)). In the court's view, only wages actually earned by employees met that standard.

The plaintiff argued that, given the ransomware outage, paying employees based on outdated records was the only practical way to continue operations and avoid payroll disruption. *Id.* ¶ 13. The court acknowledged that the cyberattack forced the plaintiff to improvise, but concluded that the policy covered only amounts the plaintiff was obligated to pay. Because the plaintiff had no duty to pay employees more than they earned, the excess payments were not necessary expenses within the meaning of the policy. *Id.* ¶ 32. According to the court, "[e]xpenses were not necessary if they were expenses 'that the insureds may have wanted to incur on a gratuitous or voluntary basis,' which would have been the opposite of 'necessary.'" *Id.* ¶¶ 29-30 (quoting *Chatham Corp.*, 351 Ill. App. 3d at 359).

The court emphasized that it would not expand coverage beyond the policy's terms or rewrite the parties' agreement to accommodate the insured's business judgment during an emergency, noting that "[w]hile it may be true that plaintiff felt that it had no choice in that moment but to pay out extra funds in order to meet its payroll obligations, plaintiff's apparent misfortune does not create coverage where none exists under the policy." *Villa Fin. Svcs.*, 2025 IL App (1st) 250754-U, ¶¶ 29-30. Although the overpayments were a direct consequence of the ransomware event and were incurred in an effort to maintain payroll, the court held that they fell outside the policy's extra-expense coverage as a matter of law. *Id.* ¶ 34.

> For insureds, the decision underscores the importance of policy wording and the risk that courts may separate the operational necessity of an emergency response from the legal necessity of each dollar spent.

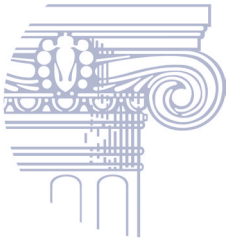
### Implications For Cyber Business Interruption Claims

*Villa Financial Services* illustrates the tension between real-world cyber incident response and judicial efforts to categorize mitigation costs after the fact. Cyber events often require insureds to act quickly with incomplete information. Temporary overpayments, duplicate payments, and other accounting distortions may be unavoidable byproducts of maintaining critical operations.

The *Villa Financial* court's analysis treats payments that exceed the insured's strict contractual obligations as outside of coverage, even if the payments were based on sound business judgment. That approach arguably narrows extra-expense coverage to a subset of emergency costs: those that can be characterized as indispensable in a formal, contractual sense. For insureds, the decision underscores the importance of policy wording and the risk that courts may separate the operational necessity of an emergency response from the legal necessity of each dollar spent.

### Practice Tip

When presenting cyber extra-expense claims, policyholder counsel should develop a detailed factual record showing how emergency expenditures functioned as an integrated mitigation strategy, not as isolated accounting anomalies. Demonstrating that a response was the only feasible means of continuing operations may be critical to framing those costs as "necessarily incurred" under the policy.



**James K. Borcia**
*Tressler LLP*, Chicago

# Seventh Circuit Court Reverses Order Enforcing Settlement Agreement

The Court of Appeals for the Seventh Circuit recently reversed a district court ruling enforcing a settlement agreement, finding that despite the parties' agreement in principle to settle and the dollar amount of that settlement, material terms of the settlement were left open that precluded it from being enforced. *Carina Ventures LLC v. Pilgrim's Pride Corporation*, No. 25-1110, 2026 WL 310790, *1 (7th Cir. Feb. 5, 2026).

In *Carina Ventures LLC*, the parties entered into settlement negotiations involving multi-district antitrust actions alleging price-fixing in the sales of broiler chickens. *Carina Ventures*, 2026 WL 310790, at *1. The plaintiff in the actions, Sysco Corporation, bought chicken, beef, and pork from the defendant, Pilgrim's Pride Corporation. *Id.* Sysco obtained litigation funding for the lawsuits from Burford Capital. *Id.*

Early in the lawsuits, Pilgrim's and many other defendants entered into a "Judgment Sharing Agreement," which was a response to the joint and several liability that can apply to all conspirators under antitrust law. *Id.* at *2. This agreement allowed a defendant to settle with a plaintiff so as to escape possible joint and several liability for that plaintiff's claims against other defendants that succeed in the future. *Id.* To gain that benefit, a settlement had to be "qualified" under the Judgment Sharing Agreement. *Id.* To be qualified under that agreement, a settling plaintiff had to agree to subtract damages stemming from its purchases with the settling defendant in any later settlements with or judgments against other defendants, a settling defendant was required to provide written notice of its settlement to other Judgment Sharing Agreement defendants within seven days after executing that settlement. *Carina Ventures*, 2026 WL 310790, at *2.

Pilgrim's and Sysco began settlement discussions in April 2021. *Id.* On August 24, 2022, the parties' representatives spoke on the phone. *Id.* They ended the call having reached an agreement in principle for Sysco to release its claims for a total of $50 million. *Id.*

Following the call, Pilgrim sent an email to Sysco: "We have a deal at $50M for settlement of Broilers, Pork, and Beef antitrust cases. Let me know the assignments in each case (prioritizing Broilers), and we will figure out the allocation and draw up the agreements," and sent an email on the next day "As discussed, I am confirming that JBS and Pilgrim's are offering $50M for a global settlement of Broilers, Pork, and Beef antitrust cases." *Id.* Sysco responded, "We accept," and requested that both parties' outside counsel connect "to work on the release." *Id.* Pilgrim's answered: "Before we draft the releases, can you confirm the assignments in Broilers?" *Carina Ventures*, 2026 WL 310790, at *2.

The parties were subsequently unable to agree on the terms of a written agreement. *Id.* at *3. In December 2022, Buford asserted its right under its agreement with Sysco to withhold its consent to the settlement, and Sysco's claims were later assigned to Buford's affiliate, Carina Ventures. *Id.* at *3-4. On September 9, 2023, Pilgrim's moved to enforce the settlement agreement, and Pilgrim's later moved for summary judgment on Carina's claims, which were both granted by the district court. *Id.* at *4-5.

Carina appealed these orders. *Id.* at *5. The Seventh Circuit reversed the district court's ruling based on Illinois law that requires mutual assent to all material terms before an agreement can be binding. *Id.*

Pilgrim's presented the settlement as a simple exchange: $50 million for releases of all of Sysco's antitrust claims against it. *Carina Ventures*, 2026 WL 310790, at *5. Any other terms, it contended, were not material. *Id.* The Seventh Circuit disagreed, finding that the parties' negotiations and actions refuted Pilgrim's theory. *Id.* at *7. The court found four terms that the parties negotiated for months after the call directly affected the value of the deal and the scope of the release, showing that these terms were both material and unresolved at the time of the initial agreement. *Id.* at *7-9. Those terms were compliance with

## About the Author

**James K. Borcia** is a partner with the Chicago firm of *Tressler LLP*, and is active in the firm's litigation practice with an emphasis on commercial and complex litigation. He was admitted to the bar in 1989 after he received his J.D. from Chicago-Kent College of Law. Mr. Borcia is a member of the Chicago and Illinois State Bar Associations, as well as the IDC and DRI.

the Judgment Sharing Agreement, the scope of Sysco's assignments, the most favored nation clause, and the allocations among the three cases. *Id.*

As to the Judgment Sharing Agreement, the court noted that Pilgrim's told Sysco over two months *after* the parties reached the supposedly binding agreement that it would walk away from the settlement if it were not compliant with the Judgment Sharing Agreement, which conduct the court found showed this was a material term that had not been resolved at the time of the supposedly binding agreement. *Id.* at *7. The court further noted that the Judgment Sharing Agreement required the settling defendant to provide written notice of a signed settlement agreement to the other Judgment Sharing Agreement defendants within seven days of reaching that agreement, and there was no evidence that Pilgrim's ever attempted to satisfy this term. *Carina Ventures*, 2026 WL 310790, at *7.

With respect to scope of the assignments, the court found that the assignments had a direct effect on the value of the exchange of money for releases, as that data told Pilgrim's which claims Sysco still possessed and therefore could release making the data critical to the value of the most central term: Sysco's release of its claims for the $50 million price. *Id.* at *8.

As to the most favored nation clause, after Sysco sent its "We accept" email, the parties continued for months to negotiate the scope of the "most favored nation" clause. *Id.* at *9.

Finally, with respect to the allocation issue, the court found that the specific allocation of the settlement amount to each group was a material term, left open at the time the parties agreed to the $50 million sum. *Id.*

# Employment Law

**Julie A. Bruch**
*IFMK Law, Ltd.*, Northbrook

## Illinois Retaliatory Discharge Claims Continue to Expand

Illinois courts continue to develop the tort of retaliatory discharge by expanding what type of conduct violates clear mandates of public policy. Most recently, in *Bradish v. Aperion Care Marseilles, LLC*, 2025 IL App (3d) 240108, ¶ 3 (Dec. 19, 2025), the Third District Court of Appeals reversed and remanded dismissal of a retaliatory discharge lawsuit brought by a former registered nurse at a nursing and rehabilitation facility who claimed that he was wrongfully terminated for reporting an inadequate supply of sterile gloves. Russell Bradish claimed that during the course of his employment as a registered nurse, his employer failed at times to provide him with the appropriate personal protective equipment that was necessary for him to perform his job duties. Specifically, Bradish alleged that the defendant had an inadequate supply of sterile gloves and despite his regular complaints about his concerns working with and treating residents at the facility without an adequate supply of gloves, the employer did nothing to remedy the shortage. *Bradish*, 2025 IL App (3d) 240108, ¶¶ 3-4. Instead, employees and agents of the facility allegedly downplayed and ignored Bradish's safety concerns and complaints. *Id.* ¶ 4.

On May 11, 2020, Aperion Care Marseilles, LLC terminated Bradish and gave no substantive reason for his termination. *Id.* Bradish claimed that due to the close proximity between his termination and complaints of the shortage of gloves and other safety supplies, it indicated that his termination was a direct result of his safety concerns. *Id.* As a result, in April 2022, Bradish filed suit against Aperion Care Marseilles, LLC for retaliatory discharge. *Id.* ¶ 5. The employer repeatedly filed motions to dismiss which were granted by the court on the basis that Bradish failed to allege that his discharge violated a clear mandate of public policy. *Id.* Bradish had originally linked his glove supply concern to the COVID-19 pandemic and to having to treat residents infected with COVID-19 without sterile gloves. *Bradish*, 2025 IL App (3d) 240108, ¶ 5.

By the fifth amended complaint, Bradish eliminated all references to COVID-19 and now alleged that his termination violated three public policies in Illinois:

> (1) a clearly mandated public policy requiring healthcare facilities, such as defendant, to properly manage and ensure the availability of personal

### About the Author

**Julie A. Bruch** is a partner with *IFMK Law, Ltd.* Her practice concentrates on the defense of governmental entities in civil rights and employment discrimination claims.

> protective equipment (PPE) in healthcare settings, (2) a clearly mandated public policy that prohibited employers from discharging any employee who complained of an occupational hazard or to prevent that employee from reporting such a hazard, and (3) a clearly mandated public policy that required employers to provide their employees with adequate supplies of sterile gloves and other protective equipment to prevent the spread of blood-borne illnesses.

*Id.* ¶ 6. *Bradish* cited a federal regulation in the Occupational Safety and Health Administration (OSHA) that applied to all occupational exposure to blood or other potentially infectious materials. 29 C.F.R. § 1910.1030 (2019); *Bradish*, 2025 IL App (3d) 240108, ¶ 7. Specifically, the regulation provided, in relevant part:

> When there is occupational exposure [to blood or other potentially infectious materials], the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices.

29 C.F.R. §*1910.1030*(d)(3)(i); *Bradish*, 2025 IL App (3d) 240108, ¶ 7.

OSHA is a source of public policy and the Act prohibits employers from discharging an employee for exercising a right afforded by the Act.

The cited regulations also defined occupational exposure to include reasonably anticipated skin contact with potentially infectious materials, provides that gloves shall be worn by an employee when it can be reasonably anticipated that the employee may have hand contact with potentially infectious materials and touching contaminated items or surfaces, and that it is the responsibility of the employer to ensure that appropriate PPE is readily accessible at the worksite or is issued to employees. *Bradish*, 2025 IL App (3d) 240108, ¶ 7 (citing 29 C.F.R. §1910.1030(b), (d)(3)(ix), and (d)(3)(iii)). Bradish further alleged in the fifth amended complaint that the regulation applied to his job as a registered nurse; he worked in an environment where it could be reasonably anticipated that he may have contact with potentially infectious materials; the lack of an adequate supply of sterile gloves posed a clear risk to him and the community and public at large because infectious diseases could easily spread without gloves; Bradish's good-faith reports regarding the shortage of supplies were protected activities; the defendant terminated Bradish, in part, as a result of his complaints about the lack of gloves and other PPE; and his termination was in violation of a clearly mandated Illinois public policy, as it would discourage others from reporting occupational health hazards. *Bradish*, 2025 IL App (3d) 240108, ¶ 8.

The defendant moved to dismiss the fifth amended complaint and requested sanctions against Bradish for filing a frivolous pleading. *Id.* ¶ 9. Following briefing and oral argument, the trial court granted the employer's motion to dismiss and gave Bradish leave to file a sixth amended complaint only if he paid a $3,000 sanction to defendant's attorney for the fees and costs related to the motion to dismiss. *Id.* ¶ 10. Bradish elected to stand on the fifth amended complaint and the trial court converted the dismissal to a dismissal with prejudice which allowed Bradish to appeal. *Id.*

The focus on appeal was whether Bradish's factual allegations adequately identified a clearly mandated public policy that was applicable under the circumstances of the present case and Bradish failed to allege sufficient facts to support that his discharge violated or undermined public policy. *Id.* ¶ 13. The employer conceded that Bradish adequately alleged the other elements of a retaliatory discharge case: that the employer discharged the employee, and that the discharge was in retaliation for the employee's activities. *Id.* ¶ 15.

Prior court decisions have held that "a clear mandate of public policy generally concerns what is right and just and what affects the citizens of the

state collectively. Such a policy does not encompass purely personal matters but, rather, matters that strike at the heart of a citizen's social rights, duties, and responsibilities." *Bradish*, 2025 IL App (3d) 240108, ¶16 (internal citations omitted). Such clear mandates can be found in state and federal constitutions, statutes, judicial decisions, and safety regulations. *Id.* Here, Bradish argued that he was a whistleblower and was discharged for reporting illegal or improper conduct. *Id.* In order for the mandate to be clear, "the alleged policy must be sufficiently specific to put employers on notice that discharge decisions relating to that policy could expose them to liability." *Id.* ¶ 17. "[T]he determination of whether a public policy exists and whether an employee's discharge violates or undermines that policy are questions of law for a court to decide." *Id.*

The majority concluded that Bradish sufficiently plead the public policy element of his retaliatory discharge claim because the provisions of the OSHA regulation were clear and specific and required healthcare facility employers to provide their employees with an adequate supply of PPE. *Id.* ¶ 18. OSHA is a source of public policy and the Act prohibits employers from discharging an employee for exercising a right afforded by the Act. *Bradish*, 2025 IL App (3d) 240108, ¶ 18. Because the OSHA regulations cited by Bradish were mandatory the court found that "[t]aken together, the OSHA regulation and its authorizing Act established a clear mandate of public policy and specified how to comply with such policy, requiring employers to furnish appropriate PPE, including gloves, to employees when there is potential occupational exposure." *Id.* ¶ 19. The court further determined that Bradish's allegations in the fifth amended complaint were sufficient at the pleading stage to allege that he was discharged for his activities of reporting/complaining of the lack of mandated gloves for defendant's employees. *Id.* ¶ 20.

The defendant had argued that Bradish failed to allege specific facts regarding this glove shortage such as on how many occasions there were shortages, the dates and duration of the shortages, or defendant's specific responses to his complaints, which made it impossible to discern how the glove shortages implicated any specific public policy or concerns about blood-borne pathogens or other infectious materials. *Id.* ¶ 21. The appellate court disagreed, concluding that a plaintiff need not plead every specific fact at the pleading stage. *Id.* The court found it was a reasonable inference that glove shortages implicated public policy and concerns regarding blood-borne pathogens and other infectious materials. *Id.*

One judge dissented on the basis that the complaint did not adequately set forth facts sufficient to bring a claim within a recognized cause of action. *Bradish*, 2025 IL App (3d) 240108, ¶ 29. While the dissent agreed that Bradish sufficiently alleged a clear mandate of public policy rooted in OSHA regulations, the dissent did not believe that Bradish sufficiently alleged a violation of the bloodborne pathogens mandate. *Id.* ¶ 32. The dissent found it "problematic" that the majority invoked "common sense" and "common knowledge" to elevate the complaint's "boilerplate allegation to well-pleaded status." *Id.* ¶ 42.

**Practice Pointer**

When counseling employers on potential terminations, attorneys should ensure they not only focus on the more common protected classes, *e.g.* gender, age, race, etc., but also consider potential retaliatory discharge claims such as a prior worker's compensation claim or the employee's possible whistleblower status. With retaliatory discharge claims often being difficult to defeat on a motion to dismiss, it is best to ensure clients are well informed on the possible repercussions of a termination decision ahead of time.

When counseling employers on potential terminations, attorneys should ensure they not only focus on the more common protected classes, e.g. gender, age, race, etc., but also consider potential retaliatory discharge claims such as a prior worker's compensation claim or the employee's possible whistleblower status.

# **Appellate Practice** Corner

**Irina Y. Dmitrieva**
*HeplerBroom LLC*, Chicago

## Do Not Wait for the File Stamp: Two First District Warnings on Appellate Finality

Two recent First District opinions show how easily a party can lose review by misjudging which order triggers the 30-day clock for filing a notice of appeal under Supreme Court Rule 303. In both cases, the court's construction of Rule 272—governing when a judgment becomes final and "entered"—proved decisive. Each appeal was dismissed because entry occurred earlier than counsel assumed.

### *National Collegiate Student Loan Trust 2007-4 v. Phelps*

In *National Collegiate Student Loan Trust 2007-4 v. Phelps*, 2025 IL App (1st) 231783, a trust that collects defaulted private student loans sued Kimberly Phelps to collect on a defaulted loan. The circuit court entered a default judgment. The parties later stipulated to dismiss the case without prejudice, while granting the trust leave to reinstate if Phelps failed to comply with a repayment schedule. When payments stopped, the trust reinstated the case, and the court entered judgment in its favor. *Phelps*, 2025 IL App (1st) 231783, ¶¶ 3-7.

Phelps filed a timely motion to reconsider. On April 24, 2023, the court denied that motion in open court. The clerk recorded the ruling on the court's half-sheet—the official docket record that memorializes court action in Cook County practice. No separate written order issued that day. *Id.* ¶ 11.

Defense counsel did not file a notice of appeal. Instead, exactly 30 days later—on May 24, 2023—counsel filed a "Motion for Entry of Order." *Id.* ¶ 12. The motion did not challenge or seek to modify the judgment; rather, it asked the court to enter a written order reflecting its April 24 ruling. On September 7, 2023, the circuit court directed that a written order be entered dated April 24, 2023, memorializing the earlier denial. *Id.* ¶ 14. Phelps then filed her notice of appeal on September 29, 2023. *Id.* ¶ 16.

> [A]bsent draft orders indicating otherwise, the half-sheet entries are the official recordation of orders entered.

The First District dismissed the appeal for lack of jurisdiction. The court began with Rule 303's requirement that a notice of appeal must be filed within 30 days after entry of the order disposing of the last postjudgment motion. *Id.* ¶¶ 23-26. It then examined when "entry" occurred. Because at the time of its initial ruling, the trial judge did not require submission of a written order and the clerk made no Rule 272 notation indicating that one would follow, entry occurred when the ruling appeared on the half-sheet. *Phelps*, 2025 IL App (1st) 231783, ¶¶ 34-37. The First District explained that "absent draft orders indicating otherwise, the half-sheet entries are the official recordation of orders entered." *Id.* ¶ 28. Consequently, the 30-day clock began to run on April 24, 2023.

The court also held that the May 24, 2023 "motion for entry of order" did not toll the deadline. It was not "directed against the judgment" within the meaning of Rule 303(a)(1). *Id.* ¶ 32. It sought only to memorialize the previous order. Because it did not attack the judgment itself, it did not qualify as a proper posttrial motion.

The majority further noted that Rule 303(a)(2) protects parties who file early. A notice filed before formal entry "becomes effective when the order disposing of said motion . . . is entered."

### About the Author

**Irina Y. Dmitrieva** is a partner with *HeplerBroom, LLC*. She focuses her practice on appellate litigation and critical trial motions. Irina has represented both government entities and private clients in federal and state appellate courts, including the Illinois Supreme Court, Illinois Appellate Court, and the U.S. Court of Appeals for the Seventh Circuit. Prior to joining HeplerBroom LLC, she handled all appeals on behalf of the Chicago Transit Authority.

> Rule 303(a)(2) protects parties who file early. A notice filed before formal entry "becomes effective when the order disposing of said motion . . . is entered." Filing prematurely would have preserved jurisdiction. Waiting for a written order did not.

*Id.* ¶ 30. Filing prematurely would have preserved jurisdiction. Waiting for a written order did not.

Justice Mitchell dissented. He read Rule 272 as designed to remove uncertainty about finality and argued that the later signed written order should control. *Id.* ¶¶ 47-50 (Mitchell, P.J., dissenting). In his view, allowing a half-sheet notation to trigger finality risks confusion and undermines the clarity Rule 272 was meant to provide. The majority disagreed. The Illinois Supreme Court denied defendant's petition for leave to appeal.

### *Carr v. City of Chicago*

If *Phelps* addressed whether a half-sheet entry can start the clock, *Carr* asked whether electronic posting of a signed order does the same.

In *Carr v. City of Chicago*, 2025 IL App (1st) 241639, the plaintiff brought a wrongful death action against the City of Chicago after a police pursuit ended in a fatal crash. A jury returned a verdict for the City. The plaintiff moved for a new trial.

On July 12, 2024, the circuit court denied that post-trial motion in a signed written order. *Carr*, 2025 IL App (1st) 241639, ¶ 11. The same day, that signed order was posted to the court's electronic docket in the Odyssey system. *Id.* ¶¶ 14-15, 20. It bore the judge's signature but no clerk's file stamp. Neither party received separate notice that the order had been posted. *Id.* ¶ 20.

On August 13, 2024, the plaintiff attempted to file a notice of appeal. The notice erroneously identified the date of the order being appealed as August 17, 2024—a date in the future—and the clerk rejected it with instructions to verify the date. *Id.* ¶¶ 16, 21. On August 14, the plaintiff resubmitted the notice with the correct date. That same day, the clerk affixed a file stamp reflecting July 12, 2024 as the effective date of the post-judgment order. *Id.* ¶¶ 17, 22-23.

The plaintiff argued that the post-judgment order was not "filed" under Rule 272 until August 14, 2024, when the clerk file-stamped it. If so, the notice of appeal would have been timely.

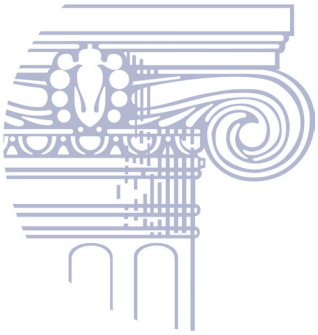
The First District disagreed. It held that filing occurred when the signed order was posted to the electronic docket on July 12, 2024 and made accessible to the parties. *Id.* ¶¶ 26-27. The absence of a file stamp was a ministerial defect that did not delay finality. *Carr*, 2025 IL App (1st) 241639, ¶ 27.

As in *Phelps*, the court emphasized that Rule 303(a)(2) protects early notices, which "become effective when the order disposing of said motion . . . is entered." *Id.* ¶ 32. What the rules do not protect is filing after the 30-day period has expired.

Because more than 30 days passed between July 12 and August 14, the court dismissed the appeal for lack of jurisdiction. *Id.* ¶ 34.

### Practice Tip

Both decisions reflect the same construction of Rule 272: entry occurs when the ruling is made of record, not when it is later formalized or file-stamped. In *Phelps*, the half-sheet entry triggered the deadline. In *Carr*, electronic posting of a signed order did the same. Defense counsel should assume the clock begins with the earliest official docket entry reflecting the ruling. If uncertainty exists, file the notice of appeal. Rule 303(a)(2) protects premature notices because they mature upon entry; nothing rescues a late one.



**Kevin H. Young**
*Cassiday Schade LLP*, Chicago

# Municipality Not Liable for Property Damage Following the Movement of a Sewer Main Because Plaintiff Was in Material Breach of the Agreement

In this case, the appellate court upheld the trial court's judgment in favor of the city of Rock Island in a breach of contract action where plaintiff Anchor Properties breached the agreement first.

A bench trial occurred on January 27, 2025. The following facts were admitted into evidence at the trial. Anchor Properties contracted with Rock Island on August 14, 2019, after construction on the property began in June 2019. *Anchor Properties, LLC v. The City of Rock Island*, 2025 IL App (4th) 250497-U, ¶ 4. When construction began, the sewer main running along the property was at subgrade level, meaning that it was essentially even with the top of the soil. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 6. Anchor Properties' owner raised concerns that the freezing of the pipe may occur, as it was not below the frost line. *Id.* ¶ 7. Additionally, Rock Island refused to move the sewer main because doing so would be very expensive. *Id.* The assistant engineer for the City stated in an email that the City would repair any damage to the parking lot for Anchor Properties necessitated by sewer repairs for leaving the sewer in place. *Id.* ¶ 8. Following this email, Anchor Properties and Rock Island entered into a contract on August 14, 2019. *Id.* ¶ 9. In pertinent part, there were 3 aspects of the contract in consideration: (1) should the subject sewer line need repair, the City would conduct necessary repairs at its own cost; (2) such repairs would be due to any damage to Anchor's driveway and parking lot necessitated by (a) sewer repairs, (b) rupture of the sewer line as a result of freezing, or (c) any other occurrence related to the sewer line and not caused by Anchor's gross negligence or intentional act; and (3) "[t]o the best of its ability, in accordance with its plans to construct a building at the Anchor property as determined by [Anchor] in its discretion, it will raise the grade in the area surrounding the sewer line, and place fibre [sic] board insulation over the pipe trench." *Id.* ¶ 10.

During the construction of the building and parking lot, an issue emerged in that the concrete subcontractor had already poured the foundation for the building while the parking lot needed to be elevated to ensure that the sewer main was properly installed. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 12. Specifically, the concrete subcontractor indicated that the footings, foundations, and floor of the building were poured in July 2019, before the sewer pipe was discovered. *Id.* ¶ 13. No tradesmen raised the grade or added insulation over the sewer pipe prior to pouring the concrete for the parking lot. *Id.* Had the tradesmen raised grade by a foot and a half, the parking lot would have been above the finished floor of the building, which meant that the overhead door to the building would not have been able to be utilized, and water would have been directed towards the building. *Id.* Additionally, raising the foundation of the building would have been expensive. *Id.* ¶ 14. The assistant municipal engineer for Rock Island testified that while the above was true, there could have been a workaround by building a retaining wall, and Anchor Properties should have located the sewer main and its depth before they solicited bids or began the design process. *Id.* ¶ 15.

The parking lot was poured in November and December 2019. *Id.* ¶ 17. In January 2021, Anchor Properties' personnel informed individuals of Rock Island that the concrete parking lot had cracked along the sewer line. *Id.* Personnel from Rock Island testified that they believed that the concrete cracked because of a temperature differential between the sewer pipe and the surrounding ground which allowed frost into the surrounding subgrades and caused the concrete to heave. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 15.

The trial court made its ruling on February 14, 2025. *Id.* ¶ 18. The judge determined that (1) the contract covered

## About the Author

**Kevin H. Young** is a partner in the Chicago office of *Cassiday Schade LLP*. Mr. Young focuses his practice on a wide range of civil litigation defense and has extensive experience handling transportation and construction matters. Prior to joining Cassiday Schade, Mr. Young worked as an attorney where he honed his litigation skills in the areas of premises and products liability. Mr. Young earned his J.D. from Loyola University School of Law and is a member of the Illinois bar.

damage and repairs necessitated by the failure of the sewer line and (2) that Anchor Properties was not negligent. *Id.* ¶ 19. That said, Anchor Properties did not fulfill its contractual obligation in that it did nothing to the best of its ability. *Id.* ¶ 19. For that reason, Anchor breached the agreement with Rock Island first, and it was not entitled to recover from a breach of contract action. *Id.*

On appeal, three issues received consideration from the reviewing court: (1) whether the third aspect of the contract was ambiguous; (2) whether the agreement required Anchor Properties to raise the grade and add insulation to the sewer pipe; and (3) whether Anchor Properties materially breached its agreement rendering it unenforceable against the City. *Id.* ¶ 23.

With regard to contractual interpretation and ambiguity, the court noted that the primary objective of an appellate court is to give an intention to the parties. *Thompson v. Gordon*, 241 Ill.2d 428, 441 (2011). The language in the contract is looked at to determine the parties intent. *Id.* When the words of the contract are clear and unambiguous, they are given their plain, ordinary, and popular meaning. *Id.* That said, if the contract is susceptible to more than one meaning, it is ruled ambiguous and a court can consider it extrinsic evidence to determine the party's intent. *Id.* When determining whether a contract is ambiguous, rather than viewing a clause or provision in insulation, the entire agreement as a whole is considered, and each provision is viewed in light of the other provisions. *Id.*

The initial issue was whether the agreement was ambiguous in that it required Rock Island to repair the concrete when a temperature differential between the sewer pipe and the surrounding ground caused the ground to heave and cracked the concrete. Anchor Properties, 2025 IL App (4th) 250497-U, ¶ 28. The appellate court then noted that for a contract to be enforceable, the parties must mutually assent to the contract's terms. *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶ 20. Only the parties' overt acts and the communications can be considered in determining whether they have entered into a contract. *Id.* The most common way to demonstrate mutual assent is a signature on a contract, and a party who has signed the contract is ascribed with knowledge and assent to the terms of the contract. *Id.* ¶ 21. In this case, the court noted that the terms were written and both parties signed the agreement. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 30.

The appellate court then considered whether the contract clearly and unambiguously required Anchor Properties to raise the grade and add insulation. *Id.* ¶ 34. Anchor Properties argued that such clauses in the contract are for the protection of the sewer pipe and not Anchor's concrete. *Id.* ¶ 34. It follows that an alternative interpretation would result in Anchor owing a duty to protect its own concrete. *Id.* Alternatively, Rock Island argued that the trial court properly determined that such clause in the contract was ambiguous and must be construed against Anchor as drafter. *Id.*

The court noted that the agreement was ambiguous because of the phrase "to the best of its ability." Illinois appellate courts have ruled that that phrase and similar analogies are too indefinite and uncertain to be an enforceable standard.

After considering the parties' arguments, the court noted that in order to recover on a breach of contract claim, the party must have performed that part of the contract. *TML Development, LLC v. Village of Hawthorn Woods*, 2023 IL 128770, ¶ 50. The first-to-breach rule excuses a party's duty to perform under the contract if the other party materially breaches the agreement initially. *Id.* Alternatively, the party that breaches first cannot seek to enforce the contract against the injured party. *Id.* The court noted that the agreement was ambiguous because of the phrase "to the best of its ability." *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 40. Illinois appellate courts have ruled that that phrase and similar analogies are too indefinite and uncertain to be an enforceable standard. *Penzell v. Taylor*, 219 Ill. App. 3d 680, 688 (1991); *Kraftco Corp. v. Kolbus*, 1 Ill. App. 3d 635, 639-40 (1971). The appellate court ruled that the language of the third point in the contract was poorly drafted, self-contradictory, and ambiguous. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 42. Because that part of the contract was ambiguous, extrinsic evidence was considered to determine the party's intent. *Thompson*, 241 Ill.2d at 441. If extrinsic evidence does not resolve the ambiguity, any ambiguity must be strictly construed against the drafter. Book citation, *Central*

*Illinois Light*, 213 Ill.2d 141, 153 (2004).

The court then considered the duty of good faith and fair dealing in entering into the contract. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 45. The court noted that Anchor Properties did not satisfy its good faith obligation because they took very little action in exploring the possibility of raising the grade and adding insulation. *Id.* ¶¶ 46-47. That is, Anchor Properties chose not to take any action to protect the pipe or the concrete pouring in the concrete parking lot and therefore did not comply with that portion of the contract in good faith. *Id.*

Lastly, the court considered whether or not Anchor Properties' breach of the third part of the contract was material. Anchor Properties, 2025 IL App (4th) 250497-U, ¶ 54. A breach of material when it is so substantial and fundamental as to defeat the objects of the parties in making the agreement or when the failure to perform renders performance of the rest of contract different in substance from the original agreement. *Direct Auto Insurance Co. v. O'Neal*, 2022 IL App. (1st) 211568, ¶ 15. In making the determination that the breach was material, the court considered the alternative possibility. *Anchor Properties*, 2025 IL App (4th) 250497-U, ¶ 55. If Anchor Properties were allowed to take no action while forcing the City to repair the concrete at its own cost, potentially due to Anchor's failure to insulate the pipes despite promising otherwise, there would be a disproportionate prejudice to Rock Island and Anchor Properties would receive an unreasonably unfair advantage. *Id.*

In sum, the appellate court upheld the determination of the trial court after a bench trial in that Anchor Properties could not recover because it materially breached the agreement first.

# Workers' Compensation Report

**Amber D. Cameron**
*Heyl, Royster, Voelker & Allen, P.C.*, Edwardsville

## Exclusivity Revisited: The Scope of Employer Liability Under Section 5(a) of the Illinois Workers' Compensation Act After *Kordas* and *Heiden*

Workers' compensation is the exclusive remedy for employees who suffer injuries arising out of and in the course of employment. 820 ILCS 305/5(a). An employee can only avoid this bar and bring civil suit against his employer for personal injury by proving one of four narrow exceptions. After the Illinois Appellate Court's decision in *Kordas v. Bob's All Bright Electric*, 2025 IL App (3d) 240482, on October 8, 2025, Illinois courts have continued their examination of the boundary between workers' compensation exclusivity and traditional tort and corporate liability, providing guidance on when exclusivity applies.

Recent appellate decisions, and arguments presented before the appellate courts, have highlighted when these principles come into practice. Cases such as *Dimas v. Wheaton Eye Clinic* 2025 IL App (3d) 250067-U, *Rivas v. Benny's Prime Chophouse,* LLC., 2025 IL App (1st) 242044, and *Heiden v. Village of Westmont*, 2026 IL App (3d) 250071, are paramount in continuing to clarify and further define the scope of workers' compensation exclusivity in Illinois.

### *Kordas v. Bob's All Bright Electric,* 2025 IL App (3d) 240482

In the case of *Kordas v. Bob's All Bright Electric*, the Illinois Appellate Court, Third District, affirmed the circuit court's grant of summary judgment for the defendant, holding the plaintiff's claims were barred by the exclusive remedy provision of the Workers' Compensation Act. *Kordas*, 2025 IL App (3d) 240482.

### About the Author*

**Amber D. Cameron** is a partner at *Heyl, Royster, Voelker & Allen, P.C.*, working out of the firm's Edwardsville and St. Louis offices, where she focuses her practice on workers' compensation and toxic tort litigation. A seasoned trial attorney, Ms. Cameron represents employers of all sizes throughout southern Illinois and Missouri. Regularly providing educational seminars to insurance companies, third-party administrators, and self-insured employers, she has a keen eye for detail and a tactical approach, working diligently with her clients to develop creative resolution strategies for her claims. Before joining Heyl Royster, Ms. Cameron gained advanced knowledge of Illinois workers' compensation law while working as a staff attorney at the Illinois Workers' Compensation Commission. She earned her law degree and a certificate in dispute resolution from the University of Missouri-Columbia School of Law, where she excelled in legal writing.

* The author would like to thank **Nicholas J. Newman**, an associate in the Edwardsville office of *Heyl, Royster, Voelker & Allen, P.C.*, for his assistance with this article.

Plaintiff Kordas filed a civil complaint against his employer alleging intentional misconduct and negligence after he was injured at work by a co-worker experiencing a psychotic episode. Kordas was struck in the head multiple times with a shovel in an unprovoked assault by his longtime coworker, Clarizio. Plaintiff alleged his employer, All Bright Electric, knew or should have known about the co-worker Clarizio's mental health issues, as Clarizio was the owner's son, and negligently hired and supervised him.

### *Appellate Court Findings*

The appellate court stressed that although the employer was aware of Clarizio's mental health history, there was no evidence of prior violent behavior at work or elsewhere, nor any evidence that the employer intentionally placed Kordas at risk of injury. *Id*. ¶¶ 29-31. Further, Clarizio had testified the attack was not provoked by anything Kordas said or did and stemmed solely from his untreated mental health condition. *Id*. ¶ 38. The injury therefore both arose out of and occurred during the course of employment and the claim was compensable under the Act. *Id*.

### *Dimas v. Wheaton Eye Clinic*, 2025 IL App (3d) 250067-U

In the case of *Dimas v. Wheaton Eye Clinic*, an employee, Angelo Dimas, filed suit against his employer, Excel Mechanical Services, as well as the parent companies of his employer after slipping and falling off a ladder on the frosty roof of Wheaton Eye Clinic while on a repair call. 2025 IL App (3d) 250067-U, ¶ 2. Mr. Dimas alleged that the parent companies of his employer, 7447 Enterprises, Inc. and Westside Mechanical Group, Inc. (parent company of 7447 Enterprises, Inc.), had a duty to manage Excel Mechanical Services and ensure that its employees had the necessary equipment to perform their job safely *Dimas*, 2025 IL App. (3d) 250067-U, ¶ 8.

The parent company defendants moved for summary judgment before the circuit court, and it was granted on the following grounds: (1) the trial court found that defendants were shielded by the exclusive remedy provision of the Workers' Compensation Act, and (2) the relationship between the parties was insufficient to establish a duty owed to the plaintiff. *Id*. ¶ 12. The court also noted that there was no support that the defendants had any knowledge of a dangerous condition at Wheaton Eye Clinic nor any evidence that they acted unreasonably, or their conduct was a proximate cause of Dimas' fall. *Id*.

### *Appellate Court Findings*

In *Dimas*, the Illinois Appellate Court, Third District, affirmed the decision of the circuit court granting summary judgment, but disagreed with some of its reasoning. *Id*. ¶ 17.

Relying on the Illinois Supreme Court's decision in *Munoz v Bulley & Andrews*, the appellate court emphasized that "if a parent company and its subsidiary are operated as separate entities, only the entity that was the immediate employer of the injured worker is entitled to Section 5(a) immunity." *Dimas*, 2025 IL App. (3d) 250067-U, ¶ 17 (quoting *Munoz v Bulley & Andrews,* 2022 IL 127067, ¶ 29).

Section 5(a) immunity arises from the employment relationship itself and reflects the statutory bargain under the Workers' Compensation Act: the employer assumes liability for no-fault compensation benefits in exchange for protection from tort liability 820 ILCS 305/5(a).

Section 5(a) immunity arises from the employment relationship itself and reflects the statutory bargain under the Workers' Compensation Act: the employer assumes liability for no-fault compensation benefits in exchange for protection from tort liability 820 ILCS 305/5(a). Where a parent corporation and its subsidiary maintain separate corporate identities, the parent does not stand in the shoes of the employer merely by virtue of ownership. Because the parent entities in *Dimas* were separate from Excel Mechanical Services and did not function as Mr. Dimas' immediate employer, they were not automatically shielded by the Act's exclusivity provision. See *Munoz*, 2022 IL 127067, generally. Thus, although Excel Mechanical Services was immune from tort liability for this accident as the direct employer, its parent corporations were not entitled to that same protection solely based on their corporate relationship.

This distinction between the parent and subsidiary is crucial to workers' compensation exclusivity. Illinois law does not impose liability on a parent company simply because they could have exercised more control, as a failure to manage is not the same as affirmative conduct giving rise to a duty. If the parent company is involved in the day-to-day operations of its subsidiary, it may be entitled to immunity under Section 5(a) of the Act, but absent this involvement or evidence the parent directly participated in wrongdoing, corporate separateness will control. As in *Dimas*, parent companies that simply exist as pass-through entities as a source of funding or lateral ownership may be sued in tort.

However, the absence of exclusivity immunity under the Workers' Compensation Act does not automatically make parent companies liable in tort. To bring a cause of action for negligence, plaintiffs are required to show that the defendant(s) owed and breached a duty of care, proximately causing plaintiff's injuries. *Forsythe v. Clark*, 244 Ill. 2d 274, 280 (2007)

The Illinois Appellate Court, Third District, rejected the trial court's decision that the parent companies were immune under Section 5(a) of the Act, but affirmed summary judgment on the basis that Mr. Dimas failed to establish that the parent companies owed him a duty of care. Dimas argued the parent companies duty arose from their role as corporate managers of Excel Mechanical Services, not their status as its parent company, and that the defendants failed to properly manage Excel. *Dimas*, 2025 IL App (3d) 250067-U, ¶ 19. The appellate court determined there was no evidence to contradict that the defendants were mere parent companies, legally separate from Excel Mechanical Services, and therefore were not liable for any act or omissions of Excel. *Id*. ¶ 22. There was no evidence that either 7447 Enterprises, Inc. or Westside Mechanical had control over day-to-day operations of Excel, its safety procedures, or decisions regarding equipment or employment. *Id*. ¶ 26. A parent company's "failure" to participate in the operations of its subsidiary cannot form the basis of a theory of liability. *Id*. ¶ 24. Without any evidence that the parent companies had any real control over Excel's employees, a duty of care cannot be established, and therefore a negligence claim will fail. *Id*.

### *Takeaway*

The holding in *Dimas* is significant. *Dimas* clarifies that Section 5(a) immunity attaches only to entities that function as the actual employer—those involved in the day-to-day operations and employment relationship—not merely those connected through corporate ownership. At the same time, the court made clear that the absence of workers' compensation immunity does not equate to automatic tort liability for a defendant. A parent corporation may be sued, but a plaintiff must still establish the existence of a duty of care grounded in actual control or involvement, and a breach of that duty. Without evidence of operational control over the employee, corporate structure alone is insufficient to sustain a negligence claim.

### *Rivas v. Benny's Prime Chophouse,* LLC, 2025 IL App (1st) 242044

In *Rivas v. Benny's Prime Chophouse LLC*, 2025 IL App (1st) 242044, Angel Rivas was employed as a busboy at the defendant's restaurant and had a known shellfish allergy. As was customary at Benny's, employees participated in a "family meal" after their shifts ended. *Rivas*, 2025 IL App (1st) 242044, ¶ 7. The meal consisted of leftover food prepared by staff and consumed in a private dining area after employees had clocked out. *Id*. Mr. Rivas ate a bowl of food containing lobster and clams. A coworker warned Rivas that the dish contained shellfish when he saw him in line for seconds, but Rivas suffered an anaphylactic reaction and died from asphyxiation. *Id*. ¶¶ 2-9.

Rivas' widow filed a Workers' Compensation Claim against the employer, alleging that Rivas' death was compensable under the Workers' Compensation Act. The defendant initially denied the claim, asserting that the injury did not arise out of or in the course of employment *Id.* ¶ 11. Following that denial, Mrs. Rivas brought a wrongful death action against Benny's Prime Chophouse alleging the defendant was negligent in failing to serve food in a reasonably safe condition, failing to maintain adequate food safety policies, and in failing to warn employees of the presence of allergens in the family meal or prepare alternative meals for those with allergies. *Id.* ¶ 15. The defendant raised three affirmative defenses: (1) contributory negligence, (2) failure to mitigate damages, and (3) that the Workers' Compensation Act provided the exclusive remedy for the claim. *Id*. ¶ 16.

The plaintiff moved to bar the defendant's exclusive remedy affirmative defense, arguing that the defendant had refused to pay workers' compensation benefits and claimed the incident was outside the scope and course of Rivas' employment. *Id*. The motion was denied; however, the court stated it would address the issues raised as the case proceeded. *Rivas*, 2025 IL App (1st) 242044, ¶ 17. After resolving other issues

in the matter, the trial court found that the plaintiff's estoppel count failed to state a cause of action and struck it from the complaint, noting that it did not believe the injury occurred during the course of employment. *Id*. ¶ 35.

The trial court also addressed the defendant's motion for a directed verdict based on the exclusivity provision of the Workers' Compensation Act. The court was unpersuaded by the defendant's argument that the denial of the claim was merely "an insurer's tactic the court should disregard" *Id.* ¶ 36. The court observed that the defendant had denied the plaintiff's claim, denied that the injuries arose in the course of employment, and thereby obtained the benefit of not paying workers' compensation benefits. Accordingly, the court concluded that the defendant failed to meet its burden of proof and that the exclusive remedy provisions of the Workers' Compensation Act were not applicable. *Id*. ¶ 37. The trial court found the plaintiff had met her burden of proving the defendant acted negligently and proximately caused the decedent's death. *Id*. ¶¶ 28-31. A judgment was entered in favor of the plaintiff in the amount of $5,782,349.85 after reduction for contributory negligence of the decedent. *Id*. ¶ 38. An appeal followed.

### *Appellate Court Findings*

On appeal, the employer argued the Workers' Compensation Act's exclusive remedy provision should apply, that judicial estoppel was wrongly applied, that knowledge of Rivas' food allergy could not be attributed to the employer based on a co-worker knowledge, that evidence was improperly admitted, and that the damages were excessive. *Rivas*, 2025 IL App (1st) 242044, ¶ 1. The Illinois Appellate Court, First District, rejected each argument and affirmed the decision of the trial court. *Id*.

In reviewing the defendant's third affirmative defense—that the plaintiff's civil action was barred by the Workers' Compensation Act—the court examined whether the injury was an accidental injury within the meaning of the Act. *Id.* ¶¶ 49, 59. Under *Meerbrey v. Marshall Field & Co.*, "the statute bars an employee from bringing a common-law cause of action against his employer unless the employee proves (1) that the injury was not accidental, (2) that the injury did not arise out of his employment, (3) that the injury was not received during the course of employment, or (4) that the injury was not compensable under the Act." 139 Ill. 2d 455, 463 (1990). In *Rivas*, the court focused primarily on the second and third exceptions—whether the injury arose out of and occurred in the course of employment.

For its analysis of whether the injury arose out of employment, the appellate court emphasized that this determination is a question of fact, dependent upon the evidence and testimony presented. *Rivas*, 2025 IL App (1st) 242044, ¶ 50. To "arise out of employment" it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v Industrial Comm'n* 207 Ill. 2d 193, 203 (2003). Applying this framework, the trial court determined that the risk to which the decedent was exposed was the risk of injury from consuming seafood, a risk personal to the employee. *Rivas*, 2025 IL App (1st) 242044, ¶ 54. Because the allergic reaction stemmed from a personal condition, rather than a risk inherent in the employment, the injury did not arise out of employment. Id. ¶ 59. The appellate court agreed.

In analyzing the third prong of the test above – that the injury occurs in the course of employment - the Illinois appellate court relied heavily on case precedent. Quoting *McAllister v. Illinois Workers' Comp. Comm'n,* the court stated the requirement that an injury occur "in the course of" the employee's employment "refers to the time, place and circumstances of injury." 2020 IL 124848, ¶ 34. If an injury occurs within the time period of employment where one can reasonably expect the employee to be performing his duties, the injury will be deemed to have occurred during the course of employment. *Rivas*, 2025 IL App (1st) 242044, ¶ 62.

Here, the court once again reasons that whether an injury occurred during the course of employment is a question of fact. The facts in this matter state that an employee had an allergic reaction to shellfish after having finished his shift for the day, off the clock, and while participating in an optional meal. The appellate court ruled the trial court correctly weighed the evidence and found the optional after-hours meal was outside the course of employment. *Id.* ¶¶ 63-65.

A Petition for Leave to Appeal was denied by the Illinois Supreme Court on January 28, 2026.

### *Takeaway*

*Rivas* reinforces that workers' compensation exclusivity does not turn solely on the location of the injury, but on whether the risk of injury bears a sufficient nexus to the employment. Even where an injury occurs on the employer's premises and arises in connection with a customary workplace practice, exclusivity will not apply if the risk is personal

to the employee. By distinguishing an optional, after-hours perk from activities incidental to active employment, the appellate court clarified that both the "arising out of" and "in the course of" elements must be independently satisfied before the Act bars a civil action. The decision further underscores that employers who deny compensability under the Workers' Compensation Act risk significant civil litigation exposure where negligence can be attributed to the employer and the injury falls outside the Act's exclusivity provisions.

### *Heiden v. Village of Westmont*, 2026 IL App (3d) 250071

In the case of *Heiden v. Village of Westmont*, a village maintenance worker, Matthew Heiden, was tasked with entering and performing repair work in a water vault due to a water main break on February 23, 2023. *Heiden*, 2026 IL App (3d) 250071, ¶¶ 4-6. Heiden entered the underground vault without safety equipment and unsupervised. *Id*. ¶ 6. While underground, Heiden's right arm became trapped as the vault filled with water and he drowned before help could reach him. *Id*. The Village was cited for several OSHA violations following the death of Matthew Heiden including lack of required permits, confined-space entry procedures, and required employee protective equipment and training. *Id.* ¶ 7.

In November of 2023, the Estate of Matthew Heiden (Estate) filed suit against the Village of Westmont (Village) in DuPage County, alleging a wrongful death and negligence claim for intentionally exposing Heiden to known extreme dangers without proper personal protective equipment (PPE), proper training, and lockout/tagout procedures. *Id*. ¶¶ 10-13. The Village filed a Section 2-619 motion to dismiss arguing it was immune from suit under the Tort Immunity Act and could not be liable due to the exclusivity provisions of the Compensation Act. *Id*. ¶¶ 15, 21-22.

The Estate alleged the exclusivity provision of the Workers' Compensation Act does not bar a common law cause of action in this matter against the employer Village, because Heiden's death did not arise out of his employment but instead resulted from the employer's deliberate actions and omissions. *Heiden*, 2026 IL App (3d) 250071, ¶¶ 12-13.

The trial court granted the defendants' Section 2-619 Motions to Dismiss the Plaintiff's Complaint with prejudice and noted in its order that the Workers' Compensation Act barred the claims because the employer did not specifically intend to injury Heiden. *Id.* ¶ 17. The trial court also rejected any attempts by the Estate to circumvent the exclusivity provision of the Act through OSHA violation based theories. *Id*.

### *Appellate Court Findings*

The Estate filed an appeal in the Appellate Court of Illinois, Third District. On appeal, the court agreed with the Estate that there were sufficient facts presented to the trial court that the Village intended to injure Heiden to avoid a Section 2-619 dismissal of its Complaint based on the exclusive remedy provision of the Illinois Workers' Compensation Act. *Id.* ¶ 37.

A plaintiff can only circumvent the exclusive remedy provision of the Illinois Workers' Compensation Act and bring civil suit against an employer by demonstrating one of four exclusions: the injury (1) was not accidental, (2) did not arise from the party's employment, (3) was not received during the course of that employment, or (4) was not compensable under the Act. 820 ILCS 305/5(a); *Heiden*, 2026 IL App (3d) 250071, ¶ 26. The Estate's argument focused on whether or not the injury was accidental in nature. *Id*. ¶ 28. While the specific intent of harm was not necessarily directed at Mr. Heiden individually, the Estate argued the intent arose from the Village's deliberate decision to save money by *cutting corners* while knowing its employee was inadequately equipped to address the water main break. *Id.* ¶ 29.

The court rejected the Village's attempt to rely on the recent *Kordas* decision to sustain the dismissal motion because the holding in *Kordas* was based on the fact there was failure to submit sufficient evidence to support a rise to the level of intentional conduct for purposes of the Compensation Act's exclusivity bar, not that an employer's reckless disregard for safety could never rise to the level of intentional conduct. *Id*. ¶ 31.

The court held that the claimant Estate sufficiently and plausibly plead intentional conduct by the Village and, therefore, that the Workers' Compensation exclusivity rule does not defeat the Estate's claims in the context of a motion to dismiss. *Id*. ¶ 52. It did not give any opinion regarding the merits of the suit, only that the Estate's allegations, taken as true, and the inference that can be reasonably drawn from them present the potential for intentional conduct that the Village knew would lead to injury and therefore, the claim should not have been dismissed at that stage and Plaintiff should be afforded the opportunity to prove its claims. *Id.* ¶ 37.

### *Takeaway*

The court recognized this case prompts the question "how gross does

gross negligence need to be before it becomes tantamount to intentional conduct?" but determined that question need not be answered here even though guidance on this subject would be helpful. Either the Illinois General Assembly or the Illinois Supreme Court, perhaps both, will need to address this question in the near future and hopefully bring guidance that will confirm the exclusivity provisions of the Compensation Act need to be strictly construed and the provisions of the Act already contemplate safety violations and other potential for harm of employees that can result in death in striking its delicate balance between employer and employee interests. *See Heiden*, 2026 IL App (3d) 250071, ¶ 67 (Hettel, P.J., dissenting).

**Conclusion**

Taken together, *Kordas*, *Dimas*, *Rivas*, and *Heiden* reflect a consistent approach by the Illinois appellate courts in attempting to preserve the statutory intent of Section 5(a) of the Workers' Compensation Act. The decisions reaffirm that exclusivity remains the rule, and exceptions to the rule should remain narrowly construed. At the same time, these cases underscore that exclusivity analysis is very fact intensive and must be undertaken early to assess an employer's true liability after an employee injury.

For employers and defense counsel, the post-*Kordas and Heiden* landscape reinforces the importance of carefully evaluating whether an injury was an accident that occurred out of and in the course of employment, relationship of corporate structure and control, and the viability of an alleged intentional tort argument by Plaintiff at the outset of litigation.

# Feature Article

**William G. Beatty**
Chicago

## Forum Shopping and the "Deference Factor" in *Forum Non Conveniens* Jurisprudence

**Introduction**

Merriam-Webster's Legal Dictionary defines "Forum Shopping" as "the practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based upon a determination of which court is likely to provide the most favorable outcome." *Forum shopping*, Merriam-Webster.com Legal Dictionary, https://www.merriam-webster.com/legal/forum%20shopping (last visited Nov. 22, 2025).

"Courts have never favored forum shopping." *Fennell v. Ill. Cent. R.R. Co,* 2012 IL 113812, ¶ 19. In fact, it has been said that "[d]ecent judicial administration cannot tolerate forum shopping as a persuasive or even legitimate reason for burdening communities with litigation that arose elsewhere and should, in all justice, be tried there." *Pruitt Tool & Supply Co. v. Windham,* 379 P.2d 849, 850 (Okla. 1963) (quoting *St. Louis-San Francisco Ry. Co. v. Superior Ct., Creek Cnty.,* 290 P.2d 118, 121 (Okla. 1955)). While forum shopping has had its detractors, "[c]ourts have long acknowledged the existence of forum shopping," and the Illinois Supreme Court has recognized that "a plaintiff, in choosing a forum, might shop for the most favorable forum." *Dawdy v. Union Pac. R.R. Co,* 207 Ill. 2d 167, 174 (2003).

Although it has been said that "[a] plaintiff's use of forum shopping to suit his individual interest is a strategy contrary to the purpose behind the venue rules and is against Illinois' public policy," *Merritt v. Goldenberg,* 362 Ill. App. 3d 902, 910 (5th Dist. 2005), forum selection cannot be permitted to override the integrity of the judicial system. *Espinosa v. Norfolk & W. Ry. Co.*, 86 Ill. 2d 111, 123 (1981). Neither the courts nor the court rules, however, have expressly prohibited the practice. In fact, the reviewing courts of Illinois have consistently held that forum shopping, no matter how evident, cannot be considered by the courts in conducting a *forum non conveniens* analysis. *Dawdy*, 207 Ill. 2d at 175; *O'Brien v. Advanced Urology Assocs. S.C.*, 2026 IL App (1st) 250608, ¶ 15; *Starr v. Presence Cen. & Suburban Hosps. Network,* 2024 IL App (1st) 231120, ¶ 19; *Pierce v. Cherukuri,* 2022 IL App (1st) 210339, ¶ 23.

### About the Author

**William G. Beatty** recently retired from the Chicago law firm of *Johnson & Bell, Ltd.* where he practiced for 45 years, primarily in product liability and employment law. Mr. Beatty is a past member of the IDC's Board of Directors and is a past recipient of the IDC's Presidents Award. He was instrumental in the formation of the Employment Law Committee, has chaired the annual meeting and has written frequently for the *IDC Quarterly*.

> [T]he reviewing courts of Illinois have consistently held that forum shopping, no matter how evident, cannot be considered by the courts in conducting a forum non conveniens analysis.

In conducting a *forum non conveniens* analysis, the courts have been instructed that *before* evaluating the various public and private interest factors, "the first question we must answer is how much deference we must afford to the [plaintiff's] choice of forum…" *Richardson v. Hussain,* 2025 IL App (5th) 240916, ¶ 23; *In re Marriage of Mather,* 408 Ill. App. 3d 853, 858 (1st Dist. 2011); *see also Vivas v. Boeing Co.,* 392 Ill. App. 3d 644, 656-57 (1st Dist. 2009) (citing *Langenhorst v. Norfolk S. Ry. Co.,* 219 Ill. 2d 430, 448 (2006)).

When the plaintiff is foreign to the chosen forum, and when the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's choice of forum is accorded "*less deference"* or "*far less deference*." *Fennell,* 2021 IL 113812, ¶¶ 18, 26; *Langenhorst*, 219 Ill. 2d at 448; *Richardson,* 2025 IL App (5th) 240916, ¶ 23 (emphasis added). When these circumstances are present, "it is reasonable to conclude that the plaintiff engaged in forum shopping to suit his individual interests, a strategy contrary to the purpose behind the venue rules." *Dawdy,* 207 Ill. 2d at 174 (quoting *Certain Underwriters at Lloyd, London v. Ill. Cen. R.R. Co.,* 329 Ill. App. 3d 189,196 (2d Dist. 2002)).

Substantial deference is afforded to the plaintiff when the case is filed in the county in which the plaintiff resides, or if the chosen forum is the situs of the injury or other transaction giving rise to the plaintiff's cause of action. *See Richardson,* 2025 IL App (5th) 240916, ¶ 23. The issue of deference becomes more complicated when the chosen forum is not the county where the plaintiff resides or is not the one in which the incident in question occurred. In such cases, the plaintiff's choice of forum is assumed to be the product of forum shopping, and less deference is afforded to it. *See, e.g., Dawdy*, 207 Ill. 2d at 174; *Fennell*, 2012 IL 113812, ¶ 26.

The question becomes how much less deference? The issue is further complicated by the fact that despite all the negative connotations associated with forum shopping, ever since the Illinois Supreme Court's decision in *Dawdy*, courts have consistently been instructed that they cannot consider forum shopping as part of their *forum non conveniens* analysis. *See* 207 Ill. 2d at 175; *see also Evans v. Patel,* 2020 IL App (1st) 200528, ¶ 33 ("Yet, while courts acknowledge that plaintiffs may forum shop, courts may not consider this practice in a *forum non conveniens* analysis.").

Simply affording the plaintiff's choice of forum *less deference,* or even *far less deference,* as a means of preventing or discouraging forum shopping, has proven ineffective, and lacking in precision both with regard to its application and its impact on plaintiff's forum choice, as demonstrated by the following series of cases recently decided by the Illinois appellate courts.

### *Deppa v. Abbott Laboratories*

*Deppa v. Abbott Laboratories,* 2025 IL App (1st) 241795, was a consolidated product liability case filed in the Circuit Court of Cook County against the manufacturers of a certain infant formula which allegedly caused the plaintiffs' premature babies to develop necrotizing enterocolitis, a serious gastrointestinal disease resulting in serious injury or death. Of the approximately 30 plaintiffs involved in the suit, seven resided in Illinois, but only one resided in Cook County. The other 22 plaintiffs resided in various other states.

As to the cases filed by the six plaintiffs who resided in Illinois (but not in Cook County), the defendants filed intrastate *forum non conveniens* motions seeking to transfer the venue of those cases to the counties in Illinois in which the plaintiffs' infants were born. The defendants also filed interstate *forum non conveniens* motions seeking to dismiss the cases filed by the out-of-state plaintiffs in favor of the various states in which the infants were born. *Deppa,* 2025 IL App (1st) 241795, ¶ 2.

The Circuit Court of Cook County denied all 29 *forum non conveniens* motions, finding that "the balance of private and public interest factors do not strongly favor transfer or dismissal." *Id.* ¶ 5. The defendants successfully petitioned for leave to appeal pursuant to Illinois Supreme Court Rule 306(a).

On appeal, as to the degree of deference afforded to the Illinois plaintiffs, the defendants were critical of the circuit court for not adequately scrutinizing the plaintiff's choice of forum. Citing

*Fennell,* they argued that since Cook County was foreign to all but one of the plaintiffs, and as to the remaining plaintiffs, none of the injuries forming the bases for the their causes of action arose in Cook County except for one, the trial court should have afforded *far less deference,* not just *less deference,* to the plaintiffs' forum choice. *Deppa,* 2025 IL App (1st) 241795, ¶ 18. As to the distinction between *less deference* and *far less deference,* the appellate court called this simply "a matter of degree," saying that the degree of deference to be applied to plaintiff's forum choice was ultimately a matter for the trial court's discretion, illustrating the absence of a standard as to how the deference factor is to be applied. Also, the appellate court was quick to point out that "the deference to be accorded is only *less,* as opposed to *none.*" *Id.* ¶ 17 (quoting *Elling v. State Farm Mut. Auto. Ins. Co.,* 291 Ill. App. 3d 311, 318 (1st Dist. 1997) (emphasis in original)).

### *Toles v. Mead Johnson & Company, LLC*

Like the *Deppa* case, the *Toles* case, 2025 IL App (5th) 231205, was another multi-plaintiff product liability action brought by the parents of babies who had contracted NEC as a result of ingesting the infant formula manufactured by the defendants. The *Toles* case was filed in St. Clair County, Illinois, where it was consolidated with 33 other cases filed against Mead Johnson, Abbott Laboratories, and related companies who were charged with manufacturing and distributing defective infant formula and with failing to warn about the dangers of contracting NEC from its ingestion by infants, primarily those who were born prematurely.

While *Toles* was mainly about challenges to the scope of general and specific jurisdiction under Illinois law, the case also dealt with *forum non conveniens* issues since many of the plaintiffs and the infants that they represented resided out-of-state, or in Illinois counties other than the chosen forum. As the court said, the consolidated lawsuits involved "90 plaintiff infants… born across approximately two decades (from 2000-22), in a variety of hospitals, in states across the country." *Toles*, 2025 IL App (5th) 231205, ¶ 2.

In an attempt to get the cases out of plaintiff-friendly St. Clair County, Abbott and Mead Johnson filed motions to transfer venue of the Illinois plaintiffs' cases to Lake County, Illinois, and to dismiss the cases filed by out-of-state plaintiffs on the bases of interstate *forum non conveniens.* After addressing the jurisdictional and venue arguments, the court considered the *forum non conveniens* issues relating to five plaintiff infants whose cases were prioritized by the court. Three of the infants were born in states other than Illinois (Missouri, Louisiana, and New York), while the other two infants were born in DuPage County and Sangamon County, Illinois.

Mead Johnson's *forum non conveniens* motions argued that the more convenient fora these five cases were the states, or other Illinois counties, in which the babies were born. Abbott filed similar motions seeking dismissal of the out-of-state cases and transfer of the Illinois cases.

Regarding the degree of deference to be afforded to the plaintiffs' choice of forum, the trial court concluded without elaboration that since neither the plaintiffs' residences nor the site of the injuries was located in the chosen forum, "the plaintiff's choice of forum was entitled to *somewhat less deference* but, nevertheless, [the trial court] found that this factor weighed slightly in favor of the plaintiffs' chosen forum." *Id.* ¶ 74 (emphasis added). Neither the trial court nor the appellate court provided any explanation how the foreign nature of the forum, both with regard to the residences of the plaintiffs (both in-state and out-of-state) or the location of the injuries by way of ingestion of the formula, allowed the choice of a St. Clair County venue to be "weighed slightly *in favor* of plaintiffs' chosen forum," but nonetheless the denial of the defendants' *forum non conveniens* motions was affirmed.

### *Richardson v. Husain*

*Richardson v. Husain*, 2025 IL App (5th) 240916, was a medical malpractice action originally filed in Madison County against Alton Memorial Hospital, located in Madison County, and a number of physicians associated with the plaintiff's medical care.

Roughly eight months after the suit was commenced the plaintiff changed her residence from Madison County to adjacent St. Clair County. Shortly thereafter she filed a motion to voluntarily dismiss her Madison County lawsuit without prejudice. This was soon followed a re-filing of her case in St. Clair County. The hospital and several physicians moved to dismiss or transfer the St. Clair County case back to Madison County, claiming that litigating in the new venue would be disruptive to the provision of medical services to the citizens of the forum where the alleged malpractice occurred and where the case had been originally filed.

Regarding the degree of deference to be afforded to the plaintiff's choice of forum in the re-filed action, the defen-

dants argued that since the case had been originally filed in another jurisdiction, and St. Clair County represented the plaintiff's second jurisdictional choice, it was entitled to significantly less deference, citing *Peile v. Skelgas, Inc.,* 163 Ill. 2d 323 (1994), a case involving a gas explosion at a house in Pike County. The plaintiff in that case filed suit in Madison County whose circuit court granted a *forum non conveniens* motion to transfer the case to Pike County where it was litigated for two years, voluntarily dismissed and re-filed in St. Clair County. The Illinois Supreme Court ultimately determined that the case should remain in Pike County.

The appellate court in the *Richardson* case distinguished *Peile* because here, the plaintiff had not moved her case because of *forum non conveniens* concerns but rather had done so voluntarily because her new jurisdictional home was more conducive to her medical condition which she alleged resulted from the malpractice committed by the defendants. After distinguishing each of the remaining cases posited by the defendants, the St. Clair County circuit court acknowledged that the case before it was one of first impression regarding the question of "how much deference is afforded to a plaintiff's [choice of forum] where, as here, she has previously filed her case in one Illinois county, moved her residence to another Illinois county, voluntarily dismissed her case in the original county in which it was filed, and subsequently refiled her case in the county in which she now resides." *Richardson*, 2025 IL App (5th) 240916, ¶ 35.

In answering this question about the degree of deference to be afforded to the plaintiff's choice of forum in cases of "move-in jurisdiction," the appellate court in *Richardson* concluded that "because (1) [plaintiff] was previously a resident of another Illinois county when she filed her initial lawsuit in circuit court in Madison County; and (2) her original lawsuit was not transferred to another circuit court on *forum non conveniens* grounds; and (3) she moved to St. Clair County, Illinois during the pendency of her case; and (4) she voluntarily dismissed her lawsuit in Madison County; and (5) she has refiled her lawsuit as a new case in St. Clair County, where she now resides… we find that the circuit court of St. Clair County did not abuse it's (sic) discretion in finding that [plaintiff] was entitled to receive *substantial deference* as a resident of the county in which she has filed her lawsuit for the purposes of the court's *forum non conveniens* analysis." *Id.*. ¶ 37 (emphasis added).

Specifically regarding concerns about forum shopping, while the court noted that "in general, forum shopping is disfavored… [w]e feel that it is important to state that this is not a factor for *forum non conveniens* analysis." *Id.* ¶ 52. The Fifth District Appellate Court thereupon entered an order affirming the decision of the trial court in St. Clair County.

In a specially concurring opinion, one of the justices stated that "[w]hile it is true that 'forum shopping' is not a factor established by precedential *forum non conveniens* cases, it is a concept which should be given consideration in light of the facts presented in this case," at least opening the door to the recognition of the reality of forum shopping as part of the *forum non conveniens* analysis. *Id.* ¶ 59.

### *Lutzenkirchen v. OSF Healthcare System*

The *Lutzenkirchen* case, 2025 IL App (1st) 250028, was another medical malpractice action, this one against a hospital located in Rockford, Illinois, along with a number of healthcare providers, all of whom worked in or near Winnebago County, where Rockford is located. The plaintiff, the son of the deceased patient, filed suit in Cook County alleging certain acts of medical negligence that were claimed to have led to his father's death.

Several of the defendants moved to transfer the case from Cook County to Winnebago County pursuant to the doctrine of intrastate *forum non conveniens,* claiming that Winnebago County was a more convenient forum for the trial of the case since: (1) all of the medical care rendered to the decedent took place in Winnebago County; (2) the travel distance for the plaintiff, who lived in Kane County, was approximately the same as between Cook or Winnebago Counties; (3) only two of the defendants resided in Cook County, whereas all of them worked in Winnebago County; (4) considering the relevant public interest factors, the court docket in Cook County was said to be considerably more congested than that of Winnebago County, the residents of Winnebago County have a strong interest in hearing the case locally, and it would be inequitable to impose the burden of jury service on the residents of Cook County, which had only little nexus to the case.

The plaintiff responded by claiming that despite defendants' arguments, his choice of forum was entitled to "strong deference," and that venue in Winnebago County would be less convenient than Cook County for the plaintiff and his brother, who would have to commute to the trial from his home in Georgia. Plaintiff also argued that some of the defendants also work in Cook County, and that the hospital also has facilities in Cook County.

The trial judge in Cook County denied the defendants' motion to transfer, and an interlocutory appeal was taken to consider the venue issue. The First District appellate court began its opinion by describing Cook County as "a forum with hardly any connection to this action." *Lutzenkirchen*, 2025 IL App (1st) 250028, ¶ 1.

Concerning the deference issue, the court first addressed the defendants' argument that the "plaintiff's choice of forum should be given little to no deference because he 'is attempting to game Illinois' procedural rules to fix venue in Cook County, a forum with no substantive connection of any kind to the allegations Plaintiff has brought in this suit.'" *Id.* ¶ 24.

The court continued by stating that whle "'it is reasonable to conclude that the plaintiff engaged in forum shopping,'" nevertheless "[w]hile forum shopping is disfavored, 'we do not consider this practice in our *forum non conveniens* analysis.'" *Id.* ¶ 24 (quoting *Dawdy*, 207 Ill. 2d at 175).

The First District Appellate Court thereupon reversed the Circuit Court of Cook County's denial of the defendants' motion to transfer and remanded the case with instructions that it be sent to Winnebago County.

### *Monteagudo v. The Gardens of Belvidere, LLC*

The *Monteagudo* case, 2023 IL App (1st) 220045, was a negligence action against a long-term care facility located in Boone County, Illinois. The plaintiff, acting as the administer of the estate of her deceased father, alleged that the cause of his death was an overdose of digoxin, administered at the nursing home, producing irregular heart rhythm and resulting in death.

Plaintiff, who along with the decedent's other family members, resided in Boone County, filed her action in the circuit court of Cook County against the long-term care home, the nursing staff that worked there, and the decedent's attending physician who supervised his medications.

Defendants moved to have the case transferred to Boone County where the plaintiff and her family resided, and where the medical care and injuries at issue occurred. Defendants also produced a series of affidavits showing the relative distances between the courthouses in the competing fora and the residences or offices of the proposed witnesses. They also argued "that the Cook County courts were substantially busier than the Boone County courts and [that] litigating [the] case in Boone County would impose far less of a burden than it would [were the case tried] in Cook County," and provided statistical information in support of their argument. *Monteagudo*, 2023 Il App (1st) 220045, ¶¶ 9-11.

The circuit court of Cook County entered an order denying the defendants' motion to transfer. On appeal, the First District appellate court admitted that while plaintiff's choice of forum was "'entitled to substantial deference,'" "a plaintiff's choice of forum is not entitled to the same deference or consideration in all cases. Rather, when a plaintiff chooses a forum where he or she does not reside or where the cause of action did not occur 'the plaintiff's choice of forum is accorded *less deference.*'" *Id*. ¶ 31 (quoting *Fennell*, 2012 IL 113812, ¶ 18).

After balancing the relevant private and public interest factors that operate in a *forum non conveniens* analysis, the first district reversed the circuit court of Cook County's denial of the defendants' venue motion and remanded the case with directions to transfer it to Boone County.

### *Larson v. Illinois Central School Bus, LLC*

The *Larson* case, 2023 IL App (3d) 220360, involved injuries to a mentally and physically disabled minor who was a passenger on a school bus which turned abruptly, causing the minor's wheelchair to overturn, resulting in a concussion and a fractured right elbow. The complaint alleged negligence for failure to properly secure the wheelchair during transport. The incident happened near the minor's home in Denton County, Texas, but the lawsuit was filed in the circuit court of Will County, Illinois, where the headquarters of the bus company was located and where its directors and officers maintained their offices.

The bus company filed a motion to dismiss under the doctrine of interstate *forum non conveniens,* citing the fact that nearly all of the occurrence witnesses and documentary evidence was located in the State of Texas; the incident giving rise to the lawsuit occurred there; the entirety of the post-accident investigation took place there as did the minor's medical treatment; and none of the witnesses were amenable to process by an Illinois court. *Larson*, 2023 IL App (3d) 220360, ¶ 6.

Despite the presence of overwhelming evidence in support of a dismissal, on the deference issue the plaintiffs argued that the circuit court "acted within its discretion by according *some deference"* to the plaintiffs' choice of forum. *Id.* ¶ 18. While the appellate court agreed with this deference argument, after due consideration of all of the private and public interest factors in its *forum non conveniens* analysis, the Third District appellate court determined that the circuit

court had abused its discretion in denying the bus company's motion to dismiss and thereby reversed the circuit court and remanded with instructions to dismiss the case. *Id.* ¶ 50.

It is possible that the reason the appellate court agreed with plaintiffs (and the trial court) that the plaintiffs' choice of forum was entitled to *some* deference, was the court's cognizance of the fact that case law states that "a plaintiff's right to select the forum is a substantial one, and . . . the plaintiff's forum choice should rarely be disturbed." *Griffith v. Mitsubishi Aircraft Int'l, Inc,* 136 Ill. 2d 101, 106 (1990) (emphasis added). Perhaps this "substantial interest" alone provides the basis for affording the plaintiff's choice of forum at least a minimum of "*some deference,"* even where, as here, the remaining public and private interest factors overwhelmingly support a transfer or dismissal on the basis of *forum non conveniens.*

### *Seilheimer v. Olsen*

*Seilheimer v. Olsen,* 2025 IL App (1st) 240418, involved a car accident that occurred in Lake County, Illinois, between the plaintiffs, Lake County residents, and the defendant, who lived in Cook County. After plaintiffs sued the defendant in his home county, the defendant took the unusual step of attempting to move the case from his own home county (Cook) to the county where the plaintiffs resided (Lake), claiming that, geographically, the courthouse in Lake County was closer to his home than the Daley Center, since he lived in the northern-most part of Cook County.

The circuit court of Cook County granted the defendant's motion to transfer the case to the plaintiffs' home forum (Lake County), and on appeal, after concluding the plaintiffs' choice of forum (Cook County) was entitled to *less* deference since they did not reside there, nor did the accident take place there, said, however, that "the deference to be accorded is only *less*, as opposed to *none*." *Seilheimer*, 2025 IL App (1st) 240418, ¶ 16 (citing *Langenhorst*, 219 Ill. 2d at 442-43 (quoting *First Am. Bank v. Guerine,* 196 Ill. 2d 511, 518 (2002)).

As for defendant's "odd circumstance" in which he claimed that "the county in which he resided is inconvenient to him", the appellate court noted that "[o]ur supreme court has found it 'all but incongruous for defendants to argue that their own home county is inconvenient.'" *Seilheimer*, 2025 IL App (1st) 240418, ¶ 22 (citing *Kwasniewski v. Schaid,* 153 Ill. 2d 550, 555 (1992)); *Foster v. Hillsboro Area Hosp. Inc.* 2016 IL App (5th) 150055, ¶ 35; *Vivas*, 392 Ill. App. 3d at 658).

The court thereupon reversed the decision of the Cook County circuit court which had granted the defendant's motion to transfer the case to Lake County.

### The Semantics of Deference

Illinois case law employs varying terms to describe the degree of deference to be afforded to the plaintiff's choice of forum, from "*less* deference," *see Richardson*, 2025 IL App (5th) 240916, ¶ 23; *Lutzenkirchen*, 2025 IL App (1st) 250028, ¶ 23, to "*somewhat less* deference," *see Pendergast v. Meade Elec. Co.,* 2013 IL App (1st) 121317, ¶ 27, to "*considerably less* deference," *see Schuster v. Richards,* 2018 IL App (1st) 171558, ¶ 21. This variance in the degree of deference to be assigned to the plaintiff's choice of forum has been said to be a "battle over semantics," *Lentz v. Kuhlmen,* 2025 IL App (1st) 241350-U, ¶ 20; *Pierce v. Cherukuri,* 2022 IL App (1st) 210299-U, ¶ 28, with reviewing courts equating the terms "considerably less deference" with merely "less deference" *Pierce,* 2022 IL App (1st) 210299-U, ¶ 28, and arguments over the difference between "far less deference" as opposed to "some deference" as simply "one of semantics." *Lentz,* 2025 IL App (1st) 241350-U, ¶ 20.

The problem of the semantics of deference is illustrated in a 2023 decision from the First District Appellate Court in the case of *Black v. Help at Home, LLC,* 2023 IL App (1st) 220802-U. *Black* involved a breathing disorder which resulted in the death of a young child. The child had been attended to by home health nurses who monitored the child's breathing while she slept. An incident occurred involving the child's ventilator which resulted in her suffering an anoxic brain injury from which she died. The child was a resident of the State of Mississippi, as was her mother and the nurse who was attending to her at the time of the incident. The nurse worked for a home health agency which maintained an office in Mississippi.

The home health agency was a limited liability company with its principal place of business in Chicago. The child's mother, as administrator of her estate, filed a claim for institutional negligence in the Circuit Court of Cook County, Illinois, and the defendant filed a motion to dismiss pursuant to the doctrine of interstate *forum non conveniens,* claiming that the connection to Cook County was tenuous at best, and that the case should proceed in Mississippi. Since the principal witnesses, along with other sources of proof, were all located in or near the State of Mississippi, the trial court dismissed the case, and the appellate court granted plaintiff's petition to appeal the

dismissal, which was reviewed under an abuse of discretion standard. *Black*, 2023 IL App (1st) 220802-U, ¶ 15.

The appellate court scrutinized language of the trial court's dismissal order to determine the degree of deference it had afforded to the plaintiff's choice of forum. The trial court's order noted correctly that since the plaintiff was not suing in her home forum, her choice of forum was to be afforded *less deference*. *Id.* ¶ 20 (emphasis added). The order went on the state, however, that since the injury did not occur in the chosen forum, plaintiff's choice of forum was to be afforded "*even less deference*," and since the plaintiff did not reside in Cook County, nor was that the situs of the incident, the plaintiff's choice of forum was afforded only "*minimum deference*." *Id.* (emphasis added).

"From this, petitioner insists that the [trial] court 'appeared to reduce the amount of deference owed to [her] twice'- once after noting that she and [the decedent] did not reside in Illinois - and then 'even less deference' after noting that [the decedent's] death did not occur here." *Id.* ¶ 21. Plaintiff further argued "that the [trial] court's use of the phrase 'minimum deference' forms no part of the *forum non conveniens* vernacular in Illinois and thus shows it did not consider her choice [of venue] properly." *Id.*

Faced with deciphering the trial court's use of the terms "less deference," "even less deference," and "minimum deference," the appellate court retreated to the language of *Langenhorst*, which used the term "somewhat less deference" to describe the degree of deference to be afforded where the plaintiff does not reside in the chosen forum, in accordance with the Supreme Court's prior decision in the *Guerine* case.

Both *Langenhorst* and *Guerine* involved fact patterns, however, which only concerned the residences of the plaintiffs and not the foreign situs of the injuries, and therefore the court turned to another case, *Elling v. State Farm Mutual Automobile Insurance Co*., 291 Ill. App. 3d 311 (1997), which included both factors to clarify that the lesser standard of deference applied if neither factor was present. *Black*, 2023 IL App (1st) 220802-U, ¶ 21 ("the deference to be accorded to a plaintiff regarding his choice of forum is less when plaintiff chooses a forum other than where he resides *or where the injury occurred*").

Regarding the plaintiff's argument about a potential "double reduction" in the deference-reducing factors due to the trial court's language about the chosen forum not being that of the plaintiff's residence as affording "less deference" being paid to plaintiff's forum choice, and likewise not being the place of injury as resulting in "even less deference" being afforded, the court admitted to seeing how the term "even less" could be interpreted as "in addition," and said that this interpretation could have been avoided had the trial court more closely (or exactly) tracked the language of *Langenhorst*. The court determined, however, that there was no indication from the trial court's remaining language that the trial court actually reduced the deference first by considering the plaintiff's residence, and then again, further reduced the degree of deference based upon the situs of the injury. *Id.* ¶ 24.

As to the trial court's use of the term "minimum deference," while admitting that this term is "not part of the Illinois *forum non conveniens* vernacular", the court simply characterized this terminology as "nothing more than a misstatement" (like the "even less" language previously referenced) and equated "minimum deference" with "somewhat less deference," calling it "essentially, semantics," properly indicating "less than substantial, but not none" and thus consistent with the *Langenhorst* standard of "somewhat less."

So "[w]hat does 'somewhat less deference' mean?" the court asked. "Again," it answered, "simply *less*, as opposed to *none*." *Id.* ¶ 26. The *Black* case illustrates the degree of conflict and confusion that semantics can introduce to the deference issue, underscoring the need for consistency in the language of *forum non conveniens* decisions, or as the appellate court stated: "there is much to be said about uniformity in the law." *Id.* ¶ 25.

### Judicial Recognition of Forum Shopping

An enigmatic aspect of forum shopping is that for all the negative connotations associated with the practice, courts are still admonished not to take forum shopping into account when performing their *forum non conveniens* analysis. *Dawdy*, 207 Ill. 2d at 175; *Evans,* 2020 IL App (1st) 200528, ¶ 33. Requiring courts to turn a blind eye to the practice of forum shopping when conducting a *forum non conveniens* analysis makes little sense, and its rationale has never been fully explained in the case law.

One approach that courts in other jurisdictions have taken in addressing this question is to recognize the reality of forum shopping and to apply a "sliding scale" when forum shopping is evident, and appears as the motive in the selection of plaintiff's choice of forum. For example, the United States Court of Appeals for the Second Circuit, in a seminal case on this question, has said:

> [T]he more it appears that plaintiff's choice of . . . forum was motivated by forum-shopping reasons . . . the less deference the plaintiff's choice of forum commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another [jurisdiction's] courts.

*Iragorri v. United Techs. Corp.,* **274 F.3d 65, 72 (2d Cir. 2001)**

Thus, judicial recognition of forum shopping, and its discreet inclusion as a factor in the *forum non conveniens* analysis, along with all of the well-recognized private and public interest factors, may help to curb what the courts have described as "this most disfavored practice." *Coalition of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior,* 100 F.3d 837, 844 (10th Cir. 1966).

### Conclusion

Simply affording a plaintiff's choice of forum "less deference" when the plaintiff's residence is foreign to the chosen forum, or when the incident giving rise to the lawsuit did not occur there, is insufficient to deter the practice of forum shopping. The "less deference" approach is lacking in a definitive standard and is subject to semantic ambiguities. Outright recognition of forum shopping, and its inclusion as a discreet factor in the *forum non conveniens* analysis, is necessary to curb the onerous practice of forum shopping.

# **Arbitration** Corner

**Daniel A. Cotter**
*Aronberg Goldgehn Davis & Garmisa*, Chicago

## Arbitration Clauses Without Arbitration: When Enforcing ADR Becomes a Defense Risk

Arbitration remains a favored dispute resolution mechanism for many businesses. Properly structured, arbitration can reduce costs, limit discovery, avoid jury uncertainty, avoid bad precedent, and mitigate class action exposure. For decades, courts have broadly enforced arbitration agreements in consumer and employment contexts, often emphasizing the strong federal policy favoring arbitration.

At the same time, courts are increasingly confronting a recurring and problematic pattern. Businesses insist that customers arbitrate disputes but then fail to comply with the basic administrative and financial requirements of the arbitral forum they selected. This conduct is producing an unexpected result. Arbitration clauses designed to limit exposure are instead becoming a source of litigation risk.

Courts are sending a consistent message. Arbitration is not merely a litigation tactic. It is a contractual commitment that carries reciprocal obligations. When a party demands arbitration but refuses to participate meaningfully in the process, courts are increasingly finding waiver, default, or loss of Federal Arbitration Act protections.

### Arbitration Is a Contract, But It Is Also Conduct

Arbitration is grounded in contract law. Courts routinely enforce arbitration provisions when the agreement is valid and the dispute falls within its scope. Yet arbitration does not occur in a vacuum. It requires cooperation with procedural rules, disclosure requirements, and fee structures established by the chosen arbitral forum.

Problems arise when a business invokes arbitration to halt litigation but then fails to take the steps necessary to allow arbitration to proceed. Common examples include refusal to pay required administrative fees, failure to register consumer arbitration clauses, or failure to submit mandatory consumer due process protocols. In some cases, businesses simply go silent after arbitration is initiated.

Courts increasingly view this behavior as inconsistent with the right to arbitrate. A party cannot demand arbitration while simultaneously preventing arbitration from occurring. That principle

### About the Author

**Daniel A. Cotter** is a Member at *Aronberg Goldgehn*. His practice encompasses a wide range of activity, including serving as an arbitrator for both the American Arbitration Association and the Circuit Court of Cook County. Mr. Cotter is a co-host with Pat Eckler on the podcast, The Podium and Panel, where they have an arbitration segment.

reflects both basic contract doctrine and a growing judicial concern that arbitration is being used as a procedural shield rather than a genuine dispute resolution mechanism.

### The Role of the Major Arbitration Forums

Most consumer and employment arbitration clauses designate either the American Arbitration Association (AAA) or JAMS as the administering forum. Both organizations have responded to the rapid expansion of arbitration by adopting detailed consumer protection standards and cost-allocation requirements.

AAA's Consumer Arbitration Rules require businesses to bear the majority of administrative and arbitrator fees and to comply with the Consumer Due Process Protocol. AAA also requires certain businesses to register their consumer arbitration clauses and related protocols. Failure to comply may result in AAA declining to administer the dispute altogether.

JAMS has adopted similar Consumer Arbitration Minimum Standards. These standards include limitations on consumer costs, transparency requirements, and mandatory disclosures. Like AAA, JAMS reserves the right to decline administration when its standards are not met.

When an arbitral forum declines to administer a case because of a business's noncompliance, courts are increasingly unwilling to compel arbitration elsewhere or to stay litigation indefinitely. Courts reason that forcing arbitration before a substitute forum would effectively rewrite the parties' agreement and reward noncompliance.

### Protocol Noncompliance: When the Forum Says No—*Ubi Jus, Ibi Remedium*

Courts have long recognized that where there is a right, there must be a remedy. An arbitration clause that bars access to court but then fails because the drafter refuses to comply with the arbitral forum's rules leaves the claimant with no forum at all. Recent federal appellate decisions demonstrate that such arrangements will not be enforced and that failure to comply with AAA consumer-administration requirements is not treated as a technical oversight, but as a substantive default that can defeat enforcement of an arbitration clause.

For example, in *Bedgood v. Wyndham Vacation Resorts, Inc.*, 88 F. 4th 1355 (11th Cir. 2023), consumers initiated arbitration before the AAA pursuant to Wyndham's arbitration agreement. The AAA declined to administer the arbitrations after Wyndham failed to comply with the AAA's Consumer Due Process Protocol and related administrative requirements. *Bedgood*, 88 F. 4th 1355 at 1365. The AAA closed the files and advised the consumers that they could return to court. *Id.* at 1362.

Wyndham then moved to stay the litigation under section 3 of the Federal Arbitration Act. 9 U.S.C. § 3. Section 3 of the Federal Arbitration Act authorizes a stay of litigation only where the party seeking the stay is not "in default in proceeding with such arbitration." *Id.* The statute provides that a court shall stay litigation pending arbitration only if the applicant is not in default of its arbitration obligations. *Id.*

The Eleventh Circuit affirmed the denial of a stay, holding that Wyndham was "in default" of its arbitration obligations because the failure of the arbitral forum was attributable to Wyndham's own noncompliance. *Bedgood*, 88 F. 4th 1355 at 1365-66. The court rejected Wyndham's argument that the district court should compel arbitration before a substitute forum, explaining that the FAA does not permit a party to force arbitration while simultaneously preventing it from occurring. *Id.* at 1361-62.

The *Bedgood* decision illustrates a growing judicial unwillingness to tolerate arbitration clauses that operate as litigation roadblocks rather than genuine dispute resolution mechanisms. Where a business's own failure to comply with the arbitral forum's rules causes the arbitration to fail, courts are increasingly permitting litigation to proceed.

### Mass Arbitration, Fee Shock, and the New AAA/JAMS Rules

The protocol-compliance issue does not arise in isolation. It is now occurring against the backdrop of a rapidly evolving mass-arbitration landscape that has placed unprecedented financial pressure on businesses that mandate individual arbitration while prohibiting class actions.

In response to the rise of coordinated filings involving hundreds or thousands of nearly identical arbitration demands, both the American Arbitration Association and JAMS have implemented new mass-arbitration procedures that impose substantial upfront administrative fees and compressed case-management timelines. These rules were adopted to address the reality that mass arbitration now functions as a substitute for class litigation.

Under the AAA's Mass Arbitration Supplementary Rules, businesses face initial filing and case-management fees that can reach seven figures before the merits of any individual claim

are addressed. JAMS has adopted similar mass-filing procedures, likewise requiring significant upfront payments and administrative compliance before arbitrations proceed.

For companies that drafted arbitration clauses to avoid class actions, mass arbitration has become the economic mirror image of class litigation, except that the filing fees are immediate and unavoidable.

Not surprisingly, some businesses confronted with mass arbitration have attempted to delay payment, contest forum administration, or refuse to proceed altogether. Courts, however, are increasingly unwilling to tolerate such tactics.

That dynamic is illustrated by the Seventh Circuit's decision in *Wallrich v. Samsung Electronics America, Inc.*, 106 F.4th 609 (7th Cir. 2024). There, Samsung faced thousands of coordinated consumer arbitration demands under its arbitration clause. *Wallrich*, 106 F. 4th at 613. After initially moving to compel arbitration, Samsung declined to pay the required AAA filing fees for the mass filings. *Id.*

The district court held that Samsung's refusal to pay constituted a default under Section 3 of the Federal Arbitration Act. *Id.* at 614. The Seventh Circuit reversed, holding that the consumers failed to prove the existence of valid arbitration agreements and had proceeded under Section 4 of the FAA. *Id* at 617. The court rejected Samsung's argument that the AAA's mass-arbitration fee structure was unfair or unanticipated, emphasizing that Samsung had drafted the arbitration agreement and selected the AAA as the administering forum. *Id.* at 620-21. The court also held that even if valid agreements existed, consumers could not "compel Samsung to pay the AAA's administrative fees." *Id.* at 622.

The Seventh Circuit's decision underscores a point that courts are now repeating with increasing frequency: a party that mandates arbitration must be prepared to arbitrate on the forum's terms, including its mass-arbitration rules and fee schedules.

When a business refuses to comply with those rules after compelling arbitration, courts are treating that conduct as a self-inflicted default that forfeits the protections of the Federal Arbitration Act.

### The Federal Arbitration Act Does Not Protect Default

The Federal Arbitration Act strongly favors arbitration, but that policy is not absolute. Section 3 of the Act authorizes a stay of litigation only if the applicant is not "in default" in proceeding with arbitration. 9 U.S.C. § 3. Courts are increasingly interpreting nonpayment of arbitration fees or refusal to comply with forum rules as precisely that kind of default.

Similarly, Section 4 of the Act permits courts to compel arbitration only "in accordance with the terms of the agreement." 9 U.S.C. § 4. When an agreement specifies a particular arbitral forum and that forum refuses to administer the dispute because of the drafting party's conduct, courts are reluctant to rewrite the contract to preserve arbitration.

The FAA does not require courts to save arbitration at all costs. It requires courts to enforce arbitration agreements as written, including their procedural and financial obligations. 9 U.S.C. §§ 3, 4. When a party's own conduct causes arbitration to fail, courts increasingly conclude that litigation must proceed.

### Waiver Through Strategic Noncompliance

A growing number of courts treat failure to pay arbitration fees as waiver of the right to arbitrate. This is particularly true when nonpayment appears strategic rather than accidental. Courts are skeptical of explanations grounded in internal miscommunication, billing delays, or post-hoc cost-benefit reconsiderations after arbitration has already been compelled.

Illinois courts recognize that a party may waive its contractual right to arbitrate through litigation conduct inconsistent with that right. In *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11–15 (2001), the Illinois Supreme Court articulated the governing waiver framework and emphasized that the inquiry is fact-specific, although the court concluded on the record before it that waiver had not occurred.

These principles align with the growing national trend treating refusal to pay arbitration fees as default under the FAA. Illinois courts are unlikely to reward arbitration gamesmanship where a party insists on arbitration but refuses to allow it to proceed.

### Why Courts Decline to Appoint Substitute Arbitrators

Defendants sometimes argue that if the designated arbitral forum refuses to administer a dispute, the court should appoint a substitute arbitrator or compel arbitration before a different forum. Courts are increasingly rejecting this argument when the failure of the designated forum is attributable to the defendant's own conduct.

Courts distinguish between situations in which a forum is unavailable for

reasons beyond the parties' control and situations in which the forum is unavailable because one party refused to comply with its rules. In the latter scenario, appointing a substitute arbitrator would undermine the parties' contractual allocation of responsibility and incentivize noncompliance.

For defense counsel, this reasoning is significant. Courts are signaling that forum selection matters and that arbitration is not interchangeable once a dispute arises. A defendant that selects a particular forum must be prepared to comply with that forum's rules or risk losing arbitration altogether.

### Mass Arbitration and Fee Shock

An increasingly important backdrop to these disputes is the rise of mass or serial consumer arbitrations. Plaintiffs' firms now routinely file hundreds or thousands of individual arbitration demands simultaneously, particularly under consumer agreements that prohibit class actions.

This strategy can produce substantial upfront administrative fees. In response, some businesses have attempted to delay payment, challenge forum administration, or refuse to proceed altogether. Courts are increasingly unwilling to tolerate these responses.

From a defense standpoint, mass arbitration presents real economic challenges. However, refusal to pay required fees can backfire. Courts can view nonpayment as self-inflicted and inconsistent with the arbitration clause the business drafted. The economic burden of arbitration, standing alone, is not a justification for abandoning the process.

> Courts distinguish between situations in which a forum is unavailable for reasons beyond the parties' control and situations in which the forum is unavailable because one party refused to comply with its rules.

### Counseling Clients Before Arbitration Clauses Are Deployed

These developments underscore the importance of counseling clients before arbitration clauses are rolled out at scale. Arbitration provisions should be evaluated not only for enforceability, but also for operational feasibility.

Defense counsel should help clients understand the downstream consequences of arbitration commitments, including fee exposure, administrative obligations, and the risk of mass filings. Arbitration clauses that function well for isolated disputes may create significant exposure when applied across a large customer base.

Early counseling allows clients to make informed decisions about whether arbitration remains the appropriate dispute resolution mechanism or whether alternative approaches, such as tiered dispute resolution provisions or internal resolution programs, may better serve their objectives.

### Practical Consequences for Defendants

The consequences of arbitration noncompliance can be severe. Courts frequently allow litigation to proceed in full, including discovery and jury trial rights arbitration was designed to avoid. In some cases, courts permit class actions to proceed where arbitration clauses were originally intended to prevent them.

Noncompliance can also damage credibility with the court. A defendant that aggressively moves to compel arbitration but then refuses to fund or administer it risks being viewed as acting in bad faith. Once waiver is found, courts rarely allow a second attempt to compel arbitration.

### Practice Tips for Defense Counsel

Defense counsel should treat arbitration clauses as operational commitments, not mere litigation tools. Counsel should initially discuss with their clients arbitration provisions and tradeoffs of adopting ADR to handle disputes, and the potential consequences of choosing arbitration. Then, if adopted, the counsel should actively work with the client to assess exposures.

First, audit arbitration provisions regularly. Many agreements reference outdated rules or fee schedules. Arbitration clauses should be reviewed against current forum requirements.

Second, ensure internal ownership of arbitration administration. Clients should designate responsibility for paying fees, submitting protocols, and responding promptly to arbitration filings.

Third, budget realistically. Arbitration is not free. If a client cannot or will not pay required fees, arbitration may

not be the appropriate dispute resolution mechanism. In addition, each hearing and touch with the arbitrator or panel results in potential costs to the client.

Fourth, align litigation strategy with arbitration conduct. A motion to compel arbitration should be paired with a clear plan to proceed promptly and in good faith once arbitration is ordered.

For defense counsel, the lesson is clear. Arbitration compliance is no longer optional. It is essential to enforceability, credibility, and effective risk management.

### Conclusion

Arbitration remains a valuable tool for defendants when used consistently and responsibly. Courts are increasingly unwilling to tolerate arbitration clauses that operate as litigation roadblocks rather than genuine dispute resolution mechanisms. Businesses that mandate arbitration must be prepared to arbitrate on the terms they chose.

For defense counsel, the lesson is clear. Arbitration compliance is no longer optional. It is essential to enforceability, credibility, and effective risk management.

# Supreme Court Watch

**John C. Hanson**
*HeplerBroom LLC*, Edwardsville

## Passing Notes and a Sigh, While *Prim*, Is Not Proper Grounds for a Mistrial

In *Robert L. Schilling v. Quincy Physicians and Surgeons Clinic, S.C., d/b/a Quincy Medical Group, et al.,* the Illinois Supreme Court, in a unanimous opinion, has further outlined where not declaring a mistrial is proper. 2026 IL 131411. The *Prim* instruction (IPI Civil No. 1.05) was read and provided to the jury briefly before a unanimous but questioned verdict was reached. Plaintiff's counsel made three motions for a mistrial that were not granted. This should provide some comfort should you find yourself in the unenvious position of after a lengthy trial, during the angst-filled jury deliberations, to be faced with a potential mistrial. Moreover, this is not just the court agreeing with the trial court's discretion, but guidelines as to what depictions of unwillingness of the jury to deliberate means for communications with a jury seemingly threatening to be deadlocked. The case also serves as an analysis of the argument that plaintiffs may make in similar circumstances to forego a defense verdict: that the *Prim* instruction is coercive to the impaneled jury.

It is important to recognize that there remains no mechanical formula for consideration of a mistrial. *Schilling*, 2026 IL 131411, ¶ 38. In a time where the attention spans of jurors is being measured though the lens of consumption of short social media videos, perhaps the time to suggest the reading of the *Prim* instruction as sooner in deliberations is going to be a recurring theme into the future.

The trial that led to these deliberations took just over one week. Plaintiff had a medical malpractice claim in which his leg was ultimately amputated below his knee following a post-surgery infection. *Id.* ¶ 4. Plaintiff alleged the treating physician misdiagnosed a fracture in plaintiff's foot, and that continued use eventually led to his leg amputation. *Id.* ¶¶ 5-6. Approximately 6 years later, the matter went to jury trial in late October 2023. The trial had six days of testimony that included the treating physician and a number of experts. *Id.* ¶ 6.

Over the course of the two days and approximately seven hours of deliberations by the jury, plaintiff's counsel requested a mistrial three times, and

### About the Author

**John C. Hanson**, an Associate with *Hepler Broom LLC* in Edwardsville, focuses his practice on the defense of litigation involving personal injury, products liability, insurance law, governmental matters, and election law. Prior to joining HeplerBroom, Mr. Hanson served as a Madison County Assistant State's Attorney, with experience in both civil and criminal matters. In addition to his State's Attorney experience, he handled the defense of commercial and toxic tort litigation as an associate in a large St. Louis metro-area firm. Mr. Hanson earned his J.D. from Southern Illinois University School of Law, his M.A. from Eastern Illinois University, and a B.S. from Southern Illinois University – Edwardsville.

THE IDC MONOGRAPH:

# Where Construction Cases are Really Won: Risk Transfer, Insurance, and Illinois Law

**Howard L. Huntington**
*Franco Moroney Buenik*

**Madeline K. Krolczyk**
*Freeman Mathis & Gary, LLP*

**Brian M. Dougherty**
*Gordon Rees Scully Mansukhani*

**John M. Fitzgerald**
*Tabet DiVito & Rothstein*

# Where Construction Cases are Really Won: Risk Transfer, Insurance, and Illinois Law

Construction projects involve inherently dangerous work performed by multiple entities operating simultaneously on a jobsite. When injury, death, or property damage occurs, determining responsibility is rarely straightforward. Illinois construction litigation therefore turns less on any single act and more on how risk was allocated in advance through contracts, insurance, and statutory frameworks.

Owners, general contractors, and subcontractors rely on indemnification provisions, insurance requirements, contribution claims, and forum-selection mechanisms to manage exposure. Illinois law permits many of these tools, but it also imposes meaningful limitations through statutes such as the Workers' Compensation Act[1], the Joint Tortfeasor Contribution Act[2], the Construction Contract Indemnification for Negligence Act[3], and the Illinois Building and Construction Contract Act[4]. Understanding how these frameworks interact is essential to effective defense strategy.

### Contractual Risk Transfer in Illinois Construction Projects

For every construction project, owners, general contractors, and subcontractors seek to reduce their risk and exposure through a combination of contractual provisions and insurance coverage. Construction projects inherently involve significant risk, including the potential for personal injury, property damage, and project delays that may constitute material breaches of contract. Because multiple parties operate simultaneously on a jobsite, often performing independent work, determining responsibility when an injury or death occurs can be complex, time-consuming, and costly. To manage and allocate these risks, project participants rely heavily on contracts and insurance.

### Risk Transfer

One primary method of managing and transferring risk is through contractual provisions, particularly indemnification clauses and insurance requirements. Illinois permits indemnification agreements in construction contracts, subject to statutory limitations. Typical indemnification language may provide that, "to the fullest extent permitted by Illinois law, the Subcontractor shall indemnify, defend, and hold harmless the Owner and General Contractor, but only to the extent caused by the negligent acts or omissions of the Subcontractor or its subcontractors." However, the Illinois Construction Contract Indemnification for Negligence Act (the "Anti-Indemnity Act")[5] voids any contractual provision that requires one party to indemnify another for that party's own negligence. In practical terms, a subcontractor cannot be required to hold a general contractor harmless for the general contractor's negligent acts; the subcontractor's indemnity obligation is limited to losses caused by its own negligence, acts, or omissions. Choice-of-law provisions may be considered to avoid the application of Illinois's anti-indemnity statute, though such provisions are often closely scrutinized.

## About the Authors

**Howard L. Huntington** is a partner with *Franco Moroney Buenik, LLC* in Chicago where he focuses his practice on commercial litigation. He also has substantial experience in the areas of construction, product liability, transportation litigation, toxic torts and civil rights litigation. He defends the interests of large and mid-market corporations, family-owned businesses, and entrepreneurs in both Illinois and Indiana. He is a member of various other associations, including Defense Trial Counsel of Indiana. Mr. Huntington is a past Chair of the IDC Tort Law Committee.

**Madeline M. Krolczyk** is an Associate at *Freeman Mathis & Gary, LLP* and is located in the Chicago office. She is a member of the Labor & Employment Law and Tort & Catastrophic Loss practice sections. Her practice focuses on advising and defending clients in general tort liability, construction and catastrophic loss litigation.

**Brian M. Dougherty** is a Partner with the law firm *Gordon Rees Scully Mansukhani, LLP* in its Chicago office where he represents construction professionals in matters involving construction negligence, construction defects, premises liability, and professional liability.

**John M. Fitzgerald** is a partner at *Tabet DiVito & Rothstein LLC* in Chicago. He is a trial and appellate litigator with experience in commercial litigation, professional liability defense and constitutional disputes. Mr. Fitzgerald is a graduate of the University of Chicago Law School and a past president of the Appellate Lawyers Association of Illinois. He currently serves as the Vice Chair of the Illinois Defense Counsel Amicus Committee.

Indemnification clauses remain critically important despite the protections afforded from *Kotecki v. Cyclops Welding Corporation*.[6] The *Kotecki* cap limits only an employer's contribution liability to the amount of its workers' compensation exposure. By contrast, a contractual indemnification clause can shift defense costs, apply to claims beyond employee injuries, affect settlement and judgment exposure, and operate in circumstances where *Kotecki* does not apply. It is helpful to think of *Kotecki* as a shield, while indemnification functions as a risk-transfer system.

Illinois is a modified comparative fault state. As a result, indemnity is often enforced only in proportion to the indemnitor's percentage of fault. Contribution claims may still arise among defendants because contractual risk transfer does not eliminate fault but instead reallocates responsibility for payment.

### *Insurance Considerations*

When a subcontractor names the general contractor and/or owner as an additional insured on its commercial general liability policy, the insurer may owe those additional insureds a duty to defend and, potentially, to indemnify.

It is essential to request and review the actual additional insured endorsement and compare it to the contract requirements. Policy language, not Certificates of Insurance ("COIs"), controls coverage. COIs do not amend, extend, or alter coverage unless the policy or endorsement expressly does so, even if the COI states that a party is an additional insured, lists specific entities, or references particular coverages or limits.

Given the prevalence of nuclear verdicts, particularly in jurisdictions such as Cook County, owners and general contractors increasingly require subcontractors to carry higher liability limits and umbrella or excess policies to protect the project's insurance program from catastrophic exposure.

### *Targeted Tenders and Practical Application*

Tenders matter. They should be made early and often.

In construction cases, multiple insurance policies may apply to a single loss. Illinois recognizes the doctrine of targeted tender, which allows an insured, typically a general contractor or subcontractor, to select which insurer will defend and indemnify it. Risk is commonly pushed downstream, with owners tendering to general contractors and general contractors tendering to subcontractors, in an effort to avoid exhausting their own primary or excess coverage.

The language of the tender letter is critical. Counsel must determine whether the insured expressly reserved or waived rights to other available policies. Once a targeted tender is made and accepted, the defending insurer generally cannot seek contribution from another insurer, even if that insurer might otherwise owe coverage. Tenders may be accepted in full, denied outright, accepted for defense only, or accepted under a reservation of rights. Where a tender is denied or accepted under a reservation of rights, contribution claims may still remain viable.

When entering mediation in a construction case, it is imperative to understand the status of all tenders and insurer responses. The fact that another defendant or insurer is paying defense costs does not necessarily mean that party will fund a settlement.

## Contribution Claims and the Workers' Compensation Framework: The *Kotecki* Cap and How it Can Be Waived

### *The Tension Between Workers' Compensation and Contribution*

A common fact pattern in negligence law is this: a general contractor hires a subcontractor for a construction project. One of the subcontractor's employees gets injured on the job. The injured employee files suit against the general contractor and asserts various negligence theories, such as premises liability and retained control under section 414 of the Restatement (Second) of Torts. The general contractor then may decide to file a third-party complaint for contribution against the subcontractor/employer. Under the Illinois Joint Tortfeasor Contribution Act, where "2 or more persons are subject to liability in tort arising out of the same injury to person . . . there is a right of contribution among them."[7] This, however, creates tension between the Contribution Act and the Illinois Workers' Compensation Act (the "Compensation Act"). The reason is that the Compensation Act provides a no-fault system of recovery by injured employees. If a general contractor is allowed to seek contribution from the employer, then, in theory, a defendant could recover more from the employer than the employer is required to pay to

the injured plaintiff. In *Doyle v. Rhodes*, the Illinois Supreme Court resolved this tension by allowing a claim of contribution against an employer.[8]

### *Employer's Contribution Equals Workers' Compensation Liability*

One issue left open in *Doyle* was the amount of contribution that an employer may be liable. This was resolved by the Illinois Supreme Court in *Kotecki*.[9] In *Kotecki*, the court had to decide whether an employer, sued as a third party defendant, was liable for contribution in an amount greater than its statutory liability under the Compensation Act.[10] The court cited the reasoning from the Minnesota Supreme Court in *Lambertson v. Cincinnati Corporation*, which explained the conflict between contribution and indemnity on the one hand, and the workers' compensation system on the other hand.[11] The *Lambertson* court adopted a rule that an employer's contribution liability was limited to the amount of its workers' compensation liability.[12] *Kotecki* adopted this reasoning since the competing interests were equally as strong in Illinois.[13] Allowing a third-party to obtain limited contribution also preserves the employer's interest in not paying more than its workers' compensation liability.[14] This rule has come to be known as a the "*Kotecki* cap" since contribution liability is "capped" at the amount of worker's compensation liability.

### *Waiver of the Kotecki Cap and Construction Contract Indemnification Act*

In order to alleviate the harsh results of the *Kotecki* cap, in a contract, one party could require that another party (namely an employer) waive the protection of the cap. This could be done, for instance, in an indemnification clause in a contract between a general contractor and sub-contractor for a construction project. In *Braye v. Archer-Daniels Midland Company*, the court had to determine whether the employer (All Tri-R) could voluntarily waive the protections of the Compensation Act.[15] The court reasoned that the Compensation Act was intended to benefit an employer.[16] Thus, based on the employer's business judgment, it may decide to waive the protections of the law, which does not violate the Compensation Act's public policy.[17]

The second question the *Braye* court needed to address was whether the purchase order between Archer-Daniels (ADM) and All Tri-R violated the Construction Contract Indemnification for Negligence Act (the "Indemnification Act").[18] The Indemnification Act voids construction agreements that seek to require the indemnitor to indemnify the indemnitee for its own negligence.[19] The policy behind the Indemnification Act was ensuring that parties engaged in construction activities "take accident prevention measures and provide safe working conditions."[20] The contractual clause provided:

> If [All Tri–R's] work under the order involves operations by [All Tri–R] on the premises of [ADM] or one of its customers, [All Tri–R] shall take all necessary precautions to prevent the occurrence of any injury to person or damage to property during the progress of such work and, except to the extent that any such injury or damage is due solely and directly to [ADM's] or its customer's negligence, as the case may be, [All Tri–R] shall pay [ADM] for all loss which may result in any way from any act or omission of [All Tri–R], its agents, employees or subcontractors.[21]

The *Braye* court found that the Indemnification Act was not implicated since ADM's third-party complaint was seeking contribution and not indemnification from All Tri-R, which did not offend the Contribution Act's "goals of achieving comparative fault and encouraging good-faith settlements."[22] The contractual language required All Tri-R to pay all liability its own negligent conduct.[23]

After *Braye* was decided, the Illinois Supreme Court handed down its opinion in *Liccardi v. Stolt Terminals*.[24] There, Stolt hired Gunderson to clean a storage tank, and one of Gunderson's employees fell from a scaffold and died. The employee sued Stolt, and Stolt filed a third-party complaint for indemnification and contribution against Gunderson. One of the issues before the court was "whether the particular contractual provisions in this case operated as a waiver of the *Kotecki* cap on Gundersen's contribution liability, or whether they are void and unenforceable under the Construction

Contract Indemnification for Negligence Act on the grounds that they require Gundersen to indemnify Stolt for Stolt's own negligence."[25]

Paragraph seven of the parties' contract provided:

> If Vendor performs services * * * hereunder, [Gunderson] agrees to indemnify and hold harmless Stolt Terminals (Chicago) Inc. from all loss or the payment of all sums of money by reason of all accidents, injuries, or damages to persons or property that may happen or occur in connection therewith.[26]

The court found that at the time the parties' contract was entered into, Stolt was presumed to know that indemnity provisions in construction contracts are void in violation of public policy and would not be enforced.[27] There was also no indication that Stolt ever believed that the contract entitled it to indemnification for its own negligence.[28] Rather, based on count I of the third party complaint, Stolt believed it was entitled to indemnification for losses proximately resulting from Gundersen's wrongful acts or omissions.[29] Because Stolt did not construe paragraph 7 as relieving it of liability for its owns acts or omissions, it did not extinguish Stolt's incentive to exercise due care, the Indemnification Act was not implicated, and paragraph seven was not void.[30]

### Practice Tip

Contractors who hire subcontractors must provide for indemnification in the contracts to protect higher-tiered contractors. The best practice is to expressly mention that the lower-tiered contractor's indemnification liability will not be limited by the amount of the lower-tiered contractor's workers' compensation liability to an injured employee, or even better, mention that the *Kotecki* cap is being waived. Using such language should leave no doubt in anyone's mind the intention of the parties.

Indemnification clauses should also comply with the Indemnification Act to make it clear that a higher-tiered contractor will not be indemnified for its own negligent conduct. Failing to do this could result in the indemnity clause being voided. While some general contractor-subcontractor agreements place work site safety on the latter, the general contractor should still ensure that it has general safety policies and practices in place for its own employees and that it has the general right to oversee safety on a job site. Practitioners should also consult the case law interpreting section 414 of the Restatement (Second) of Torts to ensure that a general contractor's safety obligations do not result in "retained control" over a subcontractor's employees. The case *Lee v. Six Flags Theme Parks* provides a discussion on "retained control."[31] In sum, meticulous contract drafting, in consultation with existing law, is a must to protect one's interests.

## Damage Waivers and Exculpatory Clauses

### *Waiver of Consequential Damages*

In the construction arena, waivers of consequential damages are generally enforceable in Illinois. "Consequential damages" are losses that do not flow directly and immediately from a party's wrongful act but rather result indirectly and arise variably from the act.[32] While indirect or arising in special circumstances, the loss must still be reasonably foreseeable according to the contemplation of the parties at the time the contract was entered, given the background and purposes of the contract. A waiver of consequential damages may establish that losses which are merely collateral to the contract are unrecoverable.[33]

Consequential damages may include, for example, items such as an owner's extra financing costs, liabilities to subcontractors, or a contractor's lost business opportunities from devoting resources to a cancelled project. Lost profits, on the other hand, can be categorized as either direct or consequential damages, depending on the situation.[34] Perhaps counterintuitively, commercial parties also have the freedom to contractually define specific losses to be waived within provisions captioned as a "consequential waiver," even if those items would not otherwise constitute consequential damages under common law.

### *No-Damage-for-Delay Provisions*

Illinois courts uphold no-damage-for-delay provisions, which are designed

to limit liability related to delays arising from any reason, whether caused by the owner or the contractor.[35] These provisions are construed strictly against the party seeking their benefit.[36] Delays covered by these provisions often include lists of specific causes of hindered work along with a blanket catch-all, while providing time extensions as the sole remedy.

There are exceptions. Courts will not apply no-damages-for-delay clauses where delay is caused by "bad faith," where the delay is "not within contemplation of parties," where the delay is of "unreasonable duration," and where the delay is attributable to "inexcusable ignorance or incompetence of engineer." [37]

### *General Considerations Relevant to Exculpatory Clauses*

While a contract will define the limits of duty in negligence cases,[38] a party to a contract cannot negate a duty to those who are not parties to the contract merely by including exculpatory and indemnification language in that contract[39].

Absent fraud or willful and wanton negligence, a contract's exculpatory clause will be valid and enforceable unless there is a substantial disparity of the parties' bargaining position, the social relationship between the parties militates against upholding the clause, or enforcement of the exculpatory clause would violate public policy.[40]

Courts will closely scrutinize exculpatory clauses and strictly construe them against the party seeking to rely on them, especially when that party also drafted the waiver.[41] An exculpatory clause should contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it encompasses and for which the party agrees to assume the risk.[42] The parties need not have contemplated the precise occurrence that results in injury, but the injury must fall within the scope of possible dangers ordinarily accompanying the activity.[43]

### Practice Tip

Given the scrutiny applied to exculpatory clauses, when research uncovers no cases interpreting similar or analogous language, or where there are seemingly competing terms, reference to the canons of contract interpretation can provide a helpful framework for arguing a position. The court's primary objective is to give effect to the intent of the parties.[44] The court looks to the language of the contract to determine the parties' intent and construe the contract as a whole, viewing each provision in light of the other provisions.[45] The intent of the parties is not to be derived from any clause or provision standing alone.[46] A contract will be considered ambiguous if it is capable of being understood in more sense than one.[47] Courts, however, "should make reasonable efforts to harmonize apparently conflicting provisions in a contract."[48] If contractual provisions conflict or create an ambiguity, the more specific provision controls.[49]

## Choice of Law and Forum Selection in Construction Contract Disputes

### *Section 10 of the Construction Act—The Basics*

Multi-million-dollar construction disputes often turn on things which, on the surface, have very little to do with the quality of anyone's work or the completion of any project. Those disputes are sometimes won or lost based on arguments over which state's law will govern the interpretation of a contract, which state is the appropriate forum for litigating a dispute, or whether the decisionmaker will be a court or a private arbitrator.

In the absence of legislation, the power to decide all those issues belongs to the party who drafts the construction contract. Historically, Illinois courts "readily enforced forum-selection clauses, unless enforcement contravened the strong public policy of the state in which the case was brought."[50] But not everyone is satisfied with the freedom of contract, particularly if the party who drafts the contract holds, or is perceived to hold, unequal bargaining power. Under those circumstances, parties who feel oppressed by the freedom of contract tend to call their legislators.

That is how section 10 of the Construction Act was born. By enacting section 10 of the Construction Act, Illinois joined "[m]any states" that "outlaw forum selection clauses in construction contracts" due to a perception that "large multi-state general contractors were forcing local subcontractors into them, thus compelling those local sub-contractors to resolve disputes at great cost in the

large general contractor's home state."[51] One Illinois legislator dramatically accused unidentified "gigantic, behemoth national companies" of "thrust[ing]" forum selection and choice-of-law clauses "upon Illinois contractors" in "an adhesion-type fashion."[52]

In an attempt to address this purported problem, section 10 of the Construction Act (titled "Application of laws of another state") provides as follows:

> A provision contained in or executed in connection with a building and construction contract to be performed in Illinois that makes the contract subject to the laws of another state or that requires any litigation, arbitration, or dispute resolution to take place in another state is against public policy. Such a provision is void and unenforceable.[53]

Section 10's "plain language is clear that, if you build in Illinois, you litigate in Illinois."[54] Similarly, if you build in Illinois, you cannot contractually select another state's law.[55]

Section 10's language is broadly construed. On its face, it applies to any provision "contained in or executed in connection with a building or construction contract to be performed in Illinois."[56] Section 5 of the Construction Act, in turn, defines "building and construction contract" as "a contract for the design, construction, alteration, improvement, repair, or maintenance of real property, highways, roads, or bridges."[57] In this context, "real property" means "land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land."[58]

Accordingly, section 10 has been applied even to contracts that, at first glance, might not seem to be "building and construction" contracts. In *McCoy*, for example, section 10 invalidated a forum selection and choice of law provision in a master services agreement for wind turbine operation, maintenance, and repair services.[59] The wind turbines were "attached to or erected on land," the court reasoned.[60] Similarly, in *Evoqua Water Technologies, LLC v. AFAM Concept*, section 10 was held applicable to a contract for installation of a water purification system in a commercial building.[61] The court relied on an affidavit showing that the water purification system's control panel had been "screwed into the wall" in the defendant's building and that "the water entry and exit piping was connected to the water systems on [the defendant's] real estate."[62] In short, section 10 will be applied even to contracts that appear far removed from more conventional construction settings.

Yet there are limits to the breadth of section 10. One litigant tried to argue that section 10 evinced an Illinois public policy against all forum-selection clauses in construction contracts involving Illinois companies, regardless of where the project took place.[63] That argument failed for the simple reason that, by its plain terms, section 10 does not apply unless the building and construction contract is to be performed in Illinois.[64]

One federal district court rejected a challenge to section 10 under the dormant Commerce Clause of the United States Constitution, finding that section 10 is an "evenhanded regulation."[65]

### *Pre-Emption of Section 10 of the Construction Act by the Federal Arbitration Act*

In *R.A. Bright Construction, Inc. v. Weis Builders*, the appellate court recognized one important limitation to section 10's application—specifically, when a building and construction contract implicates interstate commerce and requires the resolution of disputes by arbitration in a forum outside of Illinois, section 10 will be preempted by the Federal Arbitration Act (the FAA).[66]

In that case, the agreement between a Minnesota general contractor and its Illinois subcontractor for a construction project in Illinois provided as follows: "Any dispute arising out of or related to this subcontract . . .shall at contractor's sole discretion . . . (c) be settled by arbitration venued in Hennepin County, Minnesota in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment rendered upon the award may be entered in any court having jurisdiction thereof."[67]

The appellate court first found "no doubt that this transaction does, in fact, involve interstate commerce or, at the least, has a slight nexus to interstate commerce," reasoning that the record included evidence that the subcontractor had purchased supplies from a vendor in Wisconsin for use in the project.[68] Moreover, the appellate court explained, the general contractor was "a Minnesota corporation with offices in four states."[69] The appellate court further noted that

the project was for the construction of a national retail store (Wal-Mart).[70] Accordingly, the appellate court held, the subcontract evinced "a transaction involving commerce as contemplated by section 2 of the FAA."[71] The FAA therefore preempted section 10 of the Construction Act, so the appellate court reversed the circuit court's denial of the general contractor's motion to compel arbitration and remanded with directions to stay the proceedings and compel arbitration.[72]

The subcontractor argued that the FAA did not preempt generally applicable defenses to the enforcement of a contract, and it suggested that *forum non conveniens* was one such defense.[73] The appellate court rejected that argument because *forum non conveniens* is "not a contract defense, but merely a procedural mechanism employed to transfer a case to a forum in which adjudication 'can be had more conveniently.'"[74]

One justice dissented from the majority's opinion in *R.A. Bright*, but only because she was not convinced that the transaction involved interstate commerce.[75] The dissenting justice expressly agreed that the FAA preempts section 10 of the Construction Act when the transaction implicates interstate commerce and the federal policy in favor of arbitration.[76]

Interestingly, the subcontract provision in *R.A. Bright* mandated arbitration in Minnesota but said nothing about the choice of law.[77] If that provision had mandated arbitration in Minnesota and required the subcontract to be interpreted under Minnesota law, it is unclear whether FAA preemption would have extended far enough to block section 10 of the Construction Act from invalidating the selection of Minnesota law. If not, the outcome might have been an arbitration in Minnesota in which the arbitrator was required to use Illinois law to interpret the subcontract.

One other decision addresses the interplay between section 10 of the Construction Act and FAA preemption, and only in dicta. In *M.A. Mortenson/The Meyne v. Edward E. Gillen*, a federal district court indicated that the FAA would preempt section 10 of the Construction Act with respect to a contract provision mandating arbitration outside of Illinois where the transaction involved interstate commerce.[78] But the court noted that it did not need to "conclusively" decide that issue because the contract at issue predated section 10 of the Construction Act, so section 10 was inapplicable by its own terms.[79]

## Practice Tip

There are many reasons why a general contractor may prefer to arbitrate, rather than litigate, a contract dispute with a subcontractor. One of the more overlooked reasons to use an arbitration provision in a subcontract or another construction contract is the opportunity to invoke FAA preemption, avoid section 10 of the Construction Act, and validly designate a forum outside of Illinois for the resolution of disputes involving an Illinois construction project. A choice of law and forum selection provision that does not require arbitration, on the other hand, will not trigger FAA preemption and will be invalidated under section 10 of the Construction Act so long as the construction contract was performed in Illinois. As discussed above, while FAA preemption requires the project to have implicated interstate commerce, that standard is not demanding and will probably be met in the vast majority of cases involving large construction projects.

## Practice Considerations and Final Takeaways

Construction litigation in Illinois is shaped less by any single doctrine than by the interaction of contracts, statutes, and insurance. Effective risk management requires, in part:

1. Precise indemnification drafting that complies with the Anti-Indemnity Act;
2. Explicit waiver language where *Kotecki* protection is intended to be waived;
3. Careful coordination of indemnity obligations and insurance requirements;
4. Early and strategically targeted tenders; and
5. Awareness of section 10 limitations and FAA preemption opportunities.

Meticulous contract drafting, informed by existing law, remains the most effective tool for allocating risk and controlling exposure before an accident ever occurs.

**Endnotes**

[1] 820 ILCS 305/1, *et seq.*

[2] 740 ILCS 100/1, *et seq.*

[3] 740 ILCS 35/1, *et seq.*

[4] 815 ILCS 665/1, *et seq.*

[5] 740 ILCS 35/1, *et seq*.

[6] *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155 (1991).

[7] 740 ILCS 100/2(a).

[8] *Doyle v. Rhodes*, 191 Ill.2d 1, 14 (1984).

[9] *Kotecki*, 146 Ill.2d 155 (1991).

[10] *Id.* at 156.

[11] *Lamberton v. Cincinnati Corporation*., 312 Minn. 114, 119-20 (1977).

[12] *Lamberton*, 312 Minn. at 130.

[13] *Kotecki*, 146 Ill.2d at 164.

[14] *Id*. at 165.

[15] *Braye v. Archer-Daniels Midland Company* 175 Ill.2d 201 (1997).

[16] *Braye*, 175 Ill.2d at 211.

[17] *Id.* at 212.

[18] 740 ILCS 35/0.01 *et seq*.

[19] 740 ILCS 35/1.

[20] *Braye*, 175 Ill.2d at 211 (*citing Davis v. Commonwealth Edison Co*., 61 Ill.2d 494, 498-99 (1975)).

[21] *Braye*, 175 Ill.2d at 203 (emphasis added)

[22] *Id.* at 217.

[23] *Id.* at 214.

[24] *Liccardi v. Stolt Terminals, Inc*., 178 Ill.2d 540 (1997).

[25] *Liccardi*, 178 Ill.2d at 545.

[26] *Id.* at 548.

[27] *Id.* at 549.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Lee v. Six Flags Theme Parks*, 2014 IL App (1st) 130771.

[32] *E.g.*, *Westlake Fin. Grp., Inc. v. CDH-Delnor Health Sys.*, 2015 IL App (2d) 140589, ¶ 31.

[33] *E.g.*, *Asset Recovery Contracting, LLC v. Walsh Const. Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 102.

[34] *Westlake Fin. Grp., Inc.*, 2015 IL App (2d) 140589, ¶ 34.

[35] *E.g.*, *M.A. Lombard & Son Co. v. Public Bldg. Comm'n of Chicago*, 101 Ill.App.3d 514, 519 (1st Dist. 1981).

[36] *J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 276 (1994).

[37] *J & B Steel Contractors, Inc.*, 162 Ill. 2d at 277.

[38] *Putnam v. Village of Bensenville*, 337 Ill.App.3d 197 (2nd Dist. 2003).

[39] *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 391 (1986); *see also Chicago Steel Rule and Die Fabricators Co. v. ADT Security Systems, Inc.*, 327 Ill. App. 3d 642, 653-54 (1st Dist. 2002).

[40] *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, ¶ 18.

[41] *Solomon v. Ctr. for Comprehensive Servs., Inc.*, 2023 IL App (5th) 210391, ¶¶ 56-57.

[42] *Hawkins*, 2015 IL App (1st) 133716, ¶ 19.

[43] *Id.* ¶ 19.

[44] *Shapich v. CIBC Bank USA*, 2018 IL App (1st) 172601, ¶ 18.

[45] *Shapich*, 2018 IL App (1st) 172601, ¶ 18

[46] *Kuykendall v. Schneidewind*, 2017 IL App (5th) 160013, ¶ 33 (2017).

[47] S*herwood Commons Townhome Owners Association, Inc. v. Dubois*, 2020 IL App (3d) 180561, ¶ 30 (2020).

[48] *Coe v. BDO Seidman, LLP*, 2015 IL App (1st) 142215 ¶ 27 (finding "these seemingly contradictory provisions can be harmonized").

[49] *Coe*, 2015 IL App (1st) 142215 ¶ 27.

[50] *Foster Wheeler Energy Corp. v. LSP Equipment, LLC*, 346 Ill. App. 3d 753, 759 (2d Dist. 2004).

[51] *Presidential Hospitality, LLC v. Wyndham Hotel Group, LLC*, 333 F. Supp. 3d 1179, 1230-31 (D. N.M. 2018).

[52] Illinois Senate Transcript, 2002 Reg. Sess. No. 94, p. 24 (remarks of Sen. Dillard) (cited in *Presidential Hospitality, LLC*, 333 F. Supp. 3d at 1230).

[53] 815 ILCS 665/10 (eff. July 16, 2002).

[54] *Dancor Construction, Inc. v. FXR Construction, Inc.*, 2016 IL App (2d) 150839, ¶ 81 n. 2.

[55] 815 ILCS 665/10.

[56] *Id.*

[57] 815 ILCS 665/5.

[58] *McCoy v. Gamesa Technology Corp., Inc.*, No. 11 C 592, 2012 WL 245162, ¶ 4 (N.D. Ill. Jan. 26, 2012) (*quoting* Black's Law Dictionary (9th ed. 2009) (defining "property")).

[59] *See McCoy*, 2012 WL 245162, ¶¶ 4-5.

[60] *Id.*

[61] *Evoqua Water Technologies, LLC v. AFAM Concept Inc.*, No. 21 C 4708, 2022 WL 117769, ¶ 2 (N.D. Ill. Jan. 12, 2022).

[62] *Evoqua Water Technologies, LLC*, 2022 WL 117769, ¶ 2; *see also Continental Glass Sales & Investment Corp. v. First Finish, LLC*, No. 21 cv 6734, 2022 WL 1620233, ¶¶ 3-4 (N.D. Ill. May 23, 2022) (section 10 applied to a contract for installation of glass barn door and glass shower door assembly units in a hotel).

[63] *J.F. Electric, Inc. v. HD Supply, Inc.*, 2013 IL App (5th) 120279-U, ¶ 11 (unpublished Rule 23 order).

[64] *J.F. Electric, Inc.*, 2013 IL App (5th) 120279-U, ¶ 11; *see also* 815 ILCS 665/10.

[65] *McCoy*, 2012 WL 245162, ¶¶ 5-6.

[66] *R.A. Bright Construction, Inc. v. Weis Builders, Inc.*, 402 Ill. App. 3d 248, 249-56 (3d Dist. 2010).

[67] *R.A. Bright Construction, Inc.*, 402 Ill. App. 3d at 254-55.

[68] *Id.* at 251-52.

[69] *Id.* at 252.

[70] *Id.* at 253.

[71] *Id.* at 252.

[72] *Id.* at 254-56.

[73] *R.A. Bright Construction, Inc.*, 402 Ill. App. 3d at 255.

[74] *Id.* (citation omitted).

[75] *See id.* at 256-57.

[76] *Id.* at 256.

[77] *See id.* at 254-55.

[78] *M.A. Mortenson/The Meyne Co. v. Edward E. Gillen Co.*, No. 03 5135, 2003 WL 23024511, ¶ 4 (D. Minn. Dec. 17, 2003).

[79] *M.A. Mortenson/The Meyne Co.*, 2003 WL 23024511, ¶¶ 2-4.

the impaneled jury was read the *Prim* instruction once before returning with a unanimous vote for the defendant.

The jury was impaneled shortly after 2 o'clock in the afternoon, following the sixth day of trial. Deliberations continued into the evening, with questions of meanings of negligence and standard of care. *Id*. ¶ 6. At 7 o'clock that evening, the jury provided a note "[i]t is very obvious that we will not come to an agreement unanimously. Sitting in here for hours and hours will not make a difference." Less than an hour later, the court discharged the jury for the evening, following an agreed response to the jury to "[p]lease continue your deliberations. We will check back in with you shortly." *Id*. ¶ 7.

The following morning, the jury resumed deliberations, and less than an hour later, what became known as the "surrender note" was submitted by an unidentified juror. *Schilling*, 2026 IL 131411, ¶ 8. The note stated:

> For the record, I will sign the verdict for the defendant Dr[.] Love. I am firm in my support for the plaintiff Mr. Shilling. I am only signing to end this deliberation and put an end to this. After many hours of discussion and debate, we cannot come to a unanimous decision. Therefore, it's my position to sign only to end this. I 100% believe Dr[.] Love was negligent in providing the appropriate care to his patient. As a result, Mr[.] Schilling['s] overall care was impacted because of Dr[.] Love[']s decision. Once again, **I am only agreeing to sign to end this**.

*Id*. ¶ 8.

Following the note, defense counsel requested the *Prim* instruction, the plaintiff's counsel sought a mistrial. Plaintiff's counsel contended that while a *Prim* instruction may have been appropriate with the note of the previous evening stating that a difference would not be made, that following the note, a mistrial was appropriate.

The *Prim* instruction, IPI Civil No. 1.05 was read to the jury and provided in writing.

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

*Id*. ¶ 9; IPI Civil No. 1.05.

Plaintiff's counsel again moved for a mistrial, following the initial reading of the *Prim* instruction. Approximately ten minutes into continued deliberations, another note was sent by the jury, asking questions about "deviation from standard of care" and "professional negligence," and a deposition. *Id*. ¶ 10.

Approximately 40 minutes later, the jury reached a verdict. *Id*. ¶ 12. All jurors were polled, and all answered "yes," but one juror both hesitated and with a loud sigh, answered "yes." *Id*. ¶¶ 13-14. Plaintiff's counsel then suggested the exacerbated juror may well have been the author of the Note, and again moved for a mistrial. *Schilling*, 2026 IL 131411, ¶ 14. The motion for mistrial by plaintiff's counsel was denied. *Id*.

Plaintiff's counsel made a post-trial motion for a new trial arguing that a mistrial should have been declared when the trial court received the note. *Id*. ¶ 15.

As dramatized as the note was by plaintiff's counsel and the plaintiff's bar in *amici* to the court, the appellate court pointed out that the note was not contemporaneous with a verdict, but was after an additional six hours of deliberations, and still awaited a response from the court. In short, it was a request for guidance instead of a statement of true futility. *Id*. ¶ 25.

The court considered two arguments of the plaintiff as to whether the trial court denying plaintiff's motion for mistrial following the note was in error. The court analyzed both of plaintiff's arguments, based on plaintiff's characterizing the note as "a promise, guarantee, or assurance that he or she would return a verdict based on a manifestly improper reason, as well as plaintiff's argument that the note constituted juror misconduct that should have led to the granting of a mistrial. *Id*. ¶¶ 24-25. The court rejected

both of those arguments, agreeing with the appellate court that a reasonable interpretation of the note was, as there was a wait for a response from the trial court, that the note sought guidance instead of being a statement that deliberations could not continue. *Id*. ¶ 25.

Next, the court considered plaintiff's claim the trial court errored in refusing to conduct additional polling of the jury. *Schilling*, 2026 IL 131411, ¶ 44. While the court acknowledged that the trial court is to hear the juror's response, as well as to observe the demeanor and tone of the juror in polling, that the trial court has discretion in determining that the juror has freely assented to the verdict. *Id*. ¶ 47.

In considering the note, the court observed that the juror at the time of polling had an opportunity to disclose any mistake, coercion, or dissent. *Id*. ¶ 49. As with other issues, this was primarily fact-based. The court found that the juror's long pause and loud sigh before answering yes to the polling did not require that polling continue, as it was unambiguous. *Id*. ¶ 56. The court looked to a lack of noted desire by the juror to note disagreement or ask to change their vote. *Id*. ¶ 56.

Finally, the court considered plaintiff's claim that the *Prim* instruction was coercive to the jury following the note. *Id*. ¶ 43. The court found the facts of the case itself supported the appellate court's opinion that the *Prim* instruction was used as intended, to provide guidance to a deadlocked jury, and not inherently coercive. *Id*. ¶ 43.

In short, this is a refreshing of the standards in what behaviors by impaneled jurors do not constitute grounds for a mistrial.

# **Legislative** Update

**Henry W. Goldman**
*McCoy Leavitt Laskey LLC*, Chicago

## Defense Initiatives in the General Assembly and Anti SLAPP Developments in Illinois

The spring session of the Illinois General Assembly is underway, and the defense bar is targeting procedural reforms in a politically cautious election year. With the statewide elections approaching, there will be limited new legislation introduced this year. The Illinois Defense Counsel, however, has collaborated with legislative sponsors to introduce two civil justice reform measures addressing joint and several liability and punitive damages in legal malpractice cases. Additionally, Senate Bill 1181, enacted on August 21, 2025, amended the Illinois Citizen Participation Act (ICPA) in response to the Illinois Supreme Court's decision in *Glorioso v. Sun-Times Media Holdings, LLC*, 2024 IL 130137, by strengthening speech protections for the press in Strategic Lawsuits Against Public Participation (SLAPP).

Senate Bill 2626 sponsored by Senator Jil Tracy on the subject of joint and several liability seeks to amend Sections 2-1107.1 and 2-1117 of the Illinois Code of Civil Procedure to permit a settling tortfeasor defendant to be included in the jury verdict form and to be considered in the jury's apportionment of fault. Currently, Section 2-1117 provides that a tortfeasor defendant found less than 25% at fault is severally liable for non-medical damages. 735 ILCS 5/2-1117. However, under current practice, only non-settling defendants remaining at trial appear on the verdict form for fault allocation purposes. SB 2626 aims to materially reduce exposure to non-settling defendants by amending Section 2-1107 to permit settling tortfeasors to be included on the jury verdict form for the apportionment of fault. Additionally, the bill amends Section 1107.1 to prohibit the court from instructing the jury of the consequences of any findings of fault of any plaintiff or defendant. Senate Bill 2626 is currently assigned to the Senate Judiciary committee where we anticipate opposition by the plaintiff's bar.

Senate Bill 2627 by Senator Jil Tracy seeks to amend 735 ILCS 5/2-1115 of the Code of Civil Procedure to prohibit the recovery of punitive damages in legal malpractice actions, including punitive damages sought that are compensatory in nature and were assessed against the legal malpractice plaintiff in the underlying case. The amendment would ultimately nullify the holding in *Midwest Sanitary Service v. Sandberg, Phoenix & Von Gontard P.C*, 447 Ill. Dec. 722 (2021),

### About the Author

**Henry W. Goldman** is a partner in the Chicago law firm of *McCoy Leavitt Laskey*, a nationwide firm specializing in defense of fire and explosion cases, as well as liability and coverage counsel for personal injury and subrogation matters.

in which the Illinois Supreme Court held that in its current form, Section 2-1115 of the Code permits the recovery of punitive damages in legal malpractice cases even where the recovery of the punitive damages was compensatory in nature and stemmed from the lawyer's negligence in the underlying case. 2022 IL 127327. Senate Bill 2627 is currently assigned to the Senate Judiciary committee where it will also likely face opposition due to its intent to limit the recovery of damages.

Senate Bill 1181, enacted into law on August 21, 2025, amended the Illinois Citizens Participation Act (ICPA), 735 ILCS 110/1 et seq., to increase First Amendment protections for the press against Strategic Lawsuits Against Public Participation (SLAPP). The SLAPP law was enacted in response to the recent supreme court holding in *Glorioso v. Sun-Times Media Holdings, LLC*, 2024 IL 130137. In *Glorioso*, a former Illinois Property Tax Appeal Board official filed an action against the Chicago Sun Times ("Sun Times") alleging counts of defamation per quod, defamation per se, false light invasion of privacy, and intentional infliction of emotional distress over articles published by Sun-Times in 2020 regarding an investigation by the Illinois Office of Executive Inspector General (OEIG) into the Illinois Property Tax Appeal Board (PTAB) and its handling of the 2011 property tax appeal of the Trump International Hotel in Chicago. The articles were published in response to an anonymous whistleblower complaint that was submitted to the OEIG, naming several individuals at PTAB, including Glorioso, and alleging that the Trump Tower tax reduction was done for politically motivated reasons. See, *In re: Mauro Glorioso*, Case No. 19-02400. The Sun-Times learned of the Anonymous Complaint when an anonymous source delivered a copy of the complaint to a Sun-Times investigative reporter in 2019. As a result of the investigation, Glorioso was terminated from his position with the PTAB.

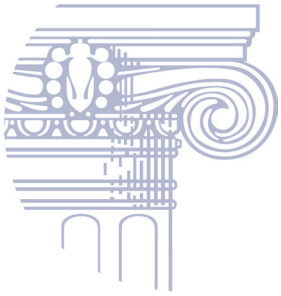
> The Illinois Defense Counsel, however, has collaborated with legislative sponsors to introduce two civil justice reform measures addressing joint and several liability and punitive damages in legal malpractice cases.

In response, Glorioso filed a lawsuit against the Sun Times alleging that the statements contained in the article were materially false, published with actual malice, and falsely depicted him as a corrupt politician lacking integrity. Glorioso claimed that, as a result of the publication of these false statements, he suffered special damages in the form of the loss of his employment as executive director and general counsel of PTAB, the salary and benefits that came with the position, as well as damage to his reputation, humiliation, anxiety, and other mental distress. Additionally, Glorioso claimed that other false statements were made in the article suggesting that his actions would raise property taxes and jeopardize funding for Chicago government agencies.

The Sun Times sought dismissal of the suit as a SLAPP under the ICPA by arguing that the legislature enacted the ICPA to combat the rise of meritless lawsuits used to retaliate against the news publication's attempt to participate in government through exercising their first amendment rights. *See Ryan v. Fox Television Stations, Incorporated*, 2012 IL App (1st) 120005, *Sandholm v. Kuecker*, 2012 IL 111443. The motion to dismiss the suit was denied by the Circuit Court and upheld in the Appellate Court. On appeal, the Illinois Supreme Court upheld the denial of Sun Times' motion based on the law that was written at the time because under the operative version of ICPA the Sun Times failed to meet its burden of proof to show that the Plaintiff's lawsuit was retaliatory in nature and that the gist or sting of the allegedly defamatory statements contained in the article were actionable. The dissent commented that the majority's holding was based on ambiguous law and conflicts with the fair report privilege that protects the news media from defamation actions when it reports information obtained from governmental and public proceedings on matters of public interest. *Harrison v. Chicago Sun-Times, Inc*., 341 Ill. App. 3d 555, 572 (2003).

In response to this outcome, the legislature signed into law SB1181 that amends the ICPA by providing the press and media outlets with additional first amendment protections against SLAPP lawsuits. Originally enacted in 2007, the Citizens Participation Act was enacted to codify free speech protections and to quell the increase in SLAPP lawsuits which are designed to chill and diminish citizen participation in government and used to as means of intimidation, harassment or punishment. SB 1181 amended section 5 of the Act to codify additional

protections for the freedom of the press where the press is "opining, reporting, or investigating matters of public concern is participating and communicating with the government." This language puts the press and other media outlets on equal footing with ordinary citizens when reporting on Government actions. Section 15 of the Act was amended to account for the freedom of the press where a motion to dispose of a SLAPP claim occurs and adds that acts of free speech by the press are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome. Section 17 was added to provide an automatic stay of the proceedings where a motion is filed to dispose of the alleged SLAPP claim. The legislature also amended Section 25 of the Act to provide an award of attorney's fees and costs to a responding party where the court determines that the motion was frivolous or filed solely with intent to delay the proceeding. The amended Act will effectively reduce the recurrence of SLAPP claims and prevent unnecessary litigation.



# **Civil Rights** Update

**Alexeus E. Bender**
*Heyl, Royster, Voelker & Allen, P.C.*, Rockford

In recent years, jury verdict awards have steadily grown larger, signaling a shift in how juries view damages and responsibility. This trend has increased litigation risk, especially because prejudgment interest could now add significant additional costs to an award.

In *Bolden v. Pesavento*, the plaintiff brought a wrongful-conviction lawsuit under 42 U.S.C. § 1983 against the City of Chicago after his sentence for murder was vacated in April 2016. *Bolden v. Pesavento*, 158 F.4th 879, 881 (7th Cir. 2025). The plaintiff prevailed at trial, and the jury awarded him $25 million in damages for pain, suffering, and the loss of a normal life. *Id*. Then the district court awarded him another $7.6 million in prejudgment interest for the six years and five months it took him to obtain a judgment against the city. *Bolden v. Pesavento*, 158 F.4th at 881.

On appeal, the Seventh Circuit held that prejudgment interest may be awarded on non-economic damages despite their inherently subjective nature, and that the trial court reasonably concluded the jury's $25 million compensatory award did not already include prejudgment interest. *Id*. at 883. The court further explained that, before awarding prejudgment interest, the trial court was required to apportion the compensatory damages between past and future losses, and that the trial court's comments regarding defendants' settlement conduct did not convert the prejudgment interest award into an improper penalty for refusing to settle. *Id*. at 886.

Prejudgment interest "serves dual purposes: to fully compensate the plaintiff and to minimize a defendant's incentive to delay." *Thorncreek Apartments III, LLC v. Mick*, 886 F.3d 626, 637 (7th Cir. 2018). It is grounded in the recognition that "[c]ompensation deferred is compensation reduced by the time value of money." *Matter of Milwaukee Cheese Wis., Inc*., 112 F.3d 845, 849 (7th Cir. 1997). By accounting for this lost value, "[p]rejudgment interest restores a plaintiff to the position she would have been in but for the violation." *Frey v. Coleman*, 903 F.3d 671, 682 (7th Cir. 2018). Additionally, by eliminating what would be, in effect, an interest-free loan to the defendant, prejudgment interest avoids unjust enrichment and disincentivizes foot-dragging in litigation. *Bolden,* 158 F.4th at 882.

### Availability of Prejudgment Interest on Noneconomic Damages

In their appeal, the defendants argued that the district court's award of prejudgment interest must be reversed

## About the Author

Serving in the criminal justice system as a 711 Attorney, a police officer, and a criminal prosecutor, primarily working narcotics and DUI offenses, provided **Alexeus Bender** of *Heyl, Royster, Voelker & Allen, P.C.* with a unique perspective on the law. In her young career, she has handled multiple jury and bench trials in Winnebago and Kane Counties and has successfully argued a variety of motions. Working out of the firm's Rockford office, Ms. Bender begins her tenure with a focus on Business and Commercial Litigation, Casualty & Tort, Medical Malpractice, Civil Rights Litigation/Section 1983 & Correctional Healthcare, and Long-term Care & Nursing Homes.

because *Bolden's* damages for pain, suffering, and the loss of a normal life are non-economic. *Bolden*, 158 F.4th at 883. The defendants argued that because the jury's award reflected only a rough estimate of Bolden's intangible emotional harm—unlike readily ascertainable contract or wage damages—prejudgment interest is inappropriate since such harm could not have been invested or accrued time value. *Id*. at 883.

The *Bolden* court relied on *Hillier v. Southern Towing Co.*, (an admiralty case) despite the defense's argument that it was inapplicable and that its decision should be applied in only admiralty cases. *Bolden*, 158 F.4th at 883. In *Hillier*, the court held that while the decision to exclude future harm was appropriate, the lower court had erred in finding noneconomic harms ineligible for prejudgment interest. *Hillier v. Southern Towing Co.*,740 F.2d 583, 584 (7th Cir. 1984). This was not the only instance in which this remedial principle was applied in federal law violations. Other types of litigations where such principle has been applied include age discrimination, trademark, and equal protection claims. While none of those cases involved purely economic damages like *Bolden's claims*, the underlying principle—to make the injured party whole—applies with equal force to damages for pain and suffering. *Bolden*, 158 F.4th at 883. The court explained that therefore, under the law, the defendants' liability to *Bolden* under Section 1983 accrued when the State dismissed the charges against him in April 2016. *Id*.

### Award of Prejudgment Interest

Shifting to the award, the court started from the baseline notion that there is a presumption in favor of granting prejudgment interest in cases alleging violations of federal law. *Id* at 885. Here, the defendants argued the district court abused its discretion in granting prejudgment interest in three different ways: (1) the jury's verdict fully compensated Bolden; (2) the court lacked any basis to determine the portion of the verdict for which interest could be awarded; and (3) the interest was an improper penalty for delays outside their control. *Id*.

The defense argued that the $25 million dollar verdict included the lost time value of *Bolden's* compensation, and that prejudgment interest was already "baked in" to the verdict. *Id*. While the concept of prejudgment interest was never discussed with the jury, the defense pointed to language included in the jury instructions that *Bolden* should be compensated for "any injury that you find he sustained *and is reasonably certain to sustain in the future*" as well as statements by Bolden's counsel encouraging the jury to consider Bolden's losses "to this day." *Id*. Although the jury instructions could suggest the jury accounted for interest, the district court reasonably concluded it did not.

As to the determination of past and future damages, the parties agree that only *Bolden's* past damages (those he suffered while in prison) and not his future damages (those he suffered after release) could serve as a basis for an interest award. *Bolden*, 158 F.4th at 886. The court pointed out that the best practice to avoid issues with post hoc apportionment of past and future damages entirely is to allow the jury itself to separate these categories on a special verdict form. *Id*. Because the verdict form did not address this issue at trial, the case was remanded for the district court to determine what portion of the verdict reflected past damages and to recalculate prejudgment interest on that prorated amount. The district court was instructed that it use any "reasonable method" of calculation based on a review of the record as a whole. *Id*.

Finally, the defendants argued that the district court's prejudgment interest award functioned as an improper penalty pointing to the nearly two-year delay in trying the case arose through circumstances outside their control; specifically, the case's reassignment and the COVID-19 pandemic. *Id* at 888. While the purposeful delay by the party seeking the interest, which "injures the other side by forcing it to act as an uncompensated trustee or investment manager," might ultimately warrant denying prejudgment interest, delays "attributable to the judicial branch (effect is neutral between the parties) does not. *Id*.

### Conclusion and Practice Tips

The court in *Bolden* reaffirmed that prejudgment interest serves to make a plaintiff whole by accounting for the time value of money and preventing a defendant from benefiting from litigation delay. At the same time, *Bolden* emphasized that prejudgment interest must be limited to past damages and may not be applied to future damages, which are already intended to compensate for harms occurring after judgment. As a practical matter, *Bolden* increases the financial exposure in § 1983 cases as the case progresses, and it stresses the importance of developing a record, targeted interrogatories, or the use of a special verdict form that distinguishes past from future losses to allow for an accurate interest calculation. The financial impact that the decision in *Bolden* presents directly effects local city and county government and could be devastating relating to long term litigation.

# **Municipal** Law

**Thomas G. DiCianni** and **Kathleen M. Kunkle**
*Ancel Glink, P.C.*, Chicago

## Illinois Supreme Court Confirms Inadvertence and Inattentiveness Do Not Constitute Willful and Wanton Conduct

In its recent decision in *Haase v. Kankakee School District 111*, 2025 IL 131420, the Illinois Supreme Court confirmed that a teacher's mere inattentiveness to student activities occurring during a gym soccer game may be negligent, but is not willful and wanton conduct for purposes of the Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act"), 745 ILCS 10/1-101, *et seq*. *Haase,* 2025 IL 131420, ¶¶ 1, 45. In affirming summary judgment for the defendant school district and its teacher, the Illinois Supreme Court explained that the plaintiff failed to establish willful and wanton conduct as a matter of law on the part of the teacher. *Id*. ¶¶ 1, 45, 46. As such, the school district and its teacher were entitled to immunity from plaintiff's claims as pleaded in his complaint. In addition to presenting a clear analysis of section 3-108 immunity, the *Haase* opinion serves as a reminder as to how the state of the evidence and the allegations contained in the complaint frame the issues and determine the summary judgment decision.

On March 13, 2017, plaintiff Riley Haase ("plaintiff") was a seventh-grade student within Kankakee School District 111 (the "District") when he was injured during his physical education class. *Id*. ¶¶ 3, 5. Plaintiff filed a complaint against the District and its physical education teacher, Darren Dayhoff, ("Dayhoff"), alleging a cause of action for willful and wanton conduct and a cause of action under the Family Expense Act, 750 ILCS 65/15(a)(1). *Haase,* 2025 IL 131420, ¶¶ 1, 3, 8.

By his complaint, the plaintiff alleged Dayhoff "provided soccer balls to the students, went to a seat in the corner of the gym, put his feet up, and began using his cellphone and/or a computer." *Id*. ¶ 4 (internal quotation omitted). Plaintiff further alleged that another student in the class, "Student A," "had a history of physically violent behavior towards other students and required an increased amount of supervision for the benefit and safety of other students." *Id.* (internal quotation omitted). Plaintiff alleged Student A "began to initiate unwanted physical contact between himself and other students playing soccer, committing prohibited battery and physical aggression, in a manner that had no connection to otherwise incidental contact between students playing the game." *Id*. ¶ 5 (internal quotation omitted). Plaintiff alleged that Student A "tackled [plaintiff], causing him to fall and severely injure his arm, resulting in paralysis of the arm and permanent injury." *Id.* (internal quotation omitted).

At his deposition, the plaintiff testified that a few minutes into the soccer game, Student A "began 'running in and trying to grab the ball,'" and that about three times, Student A "'would run up and try to push them [whoever had the ball] for the ball." *Id*., at ¶ 11. Plaintiff had no memory of the incident involving Student A, whereby he was injured, but plaintiff's friend told Dayhoff that "Student A had tackled Riley into a wall." *Haase,* 2025 IL 131420, ¶ 12. Plaintiff further testified that prior to being injured, he "had not had problems with Student A in gym class or in school," and he "did not think Student A 'personally targeted' him." *Id*.

Plaintiff's friend testified at his deposition that "Student A was running in and out of the soccer game," and "Student A was playing soccer aggressively and being 'unnecessarily rough.'" *Id*. ¶ 13. The friend confirmed "he did not report Student A's behavior because he 'didn't really think much of it' and it 'didn't harm [him] in any way.'" *Id*. The friend confirmed that before Student A made

### About the Authors

**Thomas G. DiCianni** is a partner in the law firm of *Ancel Glink, P.C.* He concentrates his practice in general litigation, defense of government entities and public officials, municipal law, and the representation of governmental self-insurance pools.

**Kathleen M. Kunkle** is a partner with *Ancel Glink, P.C.* in Chicago, Illinois. Ms. Kunkle represents municipalities and their employees in general tort litigation, including defense of civil rights, personal injury, wrongful death, catastrophic industrial and trucking accidents, premises liability, and sexual abuse claims. Ms. Kunkle practices extensively in state and federal court and has taken many cases to jury verdict.

contact with plaintiff that injured him, Student A was simply trying to get the ball away from plaintiff, as anyone would typically do in soccer. *Id*.

At his deposition, Dayhoff confirmed the students had a choice that day to play either soccer or basketball. *Id*. ¶ 14. He flatly denied plaintiff's allegation "that he was sitting down in the corner during the entire gym class." *Haase,* 2025 IL 131420, ¶ 14 Rather, Dayhoff testified "he was observing both groups of students from a corner of the gym and periodically walking around the gym to supervise the games." *Id*. Dayhoff saw the incident involving Plaintiff "from a distance;" he saw "three or four kids battling for the ball," he could not see exactly what happened, but the plaintiff ended up on the floor injured. *Id*. ¶ 16 (internal quotations omitted).

Notably, Dayhoff testified he did not see Student A engage in any aggressive behavior that day; from what Dayhoff saw, Student A was playing soccer just like any other student. *Id*. ¶ 15. Dayhoff testified that "if he had observed Student A engaging in aggressive or unwanted physical behavior, he would have removed him from the game and possibly imposed other consequences." *Id*. Further, Dayhoff testified he did not recall any disciplinary issues with Student A, and he did not recall sending Student A to the office for any reason. *Id*. ¶ 17. Dayhoff never received any information or warning from any district administration regarding Student A's disciplinary history, and he never reviewed Student A's disciplinary history himself. *Haase,* 2025 IL 131420, ¶ 17.

The circuit court granted the Defendants' motion for summary judgment, finding the Defendants were entitled to immunity from Plaintiff's claims under sections 2-109 and 2-201 of the Tort Immunity Act. *Id*. ¶ 22. Section 2-201 provides municipal employees with so-called discretionary immunity; "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201. Section 2-109 immunizes the municipality from liability for an injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCS 10/2-109.

The circuit court reasoned that all of the decisions Dayhoff made regarding supervising the gym class, "including his decisions to allow a recreational game day, to allow Student A to participate in the soccer game, and to refrain from interceding in the soccer game, involved both the exercise of his discretion and a determination of policy within the meaning of section 2-201." *Haase,* 2025 IL 131420, ¶ 22.

The circuit court further reasoned that the undisputed evidence did not establish willful and wanton conduct on the part of Dayhoff; any "inadvertence" or "inattentiveness" on the part of Dayhoff did not rise to the level of willful and wanton conduct. *Id*. ¶ 23. "Thus, even if section 2-201 immunity did not apply, section 3-108 of the Tort Immunity Act immunized the defendants from liability for injuries resulting from negligent supervision." *Id*. Under section 3-108, "neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury." 775 ILCS 10/3-108(a).

Plaintiff appealed the circuit court decision, and a split Third District Appellate Court reversed. *Haase, supra*, 2025 IL 131420, ¶ 24. Ultimately, the appellate court found a dispute of material fact as to whether the district committed willful and wanton conduct, given Student A's disciplinary history, which precluded summary judgment. *Id*. ¶ 24. The appellate court also found an issue of material fact as to "whether Dayhoff made a conscious discretionary decision or policy determination" entitling him and the district to immunity under sections 2-201 and 2-109. *Id*.

The Illinois Supreme Court granted the Defendants' petition for leave to appeal. *Id*. ¶ 27. Agreeing with the circuit court's decision, the Illinois Supreme Court reversed the appellate court's decision. *Id*. ¶¶ 46, 48. First, the Supreme Court side-stepped the discretionary immunity question, finding the defendants were entitled to immunity under section 3-108. *Id*. ¶¶ 35, 42-44. The Supreme Court began by finding no dispute of material fact as to "whether the defendants' conduct was willful and wanton." *Id*. ¶ 35. The court noted that under the Tort Immunity Act, willful and wanton conduct is defined as "'a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.'" *Id*. ¶ 33, (*quoting* 745 ILCS 10/1-210).

Plaintiff argued there was an issue of material fact as to "whether the district's failure to inform Dayhoff of Student A's history of fighting and physical aggression was willful and wanton." *Haase,* 2025 IL 131420, ¶ 35. The Supreme Court looked to the plaintiff's complaint and found plaintiff's own allegations, or lack thereof, precluded such a finding as

> In addition to presenting a clear analysis of section 3-108 immunity, the *Haase* opinion serves as a reminder as to how the state of the evidence and the allegations contained in the complaint frame the issues and determine the summary judgment decision.

against the District. "The problem with the [plaintiff's] argument and the appellate court's holding is that the [plaintiff] never pled that the District breached [any duty to provide teachers with Student A's disciplinary history]." *Id*. The court noted that plaintiff had only alleged liability on the part of the district based on its status as Dayhoff's employer and based on respondeat superior; Plaintiff never alleged "the District was independently liable for its own willful and wanton conduct." *Id*. (citing *Hills v. Bridgeview Little League Ass'n*, 195 Ill.2d 210, 231-32 (2000) and *Vancura v. Katris*, 238 Ill.2d 352, 375 (2010)).

The court reasoned that the issue of "whether the District acted willfully and wantonly in failing to disseminate information about Student A's history to his teachers is not a genuine issue of material fact" because Plaintiff failed to allege any willful and wanton conduct on the part of the District itself, beyond vicarious liability for Dayhoff's actions. *Haase,* 2025 IL 131420, ¶¶ 35, 36. The court explained: "[i]t is well established that a plaintiff is bound by the allegations in the complaint," and, thus, "[a] summary judgment motion is confined to the issues raised in the complaint." *Id*. ¶ 36 (quoting *Caulkins v. Pritzker*, 2023 IL 129453, ¶ 36 (remaining citations omitted)). Thus, any failure on the District to provide information to teachers regarding Student A's disciplinary history "cannot be the basis for defeating summary judgment in this case." *Haase,* 2025 IL 131420, ¶ 36.

The court then rejected Plaintiff's argument that there was an issue of material fact as to Dayhoff's willful and wanton conduct based on whether Dayhoff knew or should have known of Student A's disciplinary history. *Id*. ¶ 37. The court found no such dispute. *Id*. The court noted that Dayhoff testified at his deposition that he had no information about Student A's disciplinary history and had no information, knowledge, or experience with Student A being aggressive or violent. *Id*. ¶ 38. Plaintiff failed to submit any evidence to contradict or challenge Dayhoff's testimony on this point. *Id*. ¶ 37. At best, Dayhoff was inattentive to what was happening in the soccer game scrum. As to whether Dayhoff "should have known" of Student A's disciplinary history, the court noted there was no evidence presented whatsoever to establish this contention. *Id*. ¶ 40.

After determining there was no issue of material fact as to willful and wanton conduct, the court concluded that Dayhoff was entitled to immunity under section 3-108. *Haase,* 2025 IL 131420, ¶¶ 42-44. The court first pointed out that "there is no evidence in the record in this case that playing indoor soccer is an inherently dangerous activity." *Id*. ¶ 42 (citing and comparing *Murray v. Chicago Youth Center*, 224 Ill.2d 213, 245 (2007) and *Hadley v. Witt Unit School Dist. 66*, 123 Ill.App.3d 19, 20, 23 (1984), with *Barr v. Cunningham*, 2017 IL 120751, ¶ 23. Then the court noted that the "record also lacks evidence that Dayhoff's failure to supervise the students playing soccer posed a specific threat of injuries." *Haase,* 2025 IL 131420, ¶ 43.

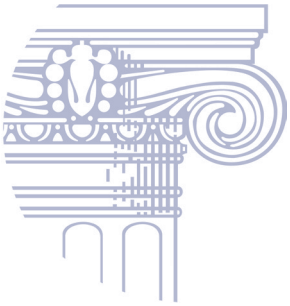
Ultimately, the court rejected Plaintiff's argument that "Dayhoff should have paid attention to the students playing soccer instead of looking at his laptop." *Id*. ¶ 44. While the court conceded that the evidence could "support a claim of negligent failure to supervise an activity on public property," Dayhoff's conduct did not "rise to the level of willful and wanton conduct" and, as such, Dayhoff was entitled to immunity under section 3-108. *Id*. ¶¶ 44, 46. The court explained:

> In an ideal school situation, it is reasonable to expect teachers, such as Dayhoff, to be attentive to their students when they are participating in physical activities during gym class. Dayhoff clearly was not. However, the legislature unambiguously intended to immunize Illinois school districts from liability for the type of negligent conduct alleged in this case.

*Id*. ¶ 45. The court concluded that "[t]he undisputed material facts . . . fall short of establishing either intentional conduct or an 'utter indifference to or conscious disregard for the safety of others,' as a matter of law, as would be required for a finding of willful and wanton conduct by Dayhoff." *Id. (*citing 745 ILCS 10/1-210).

The court determined that the defendants were entitled to immunity from the plaintiff's claims under section 3-108, and, thus, summary judgment in favor of the defendants was correct. *Haase,* 2025 IL 131420, ¶ 46. Because the court found the defendants were immune under section 3-108, the court declined to consider whether defendants were entitled to immunity under sections 2-109 and 2-201. *Id*. Likewise, the court determined the circuit court was correct in granting summary judgment in favor of the defendants on the Family Expense Act cause of action because it is dependent on the substantive cause of action. *Id*.

The *Haase* decision reflects issues municipal entities confront regularly. Negligence on the part of a teacher, by definition and pursuant to legal authority, cannot constitute willful and wanton conduct. We would like more trial judges to get this message. In addition, we often see a plaintiff's case devolve through discovery, up to summary judgment, and particularly at trial, such that the case as alleged in the complaint gives way to whatever the plaintiff can offer to support keeping the case alive. The *Haase* decision reiterates the principle that the plaintiff's causes of action stated in the complaint is not just an outline. The complaint defines the issues to be determined at summary judgment and, ultimately, at trial.



# Feature Article

**Timothy S. Richards**
*Neville, Richards, Zittel & Siegel, LLC*, Belleville

## Rule 213 in 2026: Still Lost in Translation

Still the cornerstone. Still the battleground. Still—sometimes—lost in translation.

Seventeen years ago, this author asked whether Illinois Supreme Court Rule 213 had become "Lost in Translation." The answer, regrettably, is that the translation has not improved. Rule 213 remains the single most important civil practice rule for controlling trial witness testimony—especially expert testimony. Its stated purpose is unchanged: prevent unfair surprise and discourage tactical gamesmanship through meaningful pretrial disclosure. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). The practical problem is also unchanged: the rule reads like a "limits means limits" mandate, but it is enforced through discretionary lenses—Rule 213(k)'s "substantial justice" language and the *Sullivan* six-factor test—so outcomes can turn on a judge's philosophy as much as on a transcript page number. *See* Ill. S. Ct. R. 213(k).

This article provides a comprehensive update for 2026, focused on three areas: (1) rule amendments and the unchanged but still-contested governing text; (2) the most important modern judicial interpretations including persistent circuit splits; and (3) recurring abuse patterns and constructive defense strategies—all written for Illinois trial and appellate lawyers with a defense-forward lens.

### The Governing Text: Unchanged, Still Contested

The doctrinal baseline remains intact. Rule 213(g) remains the hammer: the information disclosed in a Rule 213(f) answer or in a discovery deposition limits what a witness may testify to on direct—and Illinois courts routinely apply this beyond direct examination into redirect and rebuttal realities. Rule 213(i) remains the fuse: the duty to seasonably supplement when new or additional information becomes known. And Rule 213(k) remains the escape hatch: the rule is to be liberally construed to do "substantial justice," and it is meant to prevent unfair surprise but not become a "sword" excluding relevant evidence on pure technicalities. That language

### About the Author

**Timothy S. Richards** is a partner at *Neville, Richards, Zittel & Siegel, LLC*, where he focuses his practice on medical and dental malpractice defense, professional liability claims, first and third-party insurance litigation, products liability, and trial and appellate practice. He is the author of the original *Rule 213: Lost in Translation?* article published in the *IDC Quarterly*, Volume 19, Number 2 (2009). Mr. Richards is a past president of the local chapter of the American Board of Trial Advocates, member of the Illinois Association of Defense Trial Counsel and the Illinois and Missouri Bar Associations.

continues to power discretion-heavy outcomes.

The *Sullivan* six-factor framework continues to govern remedy determinations. When a disclosure violation occurs, trial courts must weigh: (1) surprise to the adverse party; (2) prejudicial effect of the testimony; (3) nature of the testimony; (4) diligence of the adverse party; (5) timeliness of the objection; and (6) good faith of the party calling the witness. *Sullivan*, 209 Ill. 2d at 110. What *Sullivan* gave with one hand—a declaration that disclosures must "drop down to specifics" and that courts "should not hesitate" to impose sanctions—it took away with the other by making remedy determinations a matter of discretion reviewable only for abuse. *Id.* at 109.

### Key Judicial Interpretations

This is the usable part for trial and appellate lawyers: what modern cases actually do with Rule 213.

### The Dameron Decision

The Illinois Supreme Court's most significant Rule 213 decision since *Sullivan* arrived in *Dameron v. Mercy Hospital & Medical Center*, 2020 IL 125219. The court addressed a question of first impression: whether a party may redesignate a Rule 213(f)(3) controlled expert witness to a Rule 201(b)(3) non-testifying consultant after receiving unfavorable results. *Dameron*, 2020 IL 125219, ¶ 14. The plaintiff disclosed Dr. David Preston as a controlled expert who would perform a comparison EMG study. *Id.* ¶ 4. After Preston completed the study and prepared a report, but before the report was disclosed to the defendants, the plaintiff sought to redesignate Preston as a non-testifying consultant. *Id.* ¶ 6. The supreme court permitted the redesignation because it occurred almost a year before trial and the report had never been disclosed. *Id.* ¶¶ 32, 52.

Defense concern: this creates asymmetry — especially in medical malpractice practice where the plaintiff can "test" an expert and then shelter that expert as a consultant, while the defendant is often stuck with Rule 215 examiners whose unfavorable findings generally cannot be similarly protected. The strategic response is clear: depose opposing experts promptly after disclosure, before any redesignation can occur.

### Strict Versus Liberal Construction

The two voices of Rule 213, strict compliance and liberal construction, speak in two irreconcilable registers. The rule's text and leading cases demand "strict compliance" with disclosure requirements and warn courts "should not hesitate" to sanction violations. *Sullivan*, 209 Ill. 2d at 110. Yet the same rule's subsection (k) and Committee Comments command "liberal construction" for "substantial justice," declaring the rule a "shield" against surprise but "not a sword" to exclude evidence "on the basis of technicalities." Ill. S. Ct. R. 213, Committee Comm., at (k). This compilation presents the actual verbatim language from both traditions, drawn from the rule itself, its Committee Comments, Illinois Supreme Court and Appellate Court opinions, and leading scholarly commentary.

The "abuse of discretion" standard is painful to any party appealing a crushing Rule 213 trial ruling. But, alas, perhaps that party is not betting against the house.

Notably, the *Flores v. NorthShore University HealthSystem* court appeared to elevate the appellate standard of reviewing a Rule 213 trial court decision to a *de novo review*, and cited the Illinois Supreme Court as precedent: "Although the admission of evidence pursuant to Rule 213 lies within the sound discretion of the trial court, interpretation of the supreme court rules is reviewed de novo." *Flores v. NorthShore University HealthSystem*, 2020 IL App (1st) 190465, ¶ 47 (internal citations omitted).

The significance of how the *Flores* comment about *de novo* review resulted in the direct application of the strict, bright lines contemplated should not be lost on any trial or appellate lawyer. "When construing a supreme court rule, our primary goal is to ascertain the intent of the drafters as indicated by the language used, given its plain and ordinary meaning." *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297, ¶ 22. In making this determination, "a court must consider the rule in its entirety, keeping in mind the subject it addresses and the apparent intent of the drafters in enacting it." *Flores,* 2020 IL App (1st) 190465, ¶ 22.

This *de novo* in the interpretation of Rule 213 review should prompt all appellate courts to recall the history and purpose of Rule 213, namely to prevent trial by ambush and strategic gamesmanship. "Where a party fails to comply with the provisions of Rule 213, a court should not hesitate sanctioning the party, as Rule 213 demands strict compliance." *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110–11 (2004) (quoting *Firstar Bank of Illinois v. Peirce*, 306 Ill. App. 3d 525, 533 (1999), quoting *Warrender v. Millsop*, 304 Ill. App. 3d 260, 268 (1999)). The *Warrender* court also established the mandatory rules principle: "Supreme court rules on discovery are mandatory rules of procedure that courts and counsel must follow." *Warrender*, 304 Ill. App. 3d at 265.

How does one reconcile the "abuse of discretion" and "*de novo*" standards of review mentioned in *Flores*? Abuse of discretion means the appellate court defers heavily to the trial court's discretion and will not disturb the ruling unless the trial court's decision is arbitrary or unreasonable—where no reasonable person would adopt the view taken by the trial court. This standard applies clearly to Rule 213 decisions under the *Sullivan* factors. Conversely, *de novo* review means the Appellate Court owes the trial court no deference at all. It decides the question fresh, as if the trial court never ruled. This standard applies to pure questions of law—statutory interpretation, rule construction, and constitutional questions. The different standards referenced in *Flores* create a framework that every practitioner should appreciate. If a Rule 213 issue on appeal is framed the "judge got it wrong on the facts", the appellant almost always loses. However, if the issue is framed "the judge misunderstood what the rule requires as a matter of law", the appellant has a much better chance. The lesson: The best path for an appellant to frame error is to claim it was a misinterpretation (*de novo*) of Rule 213, rather than weighing the *Sullivan* factors (abuse of discretion). *Flores* is some authority for that argument.

"Liberal" does not necessarily mean, "let 'em get away with it." It can mean a two-by-four being liberally applied to the derriere of an offending party. In fact, the *Flores* court was using the "liberal construction" to liberally prevent sharp Rule 213 practice: The First District vacated the $50.3 million verdict and remanded, holding that Rules 213 and 218 must be "liberally construed to do substantial justice between the parties" and that the defendants' response, filed just 14 days after receiving the plaintiff's own late disclosure, did not indicate an attempt to surprise. *Flores,* 2020 IL App (1st) 190465, ¶¶ 73–78.

### Additional Strict-Enforcement Decisions

Several other appellate decisions reinforce the strict-compliance wing. In *Clayton v. County of Cook,* 346 Ill. App. 3d 367 (1st Dist. 2004), the court reversed a $5.3 million judgment due to undisclosed expert opinions at trial. In *Chapman v. Hubbard Woods Motors, Inc.,* 351 Ill. App. 3d 99, 110 (1st Dist. 2004), the court barred expert testimony based on a catch-all disclosure that "medical witnesses" would base opinions on medical records, holding: "Providing the basis in a catch-all provision, unconnected with any specific witness or opinion, does not comply with the disclosure requirements of Rule 213."

In *Nedzvekas v. Frung,* 374 Ill. App. 3d 618 (1st Dist. 2007), the court barred a controlled expert whose disclosure merely stated the expert opined that the defendant surgeon "deviated from the standard of care" and the surgery "caused the plaintiff's injury." These sweeping, conclusory disclosures were held insufficiently specific under *Sullivan* and *Chapman.* In *Seef v. Ingalls Memorial Hospital,* 311 Ill. App. 3d 7, 24 (1st Dist. 1999), the court established: "If an opinion is important to the theory of one's case, it is essential that it and the bases therefor be disclosed. This is a bright line rule and must be followed." This bright-line principle was reaffirmed in *Morrisroe v. Pantano,* 2016 IL App (1st) 143605, ¶ 44, and again in *Tirado v. Slavin,* 2019 IL App (1st) 181705, confirming the rule's continued vitality more than a decade after *Sullivan.*

In *Firstar Bank of Illinois v. Peirce,* 306 Ill. App. 3d 525, 536 (1999), the court declared: "Rule 213 brings to a trial a degree of certainty and predictability that furthers the administration of justice." In *Warrender v. Millsop,* 304 Ill. App. 3d 260, 268 (2d Dist. 1999)—the origin of the six-factor test later adopted in *Sullivan*—the court reversed a defense verdict where the defendant disclosed an expert just 11 days before trial, holding that "where a party fails to comply with the provisions of Rule 213, a court should not hesitate sanctioning the party, as Rule 213 demands strict compliance."

### Hoke: The Document Dump as Sandbagging

In *Enbridge Pipeline (Illinois), LLC v. Hoke,* 2017 IL App (4th) 150544, the landowners disclosed a licensed real estate appraiser but identified no specific comparable sales. A supplemental disclosure consisted of a 7,000-page work file with no discernible way to identify which comparables the expert actually used. The trial court stated it would require "telepathy" to determine the comparables. The Fourth District affirmed barring the expert, expressly declining to follow the more lenient Fifth District holding in *Brdar v. Cottrell, Inc.,* 372 Ill. App. 3d 690 (5th Dist. 2007), and holding that burying required information in voluminous but impenetrable discovery is itself a form of sandbagging. *Hoke,* 2017 IL App (4th) 150544, ¶¶ 60–65.

### Stoyanov: Fabricated Disclosures

The most extreme post-*Garlock* case may be *Stoyanov v. Himont Law Group, Ltd.,* 2024 IL App (1st) 221434-U. In a legal malpractice action, the defendant

attorney fabricated Rule 213(f)(3) expert disclosures on three separate occasions. *Stoyanov*, 2024 IL App (1st) 221434-U, ¶ 2. All three purported experts testified that the opinions attributed to them in the disclosures were not their opinions. The first expert, Robinson, testified she had never spoken with the defendants about offering expert testimony, never reviewed any documents, and was never retained. *Id*. ¶ 17. The second expert, Favia, had spoken with the defendants but never reviewed documents or formed any opinions. *Id*. ¶ 39. The third expert, Raiz, had reviewed only five documents and never formed any opinions or conclusions—yet the disclosure attributed 13 specific opinions to him. *Id*. ¶ 16.

The trial court concluded that the defendant had "made up the disclosures from whole cloth—three times!" and found the conduct "outrageous." Applying the *Shimanovsky* factors for extreme sanctions, the court barred the defendants' experts, struck the defendants' answer, and entered judgment on liability in favor of the plaintiff. *Id.* ¶ 35. The appellate court affirmed, holding that the record amply supported the finding of "a deliberate, contumacious or unwarranted disregard of the court's authority." *Id.* ¶ 32. While the case is an unpublished Rule 23 order, it demonstrates that Rule 213 sanctions can extend far beyond excluding testimony—to striking pleadings and entering default judgment—when the violation involves deliberate fabrication.

### Rule 218's Sixty-Day Cutoff

More *Flores*. It vacated a $50.3 million medical malpractice verdict because the trial court improperly struck defense supplemental disclosures. When the plaintiff supplemented disclosures 56 days before trial with a psychological evaluation, the defendant sought to supplement responsive expert opinions. The trial court struck the defense supplements based on the Rule 218 sixty-day cutoff and barred autism causation evidence. *Flores*, 2020 IL App (1st) 190465, ¶ 54. The First District reversed, holding the trial court abused its discretion because the defense supplementation was responsive to late-emerging information and because reading Rule 218(c) as an absolute cutoff would gut the supplementation duty. *Id*. ¶¶ 55, 56.

Defense takeaway: when responding to late plaintiff disclosures, frame the issue as "forced supplementation." Argue: "We did not choose late disclosure; we were compelled by the plaintiff's late-produced new information." Make the record: what you would have done earlier if the information had been disclosed earlier, why the new material changes causation or damages, and what rebuttal is necessary.

### Late Disclosure and Sanctions

*McKinney v. Newgent*, 2021 IL App (5th) 200010-U, reflects a persistent reality: some courts treat late disclosure problems as case-management sins that deserve severe sanctions, even where both sides contributed to the mess. The trial court barred an expert after a messy, last-minute pretrial discovery scramble; the Fifth District affirmed. *McKinney*, 2021 IL App (5th) 200010-U, ¶ 76. While not citable as precedent, it illustrates why defense counsel should raise disclosure deficiencies early—through motions to compel and targeted Rule 213 motions—rather than risk being painted as "waiting" to spring a bar motion at the last moment.

### Reasonable Notice and Deposition-as-Disclosure

*Roach v. Union Pacific Railroad Co.*, 2014 IL App (1st) 132015, establishes the analytical structure courts apply: whether disclosures and deposition testimony provided reasonable notice and whether the opponent can show real surprise and prejudice. The practical point is critical: if you want to rely on deposition testimony as your "disclosure," you must be able to point the court to clean pages and questions that clearly put the opponent on notice. Vague deposition wandering is not "notice"; it is just noise. *Warrender v. Millsop*, 304 Ill. App. 3d 260 (2d Dist. 1999), reached a similar conclusion, finding that ambiguous deposition testimony did not satisfy disclosure requirements.

### Basis Creep and Demonstrative Evidence

*Rivas v. Benny's Prime Chophouse, LLC*, 2023 IL App (1st) 221901-U, reversed and remanded for a new trial, providing an extremely useful roadmap of how courts analyze "new bases" and "reasonable notice." The opinion specifically discusses whether testimony referencing a section of the FDA Food Code was improperly admitted when it was not fairly noticed through Rule 213 disclosures—illustrating how "new basis" problems still trigger reversal risk. *Rivas*, 2023 IL App (1st) 221901-U, ¶ 28. Courts are increasingly sensitive to "basis creep." Even when the ultimate opinion sounds the same, a new code section, guideline, reconstruction, or calculation can be treated as a new basis that should have been disclosed.

*Perez v. St. Alexius Medical Center*, 2022 IL App (1st) 181887, dealt with late-disclosed imaging reconstructions—

sagittal images created from existing CT data using freeware—that were first disclosed the morning of testimony and defended as "demonstrative." The court also established that Rule 213 disclosures can be used for impeachment against party-witnesses, not just retained experts. This is a critical issue for modern practice. "Demonstratives" are now routinely generated by software: three-dimensional reconstructions, overlays, AI-assisted measurements, animations, and literature excerpts packaged as visuals. The courtroom label does not answer the Rule 213 question. The real question is: does it function as a new basis or new opinion support that the opponent needed time to evaluate?

Defense move: treat "new demonstratives" as a Rule 213 plus foundation plus Rule 403 problem. Argue: "This is not a chalkboard sketch; this is a new, created exhibit derived by a method we have not vetted." Demand early disclosure and foundation: method, inputs, who created it, when, what settings, what assumptions.

### Expert Deposition Practice

Under the logical corollary doctrine, an expert may elaborate on disclosed opinions if the testimony represents a "logical corollary" rather than a new basis. *Brax v. Kennedy*, 363 Ill. App. 3d 343 (1st Dist. 2005). But *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637 (1st Dist. 2007), excluded testimony that introduced new precise specifics. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618 (1st Dist. 2007), similarly reinforced the distinction between permissible elaboration and impermissible new opinions. Thorough deposition practice can minimize—but not eliminate—these boundary disputes.

*Biundo v. Advocate Health and Hospital Corp.*, 2020 IL App (1st) 191970, reinforced that an expert's uncertainty at deposition precludes contrary testimony at trial. When the plaintiff's emergency room expert admitted at deposition that psychiatric evaluations "are beyond what an emergency room physician is qualified to do" and stated he was "not sure" about a medical clearance opinion, the appellate court affirmed excluding that testimony. Defense counsel should thoroughly depose opposing experts on qualifications and use expressed uncertainty to lock in favorable admissions.

### Some Other Flexible-Enforcement Decisions

In *Dameron v. Mercy Hospital & Medical Center,* 2020 IL 125219, the supreme court held that a party may redesignate an expert from a controlled expert to a non-testifying consultant in a reasonable amount of time before trial. On the gamesmanship charge, the court stated it was "unpersuaded" and would not speculate as to the plaintiff's motive. *Dameron,* 2020 IL 125219, ¶¶ 35–38.

In *Matthews v. Avalon Petroleum Co.,* 375 Ill. App. 3d 1 (1st Dist. 2007), the court found no prejudice from an expert adding measurements taken the night before testimony as a new basis for an already-disclosed opinion. The court distinguished between undisclosed opinions (sanctionable) and undisclosed bases for disclosed opinions (not necessarily prejudicial). *Matthews*, 375 Ill. App. 3d at 12-13. As noted above, the contrast with *Garlock* is stark: in *Garlock,* the Fourth District found egregious gamesmanship in withholding a known opinion that the party anticipated would emerge on cross-examination, while *Matthews* excused the failure to disclose an entirely new evidentiary basis gathered on the eve of testimony.

In *Hendrix v. Stepanek,* 331 Ill. App. 3d 206 (5th Dist. 2002), the court affirmed admission of an undisclosed causation opinion where the defendant did not request that the disclosure be made more definite—effectively placing an affirmative burden on the recipient to demand better answers rather than lie in wait.

### The Persistent Circuit Split

A significant circuit split persists between the Fourth and Fifth Districts on the fundamental question of whether opposing counsel has any duty to seek clarification of deficient disclosures. This division has practical consequences, particularly for downstate practitioners.

The Fourth District maintains strict construction. In *Enbridge Pipeline (Ill.), LLC v. Hoke*, 2017 IL App (4th) 150544, the court expressly declined to follow Fifth District precedent, holding that Rule 213 imposes no obligation on the opposing party to inform adversaries of weaknesses in their disclosures. This approach traces to *Department of Transportation v. Crull*, 294 Ill. App. 3d 531 (4th Dist. 1998), which *Sullivan* cited approvingly for the proposition that trial courts should not hesitate to impose severe sanctions for disclosure deviations.

The Fifth District takes a different view. In *Brdar v. Cottrell, Inc.*, 372 Ill. App. 3d 690 (5th Dist. 2007), the court affirmed denial of a motion to bar despite repeated disclosure violations because the defendant had "ample" time to object promptly and seek fuller disclosure but instead waited until the last minute. *Brdar*, 372 Ill. App. 3d at 700. The court characterized the defendant's conduct as

| Issue | Fourth District | Fifth District |
|---|---|---|
| Burden of Disclosure | Entirely on proponent | May shift to opponent to seek clarification |
| Opponent's Duty | No duty to point out disclosure weaknesses | Failure to seek fuller disclosure weighs against objector |
| Gamesmanship | Attributed to inadequate discloser | May be attributed to party delaying objection |

the very type of tactical gamesmanship the discovery rules are meant to discourage—shifting the usual gamesmanship accusation from the inadequate discloser to the late objector. *Id.* at 701.

The supreme court has not resolved this split. Even when the law is nominally uniform, practice differs. Chicago Law Division judges see Rule 213 fights constantly and may be more attuned to how trial strategy is built around disclosures. Some downstate venues emphasize docket control and may treat disclosure disputes as self-inflicted if not raised early enough.

### The "Two Views" Debate

The ongoing tension between strict compliance and liberal construction received definitive articulation in a 2018 exchange between two experienced Cook County judges. Hon. Donald J. O'Brien Jr. (Ret.) and Hon. William Gomolinski (Ret.) presented their contrasting interpretations in *Two Divergent Views of Supreme Court Rule 213*, IDC Quarterly, Volume 28, Number 3 (2018). That piece remains a remarkably current map of the Rule 213 fault line.

Judge Gomolinski's strict compliance view holds that Rule 213 mandates full and complete answers to interrogatories, treating disclosure requests as demands for all opinions and all underlying bases. Under this view, strategic withholding of known opinions constitutes bad faith and gamesmanship. Judge O'Brien's statutory construction view observes that Rule 213 does not expressly require disclosure of "all" or "every" opinion in written answers. The rule explicitly permits expansion via discovery deposition under Rule 213(g) and seasonable supplementation under Rule 213(i). Inserting "all" before "opinions" would render these provisions superfluous—a result forbidden by statutory construction principles.

In 2026, the "right" answer is not philosophical—it is strategic: you litigate as if your judge could be either author. That means disclose robustly (so you survive strict scrutiny) and build a record of fairness and responsiveness (so you survive discretionary scrutiny).

### Persistent Problems

"Seasonable" supplementation remains undefined. Rule 213(i) requires seasonable supplementation, but the case law is deeply fact-driven. This ambiguity enables two recurring tactics: the "late-but-inevitable" supplement, often defended as responsiveness, and the "you should have forced my disclosure earlier" counterpunch, used to argue lack of diligence. *Flores* shows courts can allow responsive supplementation even within sixty days when justice requires. But *McKinney* reflects that some courts will treat poor scheduling and sloppy supplementation as bar-worthy.

The "cumulative" exception continues to provide a convenient escape hatch. If undisclosed testimony is deemed cumulative of properly admitted evidence, courts routinely find no prejudice. In *Hendrix v. Stepanek*, 331 Ill. App. 3d 206 (5th Dist. 2002), a treating physician's undisclosed causation opinion was permitted because it was cumulative of the plaintiff's own lay testimony. The irony is rich: evidence can be barred for being cumulative, *see Kotvan v. Kirk*, 321 Ill. App. 3d 733 (1st Dist. 2001), but it can also be admitted despite a violation for being cumulative.

Good faith often proves dispositive. In *White v. Garlock Sealing Technologies, LLC*, 373 Ill. App. 3d 309 (4th Dist. 2007), the Fourth District characterized defense counsel's failure to supplement a known opinion as egregious because counsel knew the favorable opinion would emerge on cross-examination but deliberately withheld it. The court ordered a new trial and barred the witness from offering the opinion at retrial. Where *scienter* is present, courts treat violations harshly; where violations appear inadvertent, mercy abounds.

### Constructive Recommendations for Practice

#### *Build a "213-Safe" Disclosure Template*

For controlled experts, disclose opinions and bases with meaningful structure: Opinion, then Basis, then Key Materials (records, imaging, standards, literature categories). Avoid "topic-only" answers that say the witness will testify about "standard of care and causation" without the gist of what the witness will actually say.

### *Propose Scheduling Orders*

Build in: plaintiff controlled experts disclosed and deposed by date X; defense controlled experts disclosed and deposed by date Y; an explicit rebuttal window (30–60 days) for truly responsive supplementation; and a late disclosure protocol—if new material arrives inside sixty days, automatic meet-and-confer plus expedited motion plus presumptive limited cure deposition. Complete all Rule 213-related discovery at least 120 days before trial.

### *Treat New Demonstratives as Discovery*

If an exhibit is created through software (reconstructed views, measurements, overlays), demand early disclosure and foundation: method, inputs, who created it, when, what settings, what assumptions. Use *Perez* to show courts recognize the issue.

### *Preserve Objections and Prejudice*

Preserving Rule 213 objections requires immediate action: object promptly upon hearing undisclosed testimony; cite Rule 213(g) specifically; demand that the proponent prove prior disclosure (the burden rests on the offering party); articulate specific prejudice for the record; and secure an on-the-record ruling. Failure to obtain a ruling waives appellate review. *Independent Trust Corp. v. Harwick*, 351 Ill. App. 3d 941, 951 (1st Dist. 2004). Filing a motion *in limine* before trial identifying anticipated disclosure violations is best practice.

Your record should show: what you relied on in the opponent's disclosure; what you would have done with a timely disclosure (deposition, rebuttal expert, additional testing, different theme); and why the late or new opinion changed trial strategy or limited cross. *Roach*-style "reasonable notice" framing and *Tirado*-style strict-compliance citations work best together: strict rule plus concrete prejudice equals reversal potential.

## Conclusion: The 2026 Bottom Line

Rule 213 is not fading. It is, if anything, becoming more consequential because modern trials are rarer, more expert-driven, and more dependent on prepared narratives built around disclosed opinions and supporting bases.

The last decade did not produce major text changes beyond the 2018 modernization, but it produced a more modern battlefield: Rule 218 cutoff disputes (*Flores*), scheduling and sanction pressure (*McKinney*), basis creep and reversals (*Rivas*), demonstrative-versus-evidence fights in the era of software reconstructions (*Perez*), and expert redesignation asymmetry (*Dameron*). The gap between Rule 213's aspirational language and its practical application remains wide. If the Supreme Court Rules Committee ever addresses that gap, the most productive reforms would be defining "seasonable supplementation" by reference to trial date, adding an explicit protocol for late-breaking disclosures (limited cure deposition plus cost shifting rather than all-or-nothing exclusion), clarifying that data-derived demonstratives require disclosure, and resolving the Fourth-Fifth District split on the burden of disclosure.

Disclose more than you think you need to. Supplement faster than feels comfortable. Treat tech exhibits as opinion bases, not "just demonstratives." Make a prejudice record that reads like an appellate opinion waiting to happen.

Defense practitioners must navigate this terrain by understanding not just what the rule says, but how courts actually apply it—and why that gap matters. The rule's translation has not improved. Those who master its dialects, however, will be better positioned to serve their clients in the battles that lie ahead.

## Key Cases for Illinois Defense Practitioners

### Illinois Supreme Court

*Sullivan v. Edward Hospital*, 209 Ill. 2d 100 (2004)

*Dameron v. Mercy Hospital & Medical Center*, 2020 IL 125219

### First District

*Flores v. NorthShore University HealthSystem*, 2020 IL App (1st) 190465

*Perez v. St. Alexius Medical Center*, 2022 IL App (1st) 181887

*Biundo v. Advocate Health and Hospital Corp.*, 2020 IL App (1st) 191970

*Tirado v. Slavin*, 2019 IL App (1st) 181705

*Roach v. Union Pacific Railroad Co.*, 2014 IL App (1st) 132015

*Rivas v. Benny's Prime Chophouse, LLC*, 2023 IL App (1st) 221901-U (Rule 23)

*Brax v. Kennedy*, 363 Ill. App. 3d 343 (1st Dist. 2005)

*Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637 (1st Dist. 2007)

*Nedzvekas v. Fung*, 374 Ill. App. 3d 618 (1st Dist. 2007)

*Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 7 (1st Dist. 1999)

*Kotvan v. Kirk*, 321 Ill. App. 3d 733 (1st Dist. 2001)

*Independent Trust Corp. v. Harwick*, 351 Ill. App. 3d 941 (1st Dist. 2004)

**Second District**

*Warrender v. Millsop*, 304 Ill. App. 3d 260 (2d Dist. 1999)

**Fourth District**

*Enbridge Pipeline (Ill.), LLC v. Hoke*, 2017 IL App (4th) 150544

*Department of Transportation v. Crull*, 294 Ill. App. 3d 531 (4th Dist. 1998)

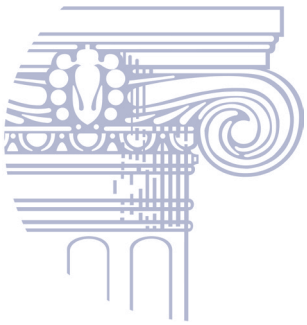
*White v. Garlock Sealing Technologies, LLC*, 373 Ill. App. 3d 309 (4th Dist. 2007)

**Fifth District**

*Brdar v. Cottrell, Inc.*, 372 Ill. App. 3d 690 (5th Dist. 2007)

*Hendrix v. Stepanek*, 331 Ill. App. 3d 206 (5th Dist. 2002)

*McKinney v. Newgent*, 2021 IL App (5th) 200010 (Rule 23)



# Civil Practice and Procedure

**Donald Patrick Eckler**
*Freeman Mathis & Gary LLP*, Chicago

## Traps for the Unwary? The Basics of Mailing and Filing Have Become Complicated

The foundational mechanics of the practice of law, transmission and filing of documents, are changing. And, in part both despite and because of technology, not for the simpler or better. The United Postal Services has changed the timing with which it will postmark items, receipt of emails has been impacted by the decision in *Balzer v. Northeast Illinois Regional Commuter Railroad Corporation*, 2026 IL App (1st) 232227, and filing in Illinois state courts continues to evolve with a further amendment to Supreme Court Rule 9. One would think that after decades these issues would be long worked out. One would be wrong.

### Change to Postmarking

Effective December 24, 2025, the United State Postal Service amended 39 CFR Part 111 to add section 608.11 to define postmarks, and as stated in Postmarking Myths and Facts released by the USPS, the change was made to reflect "adjustments to our transportation operations that will result in some mailpieces not arriving at our originating processing facilities on the same day that they are mailed. This means that the date on the postmarks applied at our processing facilities will not necessarily match the date on which the customer's mailpiece was collected by a letter carrier or dropped off at a retail location." See https://about.usps.com/newsroom/statements/010226-postmarking-myths-and-facts.htm. Merry Christmas!

If a customer needs to have a mailpiece postmarked on the day it is mailed, the sender must take it to the postal office and cannot rely on having placed it in the mailbox to have the postmark on the date it was placed in the mail. The USPS makes clear that postmarking is not a service provided by the USPS: "[c]ustomers have used postmarking for their own purposes, but postmarking is not and has not been a service that the Postal Service has provided to the public for such purposes. The postmark has always fundamentally existed to perform functions (including cancelation of postage) internal to Postal Service operations."

### About the Authors

**Donald Patrick Eckler** is a partner at *Freeman Mathis & Gary LLP*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

> As the court recognized, and which is no doubt true, security software is essential, but any delays are the charged to the recipient of the email, not the sender. It is thus necessary to check quarantines, spam filers, graymail folders, and junk e-mail boxes for time sensitive and proper emails that have been mistakenly caught and flagged.

Despite the USPS's position on the use of postmarks and that "[a] postmark date does not necessarily indicate the first day that the Postal Service took possession of the mailpiece," it has certainly been the practice of postal consumers to rely on postmarks for that purpose for time sensitive matters from tax returns and arbitration demands and in conformity with the mailbox rule. The mailbox rule, as defined by Black's Law Dictionary is "[t]he principle that when a pleading or other document is filed or served by mail, filing or service is deemed to have occurred on the date of mailing." *Gruszeczka v. Illinois Workers' Compensation Commission*, 2013 IL 114212, ¶ 10.

But what is the date of mailing? Perhaps contemporaneous affidavits of mailing will suffice, even outside of litigation, as described in Supreme Court Rule 12(b)(5), but those might suffer from credibility attacks, which was the strength of the postmark: it came from an independent party with no interest in any dispute over mailing. As the postmark cannot now be relied upon, for time sensitive matters on which mail is required, either third-party carriers should be employed or mailpieces will have to be taken to the post office to make sure a same day postmark is obtained.

**When Does One "Receive an Email?**

That was the question in *Balzer*, which concerns the other end from the sending of a communication. Unlike the mailbox rule, which to avoid the inconsistency in the time it takes for mailing deems receipt of a communication from the date it is mailed, emails are deemed received from the date they are sent because there is no such delay, as contemplated under Supreme Court Rule 12(b)(2).

The plaintiff/appellant in *Balzer* made a Freedom of Information Act request to the defendant/appellee, Metra, on July 31, 2019. *Balzer*, 2026 IL App (1st) 232227, ¶ 1. Under the Act, the response was due five business days later, or by August 7, 2019. *Id.* ¶ 48. As a result of third-party security software that flagged Balzer's email as suspicious, the email was caught in a quarantine and not manually released for review until August 1, 2019. *Id.* ¶ 1. Metra determined that the email was not received until August 1, 2019 and thus responded with a denial of the request on August 8, 2019. *Id.* ¶ 2. The circuit court held that the denial was timely, but the Illinois Appellate Court, First District reversed holding that "Metra received the email on July 31, the day Balzer sent it and Metra's third-party software received and quarantined it." *Id.* ¶ 3.

The court reasoned that "Metra cannot, of its own accord, delegate the responsibility for 'receiving' its FOIA requests to some third party and then blame its delegee for the delay in receipt" and, citing to the Uniform Electronic Transactions Act under 815 ILCS 333/15(b), found that "an electronic record is received when 'it enters an *information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information* of the type sent and from which the recipient is able to retrieve the electronic record.'" *Id.* ¶¶ 51, 57 (emphasis in original).

The reasoning in *Balzer* is not unique to the FOIA as the FOIA does not define "receipt." *Balzer*, 2026 IL App (1st) 232227, ¶ 49. The court went stated that "[i]f we ruled otherwise, the initial five-day period to respond to requests would become a fungible number. Here, the request was filed with Metra near noon on July 31 and reached Metra's desk at 8:14 a.m. the next morning. But what if a public body's security measures quarantined an email for *three* days? Five days? By Metra's logic, any amount of time that its security system delayed the request would hold off the start of the

five-business-day clock." *Id*. ¶ 61. The court also stated that Metra could have had an out "[i]f Metra could demonstrate that, for reasons utterly outside its control, Balzer's email never reached its email server (or that of any delegee like Mimecast), we might reach a different outcome." *Id*. ¶ 62.

As the court recognized, and which is no doubt true, security software is essential, but any delays are the charged to the recipient of the email, not the sender. It is thus necessary to check quarantines, spam filers, graymail folders, and junk e-mail boxes for time sensitive and proper emails that have been mistakenly caught and flagged.

**Modest Remedy to Rejections of Submissions**

As detailed in the IDC *Quarterly*, Volume 34, Number 4, " No Way to Run A Railroad: Electronic Filing and Illinois Supreme Court Rule 9," electronic filing in Illinois has been plagued with rampant rejection of submissions. The Court has amended Rule 9 with the addition of Rule 9(f)(1) which creates a procedure for remedying the rejection with the following:

(1) Rejection.

(A) If a document is rejected for any reason, the filing party may, within 5 court days of the notice of rejection, file a motion requesting that the later-filed document be deemed to have been filed on the original submission date. The motion shall set forth the following:

(i) The date of the original submission,

(ii) The date of the rejection,

(iii) The reason for the rejection, and

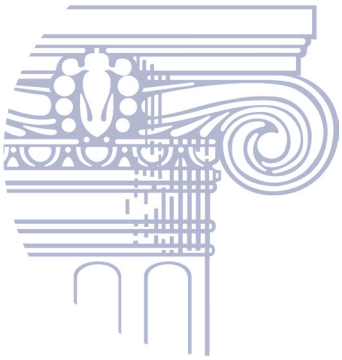
(iv) The document to be deemed filed on the date of the failed submission, attached as an exhibit. The document shall contain no changes from the original except to correct the error identified by the clerk as the reason for the rejection, if applicable.

(B) The court shall grant a timely motion for original submission date that satisfies the foregoing requirements and enter an order establishing that the effective date of filing of the corrected document shall be the date of the original submission. If the filer establishes that the original filing was rejected for reasons not in conformity with those permitted under Rule 9(f), the corrected document need not vary from the original submission.

The amendment gives the circuit court no discretion to deny a timely, properly filed, and supported motion, but the amendment does nothing to get at the heart of the problem: that circuit clerks retain the authority to reject submissions. It seems unlikely that they will be stripped of that authority anytime soon, and so vigilance should be paid to notice of rejected submissions. Thoe ejected submission may end up in quarantines, spam filers, graymail folders, and junk e-mail boxes. It is likely that a circuit court would be no more forgiving to an untimely filed motion caused by a delay by a third-party security software than it was in *Balzer* to an untimely response to a FOIA request.

What technology should be making easier and less fraught, it is not.

What technology should be making easier and less fraught, it is not. Indeed, the traps are becoming less obvious, more dangerous, and require greater discipline to avoid. These are at the very basic level of civil practice: mailing, emailing, and filing, tasks that are often left to staff. Careful practitioners will more closely monitor staff and may even handle some of these tasks themselves to avoid the most dire of consequences befalling them and their clients.



# **Amicus Committee** Report

**Edward K. Grassé**
*Grassé Legal, LLC*, Schaumburg

The IDC has filed amicus briefs in two additional cases pending before the Illinois Appellate Courts. In *Skarbeck v. Woodman's Food Market, Inc.* (2-25-0054), the Second District Appellate Court will review an issue that has plagued many practitioners since the inception of mandatory electronic filing. The plaintiff's attorney electronically filed a medical malpractice complaint with the Lake County Circuit Clerk's office. The filing did not include a Rule 222 affidavit. The Clerk's office rejected the filing due to the absence of the affidavit. The plaintiff then resubmitted the complaint with the Rule 222 affidavit; however, the filing deadline had passed between the initial submission and the resubmission. The defendant moved to dismiss the complaint as untimely, and the trial court granted the motion, holding that the failure to attach the Rule 222 affidavit by mistake did not constitute "good cause shown" as required by Supreme Court Rule 9.

The IDC filed an amicus brief in conjunction with ITLA in support of the plaintiff's position. The plaintiff and defense bars agree that clerks of court should not have the authority to supersede Supreme Court rules in their handling of filings. Clerks should serve a ministerial role by accepting documents as filed. The failure to attach a Rule 222 affidavit is subject to a motion to dismiss, and the time to file such an affidavit may be extended by the court pursuant to Rule 183. In this case, the clerk's rejection transformed an otherwise timely filing into an "untimely" one once it was eventually accepted by the clerk's office.

The Supreme Court has since amended Rule 9 to remove the "good cause" requirement and to create a procedure allowing parties to correct filings rejected by the clerk within specified time frames. However, that amendment occurred after the dismissal in this case.

The plaintiff and defense bars agree that clerks of court should not have the authority to supersede Supreme Court rules in their handling of filings. Clerks should serve a ministerial role by accepting documents as filed. The failure to attach a Rule 222 affidavit is subject to a motion to dismiss, and the time to file such an affidavit may be extended by the court pursuant to Rule 183.

The IDC also filed an amicus brief in *Musgrove v. American Alliance Holding Company, Inc.* (1-25-1016). In *Musgrove*, the plaintiff entered into a settlement agreement with the defendant insurance carrier. The carrier did not issue the settlement check within 30 days of the agreement, and the plaintiff subsequently filed suit, alleging that the carrier violated 735 ILCS 5/2-2301. Section 2-2301, commonly referred to as the Prompt Pay Act, requires certain actions to be taken within set time frames following a settlement. By its terms, Section 2-2301 applies "[i]n a personal injury, property damage, wrongful death, or tort action involving a claim for money damages."

Because the settlement in *Musgrove* occurred pre-litigation, the IDC argued that Section 2-2301 does not apply and cannot apply. Applying Section 2-2301 to pre-litigation settlements would dramatically alter the legal landscape for insurers across the state, and the statute's plain language does not encompass pre-litigation settlements.

As of the date of this writing, neither case has been argued, and no opinions have been issued.

## About the Author

**Edward K. Grassé** is a partner at the law firm of *Grassé Legal, LLC.* He has practiced in the area of tort litigation for over 10 years and concentrates his practice in the defense of personal injury, construction, fire and explosion, and premises liability suits. He is the former co-chair of the IDC Civil Practice Committee and is a former chair of the Civil Practice and Procedure Committee of the Chicago Bar Association.

# Professional Liability

**John F. Watson**
*Craig & Craig, LLC*, Mattoon

**Tracy E. Stevenson**
*Law Offices of Tracy E. Stevenson, P.C.*, Chicago

## Generative Artificial Intelligence and Use by the Civil Defense Attorney

Generative Artificial Intelligence ("AI") has been described as a transformational technology that has the potential to streamline legal services, provide efficiency previously unavailable to the legal profession and able to expand the access to justice for clients across Illinois. Ill. Att'y Registration & Disciplinary Comm'n, The Illinois Attorney's Guide to Implementing AI (2025), https://iardc.org/Files/Implementing-AI-Guide.

The *ARDC Attorney's Guide* was published following the Illinois Supreme Court's Policy on Artificial Intelligence announced on December 18, 2024, which set forth four key points as follows: (1) the use of generative AI is authorized; (2) that the attorneys who use AI must assume the professional responsibility for any AI generated information incorporated into their work product; (3) the attorneys must comply with Illinois Rule of Professional Conduct 1.1 in understanding the tools and complying with the duty of competence to ensure that its application and use is secure and legally compliant; and finally, (4) attorneys shall confirm that privacy and security of confidential and personally identifiable information including the security of any client data in the use of this technology. Ill. Sup. Ct., Policy on Artificial Intelligence (Jan. 1, 2025), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e43964ab-8874-4b7a-be4e-63af019cb6f7/Illinois%20Supreme%20Court%20AI%20Policy.pdf.

The ARDC Attorney's Guide not only provides a detailed breakdown of what generative and extractive AI is but also supplies guidelines for choosing an appropriate generative AI tool along with samples, templates, and checklists regarding client notice for informed consent, generative AI staff policy, and various tools and models for use in one's practice. The Illinois Attorney's Guide to Implementing AI at 3, 39-61.

The Illinois Supreme Court's policy embraces the advancements of AI noting the potential efficiency and improved access to justice. The policy notes that use of AI by litigants, attorneys, judges, and judicial clerks should not be discouraged, but it also acknowledges rising concerns about authenticity, accuracy, bias, and the integrity of court filings, proceedings and judicial decisions. Likewise, most civil defense attorneys are also encouraged by their clients to use generative AI tools; however, the tools must be used wisely, saving hours of research and drafting that are lost if the AI is not credibly edited. Clients are looking, and indeed requiring, their attorneys to become more efficient in reviewing and analyzing the large amounts of information received from the insurance companies, the insured clients, and obtained through the discovery process. Sophisticated clients will preach that their counsel must be proficient in the use of AI because surely the opposition is using these tools. Therefore, it becomes a necessity in our practice to use AI in a way that is compliant with the Illinois Supreme Court policy and the Attorney's Guide to Implementing AI as provided by the Illinois ARDC, but also efficient, thorough, and accurate.

### About the Authors

**John F. Watson** is a partner with *Craig & Craig, LLC* in the Mattoon office. Mr. Watson graduated with a Bachelor of Science in Mechanical Engineering from Bradley University in 1990 and received his J.D., with Honors, from The John Marshall Law School in 1993. During law school, Mr. Watson served as an Associate Editor for *The John Marshall Law Review*. Mr. Watson's fields of practice include general civil litigation, medical malpractice defense, municipal liability defense, insurance coverage and insurance law, intellectual property and criminal defense litigation.

**Tracy E. Stevenson** of the *Law Offices of Tracy E. Stevenson* in Chicago focuses her litigation practice on medical malpractice defense of physicians and hospitals. Ms. Stevenson has actively assisted municipal and governmental agencies in litigation including breach of contract and defense tort claims pursuant to the tort immunity act. She has tried over 30 cases to jury verdict in Federal and State Courts in Illinois, Florida, Louisiana and other jurisdictions. Outside her work in the courtroom, Ms. Stevenson represents litigants during arbitration/mediation, and also acts as a neutral. She has been a regular columnist for the *IDC Quarterly*, for over 10 years, and has written and published multiple articles in trade magazines. Further, Ms. Stevenson served as the 2023-2024 IDC President, chaired multiple IDC Academy programs and is an adjunct professor at the University of Illinois Chicago School of Law.

The dangers of using AI are now well known. On a weekly basis, examples can be found of completely fabricated or misrepresented cases created by AI hallucinations. AI hallucinations in the legal profession generally occur when the AI tool generates plausible-sounding, but completely fabricated, inaccurate, or non-existent legal information such as fake case authorities, false statutory citations, fabricated quotes, false exhibits and evidence, and incorrect legal positions. One should be cautious when searching to identify completely false case citations or legal principles, but also search out the potential for a case citation that identifies an actual case but incorporates language (sometimes quoted) or altered principles not accurately generated by the Generative AI tool. AI has also generated misrepresentations regarding background facts of an occurrence. For example, if a practitioner requests an AI tool to analyze a voluminous report or set of reports of an occurrence, or series of occurrences, that practitioner should not assume that the summarization of the report, the occurrence, or series of occurrences, will be fully factually accurate.

The litany of AI hallucinating cases is now being tracked by a number of sources, including Damien R. Charlotin in his database of legal decisions in cases where generative AI produced hallucinated content, typically false citations and also other types of AI generated arguments. AI Hallucination Cases, https://www.damiencharlotin.com/hallucinations/ (last visited March 26, 2026). As of February 2026 alone, the database listed over sixty citations from Federal and State jurisdictions noting fabricated case law, false quotes, misrepresented cases, or fabricated exhibits or submissions. The AI hallucinations appear in Federal District Courts and Federal Appellate Courts. Many of the parties using and citing to hallucinated cases and arguments are pro se litigants. However, many examples are lawyers submitting the false, fabricated and/or misrepresented authorities are cropping up around Illinois and the country.

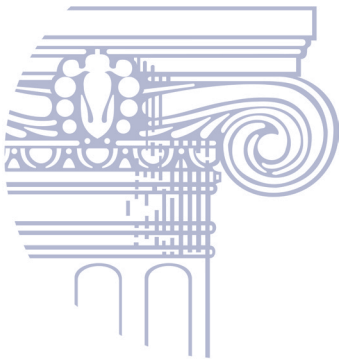
Recently, the Illinois Appellate Court Third District, in an unpublished opinion ruling on a motion for sanctions, found that a plaintiff's status as a self-represented litigant does not relieve him or her of the burden to comply with the court rules in ensuring that content submitted is accurate and complies with legal and ethical obligations. *Palsen v. Webb Chevrolet, Inc.*, 2026 IL App (3d) 250498-U, ¶ 35 (citing *People v. Shunick*, 2024 IL 129244, ¶ 64). Nor does it excuse even a pro se plaintiff from a careless reliance on AI. *Pletcher v. Village of Libertyville Police Pension Board*, 2025 IL App (2d) 240416-U, ¶ 28. The *Palsen* court upheld sanctions for the party willfully failing to comply with the appellate rules by citing fictitious authorities as being an egregious violation of Illinois Supreme Court Rule 341 requiring briefs contain proper citations to authorities, and in violation of the Illinois Supreme Court's AI Policy. *Palsen*, 2026 IL App (3d) 250498-U, ¶¶ 36-37. The *Palsen* court also found that the pervasive reliance on fictitious authorities had rendered the appeal frivolous. *Id.* ¶ 38.

In December 2025, the Illinois Appellate Court Second District noted at the outset of its analysis that respondents cited actual cases with fictitious quotes and holdings. *In re S.A., D.H., and B.M., Minors*, 2025 IL App (2d) 250280-U, ¶¶ 80-84. The court, in its unpublished opinion, noted that the respondent's fictitious language was likely hallucinated by artificial intelligence. *S.A.*, 2025 IL App (2d) 250280-U, ¶ *85.* The Second District noted that the use of fictitious quotations from actual cases violated the Supreme Court Rules and could be grounds for striking the brief and dismissing the appeal. *Id.* ¶ 86 (citing *Pletcher v. Village of Libertyville Police Pension Board*, 2025 IL App (2d) 240416-U, ¶ 29).

Tools available to Illinois practitioners have become more widely available and accessible at various price points. However, the ARDC's Attorney's Guide notes that those practitioners should become familiar with the particular generative AI company that is providing the product and the model that is being utilized. Attorney's Guide to Implementing AI at 5-6. The platform being utilized must protect confidential information and sensitive personal information of both litigants and clients. *Id*. at 7-9. In evaluating the particular product and tool being used, one must make sure the practitioner will not transmit confidential information or sensitive personal information into a tool that permits the information to be used for model training. *Id.* at 14. Further, lawyers must be aware and should investigate to make sure that there is a zero data retention policy or setting for the AI tool being used. *Id.* In Illinois, new products that have become available include ISBA's FastCase (Vincent AI) (vLex) legal research model which utilizes no model training and zero data retention. Likewise, the Lexis+ AI/LexisNexis Protégé products represent a "no training" guarantee and a zero data retention policy for its AI models. Finally, the Westlaw Advantage and Westlaw Precision product also contains a zero-customer data training policy and a zero data retention policy for its users. However, each practitioner is required under the Illinois Supreme Court Rules, and under the ARDC Attorney's Guide to

verify those settings in the product that he or she is using.

The Illinois Supreme Court has established a policy recognizing the potential efficiencies of AI and the potential for increasing access to justice for clients in need of legal services. Additionally, the Illinois ARDC has recognized the transformational technology in AI. AI, when carefully used, can streamline legal services, expand access to justice and strengthen the legal profession for years to come. However, practitioners must be cautious to ensure one does not use a technology that will hallucinate case citations, legal authorities or provide false quotations or legal principles when using these tools. Further, clients are not only encouraging, but requiring the use of AI tools to increase the efficiencies of the attorney's time in reviewing and analyzing voluminous materials that one may receive not only from the client, but through the discovery process. Diligence is required to assure accuracy of all summarizations and analyses of voluminous materials. The Illinois Supreme Court Rules and the Rules of Professional Conduct require that the attorney verify accuracy of both legal and factual analysis. We are embarking on a brave new world of generative AI, but the burden and requirements continue to fall upon the practitioner to make sure that information is indeed accurate.



# Legal Ethics

**William R. Schubert, II**
*Hinshaw & Culbertson LLP*, San Francisco, CA

## For Motions to Withdraw, Client Confidentiality Reigns Supreme

The American Bar Association published its Formal Opinion No. 519, which addresses how attorneys seeking to withdraw from a representation should proceed amid possible tension with the client's interest in keeping information related to the representation confidential. *Hint: the client's interest always comes first.* ABA Comm. on Ethics & Pro. Resp., Formal Op. 519 (2025).

As set forth in Illinois Rule of Professional Conduct ("RPC") 1.16, there are two types of grounds for requesting to withdraw from representing a client: permissive and mandatory. Ill. R. Prof'l Conduct r. 1.16 (2010). Withdrawing is *permissive* under a variety of circumstances, such as a client being uncooperative, the existence of a fundamental disagreement over strategy, or the client's non-payment of fees. *Id.* The attorney may also show grounds for permissive withdrawal by demonstrating there is no prejudice to the client or by otherwise showing good cause. *Id.*

Withdrawing is *mandatory* under more serious circumstances – including when (1) the representation will result in violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged. *Id.*

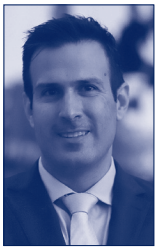
In the more serious situations falling under prong (1) for mandatory withdrawal, especially where the problem relates to the client's misconduct, the client may not want the attorney filing the motion to disclose confidential information (*i.e.,* "information related to the representation of the client" per RPC 1.6). Indeed, the client may not want the attorney withdrawing at all. These situations may include: where a client repeatedly breaches the fee agreement, where a conflict of interest arises relating to the representation, or where a client plans to commit perjury or to offer false evidence on direct examination by the attorney.

What should the attorney do in these situations? Below are some guideposts based on the Formal Opinion and related law.

### Less is More

This is the conventional wisdom for seeking a court's permission to withdraw. Say as little as possible, particularly in the initial written motion. The Formal Opinion endorsed this approach, commenting that a motion to withdraw

### About the Author



**William R. Schubert, II** is an attorney in the Professional Responsibility, Professional Liability and Risk Management practice group at *Hinshaw & Culbertson, LLP*. His caseload includes real estate litigation, legal malpractice, and insurance bad faith. Mr. Schubert has also worked with the construction industry and with international food distributors.

arising from a client's unpaid legal fees might start with "a formulaic reference to 'professional considerations.'" ABA Comm. on Ethics & Pro. Resp., Formal Op. 519 (2025).

### Inform the Client; Ask for Consent to Disclose Facts Relating to the Representation

Subject to some limited exceptions, RPC 1.6 provides that an attorney shall not disclose information related to the representation without the client's informed consent. Ill. R. Prof'l Conduct r. 1.16 (2010). The duty to communicate with the client about all material aspects of the case is unchanged during the pendency of the attorney's motion to withdraw. This means the attorney must discuss with the client, among other things: what the attorney will state in the motion to withdraw; whether disclosure of confidential information (*i.e.,* information relating to the representation) may be needed to obtain the court's permission to withdraw; the manner in which any such disclosures would be made; and how making the disclosures may affect the client's interest.

### When in Doubt, Play it Out

What happens when the client withholds consent, the court does not accept a mere "professional considerations" recitation (see above), and it informs the attorney that absent some substantiation as to the underlying facts, it will deny the motion to withdraw?

There is no guarantee that an attorney will be permitted to disclose all material information to the court in this situation, much less obtain the court's permission to withdraw, just because there happens to be compelling reasons for withdrawing. The court may ultimately order an attorney to continue representing the client in this situation, *notwithstanding that the grounds for withdrawing were mandatory*.

In that case, the attorney must continue representing the client (which does not violate the ethics rules). The Formal Opinion observed that even after a motion is denied for insufficient information, the attorney should be able to keep representing the client, while managing the problems that may have constituted grounds for mandatory withdrawal. ABA Comm. on Ethics & Pro. Resp., Formal Op. 519 (2025). With respect to instances where a client insists on using the attorney's services in furtherance of unlawful conduct, the Formal Opinion opined that "a lawyer whose motion is denied can ordinarily continue the representation without assisting in the client's intended crime or fraud." *Id.*

There are some tried-and-true techniques available for practitioners in ethically challenging circumstances. For example, a trial attorney may ask for a narrative response on direct examination if reasonably necessary to avoid acting in furtherance of a client's false testimony. This is consistent with RPC 3.3(a)'s provision that an attorney may refuse to offer false evidence. (Separately, RPC 3.3(a) may *require* the attorney to make certain disclosures to remedy the impact of a *past instance* in which the client has offered false evidence.) Ill. R. Prof'l Conduct r. 3.3 (2010).

### Consider with Caution: RPC 1.6 Exceptions; Local Court Procedures

As noted above, there are a handful of exceptions which are set forth in RPC 1.6 to the requirement of that an attorney disclosing information relating to the representation obtain the client's informed consent. Consider these exceptions prudently in the context of seeking to withdraw.

The exceptions set forth in this rule are all permissive, meaning that they denote circumstances which *permit* an attorney to disclose confidential information without consent, with one exception: paragraph (c) provides that an attorney *shall* reveal such information "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm." Ill. R. Prof'l Conduct r. 1.16 (2010).

As another threshold note, the exception contained in paragraph (a) of this rule for disclosures "impliedly authorized to carry out the representation" will not apply when the purpose of a disclosure is to support a motion to withdraw. *Id.*

As for the rest of the exceptions in RPC, which are set forth in paragraph (b), you may consider these to provide support for a request to withdraw, but again, do so with caution and restraint. The best practice is to not put an unauthorized disclosure in a written motion, and to disclose to the court only after you can show that it is clearly within an exception and that you have exhausted reasonable efforts to obviate a need to disclose (*e.g.,* by advising the client to refrain from conduct triggering the exception).

One paragraph (b) exception to be mindful of is for disclosures which "the lawyer reasonably believes necessary … (6 )to comply with other law *or a court order*." (Emphasis added). If the court reviewing a motion to withdraw orders you to disclose further information, you may do so. Even then, you should aim to do it in a way that minimizes the possibility of prejudice to the client—example,

by *not* putting such information in a public filing. *Id.*

On a related note, some courts have adopted procedures such as *in camera* review for motions to withdraw, which reduce the risk of prejudice arising from a disclosure of confidential information. Do not presume that the use of such procedures means that the requirement of client consent has been scaled back. Indeed, some state courts have concluded that even *in camera* disclosures without informed client consent can violate the ethics rules.

### You May Seek Legal Advice on Professional Responsibility Concerns Related to the Representation of a Client

Disclosing information relating to the representation of a client *to secure legal advice about your compliance with the ethics rules* is absolutely permitted. *See* Model Rules of Prof'l Conduct r. 1.6(b)(4) (Am. Bar Ass'n 2024). Be sure to maintain the attorney-client privilege for such communications, and do not bill your client for them.

It should be no surprise that the rules contemplate that an attorney's interest in ending a problematic representation should yield to the client's interest in keeping the facts of its case confidential. This reflects the fiduciary duties that attorneys owe to their clients, which include loyalty, full disclosure of material facts, and obedience to the client's lawful instructions. The above framework also reflects the system's dependence on the ability of attorneys to self-regulate, and to distinguish between cases within the general rule requiring informed consent and those truly exceptional scenarios which may require a disclosure to be made unilaterally to the court.

# Product Liability

**Alex P. Blair**
*Goldberg Segalla LLP*, Chicago

## Seventh Circuit Demonstrates that Conclusory District Court Opinions Regarding Expert Admissibility are Ripe for Appeal

On January 21, 2026, the United States Court of Appeals for the Seventh Circuit partially reversed a grant of summary judgment to a lawn mower manufacturer by the United States District Court of Central Illinois, reasoning that the district court's analysis in barring Plaintiffs' engineering expert was incomplete and therefore not entitled to deference. *Hillman v. Toro Co.*, No. 4:21-cv-04081, 2026 U.S. App. LEXIS 1405.

Rebekah Hillman, her wife, and her minor child sued due to injuries Hillman suffered while operating a zero-radius-turn riding lawnmower manufactured by Toro. *Hillman*, 2026 U.S. App. LEXIS 1405, at *1. A zero-radius-turn lawnmower can turn 180 degrees because the mower's real wheels operate independently, each utilizing a hydrostatic motor. The Toro mower that Ms. Hillman and her wife purchased used a hydrostatic brake for the rear wheels in addition to an electric parking brake, but not an independent braking system. When the mower needed to be towed, a user would push in two bypass pins which would disable the rear wheels' hydrostatic motors, and therefore the brakes. The parking brake was not powerful enough to stop the mower once it was motion by itself. Therefore, if the bypass pins were left in place and the mower began rolling down a slope there would be no way to stop its descent. *Id.* at *3. Regrettably, this is exactly what happened to Ms. Hillman, and the resultant crash required the amputation of her left leg below the knee. *Id.* at *5. The Hillmans sued under various theories of liability, but for the Seventh Circuit's analysis only strict products liability and negligence were at issue. *Id.*

The Hillmans' lawsuit hinged on whether they could prove the mower design was defective, and therefore unreasonably dangerous, via the risk-utility test. *Id.* at *7. Under Illinois law, which governed the dispute, the risk-utility test balances "the benefits of the challenged design" against "the risk of danger inherent in such designs." *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 526-27 (2008). A plaintiff can prove a design defect by presenting evidence of the availability and feasibility of alternate designs at the time of a product's manufacture. *Calles v. Scripto-Tokai Corp.*, 224 Ill.

### About the Author

**Alex P. Blair** is a partner in *Goldberg Segalla LLP*'s Chicago office. He focuses his litigation practice in the fields of products liability, toxic torts, and professional liability. He has represented clients in state and federal courts in Illinois and has extensive experience defending cases involving product defect and toxic tort exposures.

2d 247, 263-64 (2007). Without proof of defective design, the Hillmans could not prevail on either their strict liability or negligence claims. *Hillman*, 2026 U.S. App. LEXIS 1405 at *7 (citing *Calles*, 224 Ill. 2d at 270). Illinois intermediate appellate courts require expert testimony in design defect cases. *Baltus v. Weaver Division of Kidde & Co.*, 199 Ill. App. 3d 821, 834 (1st Dist. 1990). At the district court level, Toro was able to successfully challenge the Hillmans' design defect experts pursuant to Federal Rule of Evidence 702, which permits a qualified expert to offer opinion evidence so long as the expert's specialized knowledge would help the trier of fact, the expert's testimony was based on sufficient facts and data, the testimony was based on reliable principles and methods, and the expert's opinion reflected a reliable application of the principles and methods to the facts of the case. *Hillman*, 2026 U.S. App. LEXIS 1405, at *8, *citing* Fed. R. Evid. 702. Since the district court found all three of the Hillmans' expert opinions on design defect to be unreliable and irrelevant, it awarded Toro summary judgment as a matter of law. *Hillman*, 2026 U.S. App. LEXIS 1405, at *6.

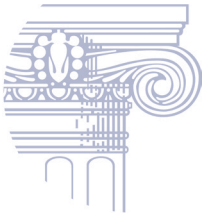
The *Hillman* court acknowledged that a district court's determination of an expert's reliability is afforded deference and generally reviewed under an abuse of discretion standard. *Id.* at *9. "To earn deference, however, the district court must show its work . . .Where an expert report contains multiple opinions, deference is due only for the district court's decisions on the opinions it satisfactorily addresses." *Id.* at *9-10. The three expert opinions barred by the district court in *Hillman* alleged three potential product defects in the Toro mower: (1) lack of a rollover protection system that could protect passengers if the mower tipped over as happened in Ms. Hillman's accident; (2) the lack of an interlock ignition system that would prevent the mower from starting if the bypass pins were engaged; and (3) lack of an independent mechanical braking system that would stop the mower if the hydrostatic brakes were disabled via the bypass pins. *Id.* at *1-2.

Although the district court had explained why it excluded most of the experts' opinions as unreliable or irrelevant, it failed to address the portion of expert Thomas Berry's report that explained the need for the mower to have an independent mechanical braking system. *Id.* at *10. "Absent from the district court's discussion of Berry's report, however, is any analysis of his opinion on the lack of an independent brake. The conclusory statement that his opinions 'do not satisfy the reliability standards of *Daubert* and [Rule 702]' is not enough to warrant deference." *Id.* at *13, *citing Anderson v. Raymond Corp.*, 61 F.4th 505, 508-509 (7th Cir. 2023). Therefore, the Seventh Circuit reviewed the district court's Rule 702 analysis of the independent braking system portion of Berry's report de novo. *Hillman*, 2026 U.S. App. LEXIS 1405, at *13.

The Seventh Circuit found Berry's opinions regarding the mower's lack of independent brake to be admissible under Rule 702 since they were relevant under the risk-utility test. *Id.* "Berry opined that the (mower's) lack of an independent brake made it 'defective in design and unreasonably dangerous,' and also that Toro 'knew or should have known of technically and economically feasible design alternatives that would have significantly reduced the risk without adversely affecting the utility of the machine.'" *Id.* at *13-14. Berry presented evidence that Toro itself manufactured an alternative design zero-radius-turn mower that incorporated an independent brake, as did several other manufacturers. *Id.* at *14. Berry's opinion was reliable because he identified various industry publications that highlighted the risk of not including an independent braking system. *Id.* at *15.

Toro challenged Berry's opinions regarding the lack of an independent brake because he had conducted no testing to demonstrate that an independent brake would have prevented Ms. Hillman's accident. *Id.* at *16. "While 'hands-on testing' can help support an expert opinion, it is not always 'an absolute prerequisite' for admission." *Hillman*, 2026 U.S. App. LEXIS 1405, at *16 (citing *Cummins v. Lyle Industries*, 93 F.3d 362, 369 (7th Cir. 1996)). The court found Berry's alternative designs reliable because they were taken from actual products on the market. *Id.* at *16-17. The court found that other reasons that Toro offered to affirm summary judgment were disputes of material fact for the jury to decide and remanded for trial. *Id.* at *19-21.

The *Hillman* court demonstrated deference to the district court's opinions as to the Hillmans' other two experts because the lower court had explained their reasoning, but the district court's silence on Berry's conclusions regarding the independent brake ultimately caused a reversal. The *Hillman* opinion demonstrates that conclusory orders on expert admissibility are ripe for appeal if the lower court does not "show its work." *Id.* at *9.



# Medical Malpractice / Healthcare Law

**Ann Barron**
*Heyl, Royster, Voelker & Allen, P.C.*, Peoria

**Sara Peal**
*Heyl, Royster, Voelker & Allen, P.C.*, St. Louis

## *Berk v. Choy's* Effect on Federal Medical Malpractice Claims in Illinois

On January 20, 2026, the United States Supreme Court issued its decision in *Berk v. Choy*, No. 24-440, 2026 WL 135974, Case No. 607 U.S. ____, (January 20, 2026). In *Berk*, the plaintiff filed suit against a doctor and a medical facility located in Delaware alleging medical malpractice. *Berk,* No. 24-440, 2026 WL 135974 at *2. The matter was originally filed in federal court based on diversity of citizenship and sought to apply Delaware state court law. *Id.* The defendants moved to dismiss the lawsuit after the plaintiff failed to attach a certifying affidavit from a healthcare professional. *Id.* at *3. Delaware requires a healthcare professional to sign an affidavit of merit certifying there are "reasonable grounds to believe there has been health-care medical negligence committed by each defendant." *Id.* at *2.

The plaintiff argued that Delaware's certification requirement is not enforceable in federal court as it is displaced by the Federal Rules of Civil Procedure. *Id.* at *3. The district court disagreed and dismissed the plaintiff's lawsuit. *Id.* The Third Circuit Court of Appeals affirmed. *Berk,* No. 24-440, 2026 WL 135974 at *3. The Third Circuit held the Federal Rules of Civil Procedure were silent, and the state law in this matter is substantive, and accordingly, the state statute applies. *Id.* at *3. An appeal to the Supreme Court followed this decision. *Id.*

The Supreme Court reversed the Third Circuit's decision. *Id.* at *12. Justice Barrett delivered the opinion, with Justice Jackson writing a concurrence. The Supreme Court held that Delaware's affidavit requirement does not apply in federal courts. *Id.* at *1. The Delaware law is displaced by the Federal Rule of Civil Procedures, specifically, Rule 8 and Rule 12. *Id.* at *1.

The Court's opinion first begins with an analysis of whether the Federal Rules of Civil Procedures displaces Delaware's law. *Berk,* No. 24-440, 2026 WL 135974 at *3. As the Court explained at the outset, when a provision of the Federal Rules of Civil Procedure governs a particular procedural question, any contrary state rule of procedure is displaced and may not be enforced in federal court. *Id.*, at *4. The Court first applied Federal Rule of Civil Procedure 8. *Id.*, at *3. This rule requires "a short and plain statement of the claim allowing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). Rule 12 further reinforces this rule by allowing for only one dismissal based on the merits, "failure to state a claim upon which relief can be granted." *Id.* at *4 (quoting Fed. Rule Civ. Proc. 12(b)(6)). When evaluating whether there is a claim, no matters outside the pleadings can be considered. *Id.* The courts instead look to whether the factual allegations when taken as true, "state a claim to relief that is plausible on its face." *Id.,* quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

### About the Authors

**Ann Barron** is a Shareholder at *Heyl, Royster, Voelker & Allen, P.C.* and serves as the Co-Chair of the Appellate Department. Ms. Barron handles medical malpractice, environmental and commercial litigation pending in state and federal court. Before joining Heyl Royster, she served as in-house counsel at Valero in San Antonio, Texas, where she managed complex environmental, commercial, class action and tort litigation. After graduating from the University of Illinois College of Law in 1994, Ms. Barron began her legal career serving as a law clerk to the Honorable James D. Heiple of the Illinois Supreme Court. After her clerkship, she worked for two law firms in the St. Louis area. She represented clients in environmental, class action, commercial, and personal injury matters pending throughout the country. Ms. Barron has represented clients before the Seventh Circuit Court of Appeals, the Illinois Supreme Court and various appellate courts in Illinois and Missouri.

**Sara Peal** is an associate attorney at the St. Louis office of *Heyl, Royster, Voelker & Alllen, P.C.*, providing innovative counsel across healthcare, medical malpractice, toxic torts, and business and commercial litigation. Ms. Peal earned her J.D. from the University of Illinois Urbana-Champaign, where she was honored with the Rickert Award for Service—the college's highest distinction—for her leadership and volunteer work. While in law school, she led a nationwide research initiative on reproductive healthcare laws alongside Professor Robin Wilson, gaining recognition at the Illinois Association of Healthcare Attorneys Symposium and on NPR Illinois's Undebates. She also holds a Bachelor of Science from Indiana University, double majoring in Marketing and Professional Sales with a minor in Law, Ethics, and Decision Making. Outside the office, Ms. Peal runs a K-pop YouTube channel, connecting with a global audience and sharing her insights with the community

The Supreme Court determined the Delaware requirement is at odds with Rule 8 because it adds to the Rule's pleading requirements. *Berk,* No. 24-440, 2026 WL 135974 at *4. Rule 8 allows for factual allegations to be sufficient; Rule 8 excludes any possibility of requiring more. *Id.* According to the Supreme Court, both Rule 8 and the Delaware statute address the same issue of the information which must be provided about the merits of the claim. *Id.* at *5. Since the Delaware statute required more than what was required by Rule 8, it conflicted with Rule 8 and could not be enforced. *Id.*

The defendants had asserted that the Delaware affidavit was a precondition to proceeding. The Court rejected this argument. *Id.* at *5. The defendants also argued that Rule 11 provides a loophole, "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." *Id.* at 6, quoting Fed. Rule Civ. Proc. 11(a). The Court found that Rule 11 does not apply to the Delaware statute since the Delaware statute requires the *pro se* plaintiff or attorney to vouch for the representations made. *Id.* According to the Court, Rule 11 does not apply to requiring affidavits from third parties. *Id.* The Court then rejected any arguments that the Delaware statute is not procedural since the statute determines what a plaintiff must present at the outset of this case. *Berk,* No. 24-440, 2026 WL 135974 at *7.

Justice Jackson's concurrent opinion arrives at the same conclusion. However, she wrote that Federal Rule of Civil Procedure 3 conflicts with the Delaware statute rather than Rule 8. *Id.* at *7. She believes the Delaware law controls the requirements to file. *Id.* at *8. Federal Rule 3 controls when a civil action commences, "[a] civil action is commenced by filing a complaint with the court." *Id.* According to Justice Jackson, Rule 3 does not leave "any room" for another rule to control what must be filed to commence a legal action. *Id*. The Supreme Court's majority opinion and Justice Jackson's concurrence clearly show that Delaware's statute and requirements do not apply in federal court.

The Supreme Court's ruling aligns with the 2019 decision in the Sixth Circuit that held the affidavit of merit are not required for medical malpractice actions in federal district courts. *Gallivan v. United States,* 943 F.3d 291 (6th Cir. 2019). Ohio courts had previously decided this rule was substantive rather than procedural. However, the Sixth Circuit (and now the Supreme Court) disagreed. The Sixth Circuit held that Rule 8 superseded Ohio's affidavit requirement, and there is no requirement for an affidavit to accompany the initial pleading filed in a lawsuit.

Based on a broad reading of the *Berk* opinion, that decision controls any time a medical malpractice case is filed in federal court. In other words, if a medical malpractice case is filed in or removed to federal court, a state statute or law requiring the plaintiff to file an affidavit of merit involving the opinion by a healthcare professional that there is a meritorious cause of action will not apply. *See Aycock v. Dr. Malhi*, 2026 WL 3127424, M.D. PA. (Feb. 5, 2026) (finding *Berk* applied to professional negligence claims in federal court and required the defendant's motion to dismiss to be denied).

Turning to Illinois, the Illinois Code of Civil Procedure requires an affidavit to accompany a medical malpractice complaint. 735 ILCS 5/2-622. This statute is similar to the Delaware statute at issue in *Berk.* Under section 2-622, an affiant must attest that the case has been reviewed by a health professional who is knowledgeable in the particular action, practices or teaches in the medicine at issue, and is qualified by experience or demonstrates competence in the subject. *Id.* The affiant must attest that the health professional has found that a "reasonable and meritorious cause for the filing of the action exists." *Id.* A separate certificate and written report must be filed for each defendant. *Id.* Failing to file the affidavit can result in a dismissal pursuant to 735 ILCS 5/2-619. *Id.*

Previously, some Illinois federal courts had held the requirements of 735 ILCS 5/2-622 applied to medical malpractice cases pending in federal court. *See e.g. Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014) (case involving Section 1983 claims and supplemental state law claims). Those cases have been effectively overruled by *Berk*. After *Berk*, an Illinois plaintiff filing a medical malpractice case in federal court is not required to attach to the complaint a certificate of merit. This includes cases which are removed to federal court based on diversity of citizenship. In federal court, gone are the days of moving to dismiss a medical malpractice case on the basis that a 2-622 affidavit and certificate of merit have not been included.

Practically, one of the areas that will likely see the largest increase in federal court practice is *pro se* prisoner complaints. Previously, when a prisoner filed a Section 1983 action in federal court relating to care and treatment occurring in a prison setting, the prisoner faced a sometimes-daunting hurdle of including the 2-622 affidavit and certificate of merit for any medical malpractice claims. In many circumstances, the medical providers against whom a supplemental

jurisdiction claim without a 2-622 certificate was filed would successfully move to dismiss those claims. Now, prisoners can include the medical malpractice claim without fear of dismissal. Section 2-622 was one of the few tools that correctional healthcare providers had to dismiss complaints against them. While a prisoner may not be able to survive summary judgment, they will be able to conduct discovery on the medical malpractice claims to try to prove their claims

The Supreme Court's ruling in *Berk* does not mean that a wrongly brought medical malpractice action cannot be dismissed in federal court. Instead, a different approach should be used. Ultimately, careful review of diversity jurisdiction and motions for summary judgment will likely become the two most used vehicles. Proving a plaintiff failed to meet diversity jurisdiction requirements or that the no basis for federal court jurisdiction is a useful tool.

Motions for summary judgement will also be a useful tool against these claims. A plaintiff must still provide expert testimony to support their state court medical malpractice action. While discovery is costly for defendants, it can be especially difficult for *pro se* plaintiffs if there is simply no expert evidence to support their claims.

In conclusion, it now appears that section 2-622 in Illinois, and other state court laws, is no longer a requirement for federal court medical malpractice actions. *Berk* has made it clear that requiring a certifying affidavit in medical malpractice claims is not required in federal court. The decision in *Berk* will require a new and different approach to be used in medical malpractice claims in Illinois federal courts. This will include careful evaluation of diversity jurisdiction and motions for summary judgment.

# Practice Development

**Glenn A. Klinger**
*Leach King Klinger Law LLC*, Chicago

## Establishing Privilege in Federal Court: The Risk of Incomplete or Inaccurate Logs

Lawyers often see privilege as automatic. A document is either protected or it is not. Hard stop. But that's not how federal courts sitting in Illinois see it, because privilege is not self-executing. It must be established–document by document–and the burden is on the party asserting privilege. If a party's privilege log is incomplete, vague, or inaccurate, courts are increasingly willing to find waiver. And in some situations, they will also shift fees. Two recent decisions from the Northern District of Illinois make the point clear.

### A Privilege Log is Proof, Not a Placeholder: *West Bend v. MK Deliveries*

In *West Bend Mutual Insurance Company v. MK Deliveries, Incorporated*, No. 24-cv-11547, 2025 WL 3063709, at *1 (N.D. Ill. Nov. 3, 2025), West Bend filed a declaratory judgment action over policy limits following a $13 million wrongful death verdict in Illinois state court in favor of the estate of a deceased plaintiff. The estate, as assignee of the insured in the coverage action, filed counterclaims alleging breach of the policy and bad faith failure to settle the underlying case. *West Bend*, 2025 WL 3063709, at *1. The estate then requested documents related to West Bend's decision not to settle the tort case before trial, including communications about the tort case, and the claim file. *Id.*

West Bend objected on attorney-client and work-product grounds and produced a privilege log. Although it amended the log twice at the estate's request, the second amended log still drew a motion to compel based on claimed deficiencies. *Id.* The court agreed. *Id.*

Assessing the amended log, which ran more than 50 pages and contained over 250 entries, the court observed that more than 100 entries lacked dates, most failed to identify the capacity of the sender or recipient, and many descriptions did not clarify whether legal advice was sought or rendered. *Id.* at *3. The court noted that West Bend had three opportunities to provide an adequate log and could have supplied additional context or submitted the documents for review during briefing. *Id.* at *4.

The court rejected simply labeling documents as attorney-client communications or work product, emphasizing that privilege must be established document-by-document. *West Bend*, 2025 WL

### About the Author

**Glenn A. Klinger** is a Partner at *Leach King Klinger Law LLC*, where he concentrates his practice on insurance coverage disputes involving commercial and professional policies. He also litigates commercial and bad faith cases, and advises clients on issues related to risk management and transfer.

> A privilege log is not a placeholder to preserve objections while hoping for deference later. It is the mechanism by which privilege is proven.

3063709, at *4. Generic descriptions and blanket assertions are not enough. *Id.* at *2. The burden rests with the party asserting privilege, and that burden requires enough detail for the court to evaluate the claim without guessing. *Id.* Even had the log sufficiently invoked protections, the court went a step further, finding that the common interest doctrine abrogated privilege because communications generated during the underlying defense were not protected in subsequent litigation between the insurer and its insured (or the insured's assignee). *Id.* at *4-5.

A privilege log is not a placeholder to preserve objections while hoping for deference later. It is the mechanism by which privilege is proven. *Id.* at *2. If the log does not allow the court to evaluate the claim with specificity, privilege is very likely waived.

### Courts Will Review and Enforce: *Prairie Management & Development v. Columbia*

In two decisions on related motions to compel documents claimed as privileged and/or protected, another magistrate judge in the Northern District of Illinois discussed similar issues. The case, brought by insureds (Prairie and Rockwell) and their insurers (Scottsdale and Westfield) for indemnity paid to settle an underlying construction injury lawsuit, alleges wrongful denial of coverage and bad faith against the carrier for the injured worker's employer (Columbia). *Prairie Mgmt. & Dev., Inc. v. Columbia Mut. Ins. Co.*, No. 23-cv-53, 2025 WL 588635, at *1 (N.D. Ill. Feb. 24, 2025). Since Columbia's claims handling and coverage determinations were central to the dispute, plaintiffs sought communications involving outside counsel and internal claim notes that Columbia withheld on attorney-client, insurer-insured, and work-product grounds. *Prairie Mgmt.*, 2025 WL 588635, at *1-2.

The court held that Columbia's privilege logs were inadequate. *Id.* at *4-5. Although they identified attorneys and claims personnel, they did not meaningfully distinguish between legal advice and ordinary claims activity, and no declarations were submitted showing that the individuals were acting in a legal, rather than claims handling, capacity. *Id.* at *3-4.

Rather than immediately finding waiver, the court ordered the disputed materials submitted for in camera review. *Id.* at *5. After reviewing, the court reached a balanced result: some documents were protected; others were not. *Id.* Portions of internal claims logs had to be produced because they reflected business activity, *e.g.*, documenting claim developments or settlement discussions, rather than legal advice. *Id.* at *5-6. The court allowed targeted redactions but rejected blanket withholding of entire claim files. *Prairie Mgmt.*, 2025 WL 588635, *5-6. It also declined to apply work-product protection where there was no showing that the documents were prepared in anticipation of litigation rather than in the ordinary course of adjusting a claim. *Id.*

Several months later, the court addressed a related issue in a second opinion. After ordering Columbia to submit all documents identified in its privilege logs for in camera review, Columbia filed a supplemental log but failed to include certain documents previously listed. *Prairie Mgmt. & Dev., Inc. v. Columbia Mut. Ins. Co.*, No. 23-cv-53, 2025 WL 1685291, at *1-2 (N.D. Ill. June 16, 2025). The omission was not promptly corrected, and despite being notified by Plaintiffs, Columbia did not act for nearly three months. *Prairie Mgmt.*, 2025 IL 1685291, at *2.

In the subsequent order, the court held that Columbia's failure to comply with Rule 26(b)(5) and the court's prior directive–combined with its lack of diligence in correcting the omission–was neither substantially justified nor harmless. *Id.* at *4. As a result, the court ordered fee shifting or production of the omitted materials (even though it ultimately concluded that the documents themselves were protected). *Id.*

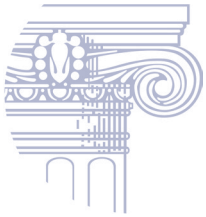
Taken together, the two *Prairie Management* opinions underscore a practical reality. Courts will carefully review disputed materials and protect genuine attorney-client communications. But privilege must be supported with clarity, and court orders must be followed precisely. When logs blur legal advice with claims handling–or when compliance with discovery directives is careless–courts will not hesitate to impose consequences. Even protected documents can be lost if the process of establishing and preserving privilege is mishandled.

### Practice Pointers

The lessons here are practical:

1. In privilege logs, include dates, authors, recipients, and their roles. Describe the substance clearly enough to demonstrate legal advice without revealing it. Labels alone are not enough.
2. Separate legal advice from business activity. Courts will not treat routine claims handling as privileged simply because counsel is involved or copied. Claims notes often contain both; redact narrowly and explain carefully.
3. Be specific when asserting work product. Identify the litigation anticipated and when the document was created. Work product does not arise from ordinary claim adjustment.
4. Follow court directives closely and promptly. If documents are ordered submitted or logs amended, account for every entry. Correct mistakes immediately. Delay can transform oversight into waiver.

Privilege remains a powerful protection, but it must be established with clarity. Courts will review logs closely, distinguish legal advice from business records, and enforce compliance with discovery rules and court orders. If you want protections to hold, prove and handle them carefully.



## Welcome New Members!

***We are proud to welcome the following new members to IDC.***

**James A. Anderson**
*Freeman Mathis & Gary LLP*
Lexington, KY

**Lamiaa Bitar**
*Cruser Mitchell,* Chicago

**Hannah Faith Cisneros**
*Rynearson, Suess, Schnurbusch & Champion, LLC,* Edwardsville

**Ana Crisan**
*Zurich North America,* Schaumburg

**James Earl**
*Bortz Kleindorfer, LLC,* O'Fallon

**Natalie Finocchiaro**
*Heyl, Royster, Voelker & Allen, P.C.*
Rockford

**Jakob E. Gammons**
*Heyl Royster Voelker & Allen, P.C.,*
Peoria

**Ethan C. Guthman**
*McCoy Leavitt Laskey LLC*, Chicago

**Michael Hall**
*Heyl Royster Voelker & Allen, P.C.*
St. Louis

**Elizabeth Jedrasek**
*Lindsay Pickett & Postel, LLC*
Chicago

**Allison P. Klein**
*Heyl, Royster, Voelker & Allen, P.C.*
Chicago

**Tetyana Kasiyan**
*DePaul College of Law,* Chicago

**Nora Kocher**
*Freeman Mathis & Gary LLP,* Chicago

**Amy M. Kunzer**
*Oberts Galasso Law Group,* Chicago

**Lewis Y. Liu**
*Goldberg Segalla,* Chicago

**Susan Miles**
*Kamykowski & Taylor, P.C.,* St. Louis

**Nicholas J. Newman**
*Heyl Royster Voelker & Allen, P.C.*,
Edwardsville

**A. Mark O'Danovich**
*Freeman Mathis & Gary LLP*
Chicago

**Sara Peal**
*Heyl Royster,* St. Louis

**Libby Rathert**
*Kamykowski & Taylor, P.C.*
St. Louis,

**John Ruggiero**
*Mohan Groble Scolaro, P.C.,* Chicago

**Emily Schroeder**
*Amundsen Davis LLC,* Chicago

**William R. Schubert, II**
*Hinshaw & Culbertson LLP*
San Francisco, CA

**Steven Schuetz**
*Lindsay, Pickett & Postel, LLC*
Chicago

**Andrew Sperry**
*Zurich North America,* Schaumburg

**Andrew St. John**
*Kamykowski & Taylor, P.C.*
St. Louis

**Sophie Stevanovich**
*Freeman Mathis & Gary, LLP*
Chicago

**Jenna Sur**
*Heyl, Royster, Voelker, & Allen, P.C.*
Chicago

**Michael Verbic**
*Heyl, Royster, Voelker & Allen, P.C.*
Rockford

**Christopher M. Vlasich**
*Trisura Group, Ltd.,* Park Ridge

# Association News

## Artificial Intelligence Symposium: Practical, Corporate, Ethical, and Judicial Insights Into AI

### July 17, Edwardsville

AI is rapidly reshaping the legal profession, bringing both opportunity and uncertainty for defense attorneys. The IDC Artificial Intelligence Symposium will provide practical guidance on using AI effectively while addressing client expectations, ethical considerations, and emerging technologies. Attendees will gain real-world tips to enhance their practices and hear perspectives from corporate claims professionals, expert witnesses, and the judiciary on the evolving role of AI in litigation.

**Featured Presentations & Speakers**

- **The Relationship Between AI, Defense Counsel, and Corporate Professionals |** Presented by: **Rebecca Fozo**, *Zurich North America*, **Taylor Smith**, *Suite 200 Solutions*, and **Christopher M. Vlasich**, *Trisura Group, Ltd.*
- **AI Best Practices In and Out of the Classroom** | Presented by: **Robert Christie**, *Baker Sterchi Cowden & Rice*
- **Artificial Intelligence in Expert Practice: What Defense Counsel Needs to Know** | Presented by: **Scott Nesvold, P.E.**, *ESi*
- **Avoiding Ethical Pitfalls of AI** | Presented by: **Anisa Jordan**, *Illinois ARDC*
- **The Madison County AI Order: Origins, Objectives, and Early Lessons for Litigants and Counsel** | Presented by: **Hon. Sarah D. Smith**, *Circuit Court of Madison County*

Learn More and Register Today at: **https://www.idc.law/event/AISymposium**

## Top Golf Experience with Brillouin

### Aug 19, Naperville

Brillouin Consulting is pleased to host an afternoon of networking, friendly competition, and great conversation for members of the Illinois Defense Counsel at Naperville's Top Golf on Wednesday, August 19, from 4:30-6:30 p.m. Whether you are an experienced golfer or have never picked up a club, this event offers a relaxed and engaging opportunity to connect with fellow defense attorneys and industry professionals while enjoying some food and drink.

Learn More and Register Today at: **https://www.idc.law/event/BrillouinTopGolf**

## Bench & Bar

*Above: Hon. Richard Goldenhersch (Ret.), and Hon. Heinz Rudolf*

## DRI Regional Meeting

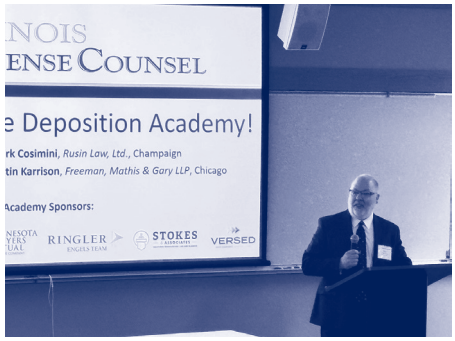
*IDC Past President and DRI Regional Director Bill McVisk and IDC President Mark Cosimini*

# Damages Conference Recording Available

Did you miss the opportunity to attend the recent Damages Conference, **From Reptile to Verdict – Mastering Damages in High-Stakes Litigation**? No worries—we've got your back! Simply go to **https://bit.ly/DamagesConferenceOnDemand** to register for the on-demand recording of the conference, featuring the following presentations:

- Charming the Reptile: Advanced Strategies for Preparing Corporate Representatives and Witnesses for Reptile-Style Litigation
- Defining, Diminishing, and Defending Damages
- Assessing Traumatic Brain Injury Claims from a Biomechanical Perspective
- Vocational Rehabilitation and Traumatic Brian Injuries
- An Exploration of the Use of Diffuse Tensor Imaging in Traumatic Brain Injury Cases
- Current Attitudes Toward Corporations and Damages: Risks & Realities; and,
- Judicial Perspective on Damages

# Deposition Academy




# Membership Renewals

Membership dues renewal notices for the coming bar year have recently been sent to all members. Dues are due by **June 30**.

## IDC Bar Year in Review

This bar year has been a busy one for IDC. Members have benefited from:

- More than 20 CLE programs (many complimentary for members) covering damages, depositions, construction law, insurance law, employment law, medical malpractice, expert strategy, emerging litigation issues, and Bench and Bar discussions.
- Signature programs and networking events including the Annual Meeting, Deposition Academy, Damages Conference, Holiday Party, and community service opportunities.
- Trusted legal resources, including the *IDC Quarterly*, *Survey of Law*, expanded practice-focused content, and updates designed specifically for defense counsel.
- Continued advocacy for Illinois defense attorneys through legislative monitoring, outreach to lawmakers, and amicus efforts in:
  - *Hensley v. Nornat Management Service and McDonalds Corp.*
  - *Musgove v. American Alliance Holding Company Inc.*
  - *Skarbek v. Woodman's Food Market*
  - *Wilson v. Napelton Goldcoast Imports*

We are very thankful for our members' support of IDC and look forward to another great bar year ahead with the following events, currently in the works:

- Defense Practice Series programs on Trucking & Transportation; Work Comp; Tort and Toxic Tort; Civil Practice & Amicus
- Joint CLE with the Missouri Organization of Defense Lawyers at Busch Stadium | August 27

## Defense Practice Series – Insurance

# Are YOU the Missing Piece?

**Get Involved** *with one of our numerous committees to make a difference in YOUR Association while you meet and work with the defense bar throughout the State of Illinois.*

Complete the Committee Application form in the back of this issue of *IDC Quarterly* or online at **www.IDC.law**.

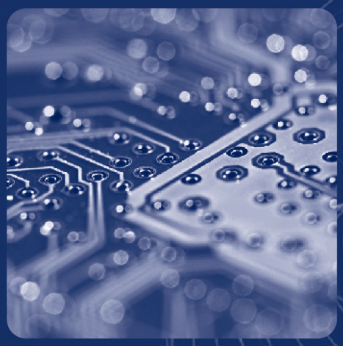
IDC

**Illinois Defense Counsel**
PO Box 588
Rochester, IL 62563-0588
800-232-0169 | www.IDC.law

FROM COMPLEXITY TO CLARITY.

# *Technical expertise* you can trust.

At ESi, we combine advanced technology with deep expertise to plan, predict, test, and solve your toughest challenges. Learn how our experts are innovating across essential industries.



ESi

Connect with our experts to get started:

newmatters@engsys.com | (866) 596-3994 | www.engsys.com

# LOOKING FOR A LOCAL ACCIDENT RECONSTRUCTION FIRM?

EXPLICO'S CHICAGO OFFICE FEATURES LOCAL BIOMECHANICS & HUMAN FACTORS EXPERTS

(773) 337-8350
CONNECT@EXPLICO.COM
WWW.EXPLICO.COM

STOKES
& ASSOCIATES
VOCATIONAL REHABILITATION | LIFE CARE PLANNING

# Precision Matters

Trusted Experts Delivering
Precise, Defendable Reports

SERVICES
- LIFE CARE PLANS
- VOCATIONAL ASSESSMENTS
- MEDICAL BILL AUDITS
- LABOR MARKET SURVEYS
- FORENSIC ECONOMICS
- WAGE & EARNING CAPACITY
- EXPERT TESTIMONY

CONTACT US

**EDDIE YEAGENS - WESTERN U.S.**
210-857-2037
EYEAGENS@STOKES-ASSOCIATES.COM

**BEAU FORNARIS - EASTERN U.S.**
504-315-0073
BFORNARIS@STOKES-ASSOCIATES.COM

REFER A CASE

WWW.STOKES-ASSOCIATES.COM

**COMPLIMENTARY CONSULTATIONS AVAILABLE**

SERVICES VARY BY CASE, AND ALL MAY NOT APPLY | ACCEPTING ENGAGEMENTS NATIONWIDE

CASE TYPES
- PERSONAL INJURY (CATASTROPHIC & NON-CATASTROPHIC INJURIES)
- WRONGFUL DEATH
- MEDICAL MALPRACTICE
- DIVORCE
- EMPLOYMENT DISCRIMINATION

# THE POWER TO SEE THE WHOLE PICTURE

Ringler Consultants have the sophistication and the experience to fit all the pieces together using structured settlement solutions and much more.

**Creative solutions.**
**Everybody can win.**

**Contact Don Engels**
**Structure Consultant since 1996**

DON ENGELS, CSSC, AIC, CLU
DEngels@RinglerAssociates.com
312-953-1611

RINGLER®
www.ringlerassociates.com

IDC Illinois Defense Counsel

# MEMBERSHIP APPLICATION

Membership in the Illinois Defense Counsel is open to Individuals, Corporations, Educators, and Law Students. For a list of qualifications, visit www.iadtc.org or phone the IDC office at 800-232-0169. Applicants shall be admitted to membership upon a majority vote of the Board of Directors.

I am applying for membership as a(an) (Select Only One):

**Private Practice** Attorney, in practice:

- ❍ 0 – 5 years ($225)
- ❍ 6 or more years ($350)

**Public Sector** Attorney, in practice:

- ❍ 0 – 5 years ($175)
- ❍ 6 or more years ($200)

- ❍ **Claims Professional** ($125)
- ❍ **Corporation** or **Association Counsel** ($125)
- ❍ **Student** ($20)
- ❍ **Educator** ($75)

## Applicant Information

Prefix_____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Organization _____

Address_____

City_____ State _____ Zip _____ County _____

Phone _____ Email _____

Home Address _____

City _____ State _____ Zip_____ County_____

Phone _____ Alternate Email Address _____

IDC Sponsor (Optional) _____

## Attorneys

Area of Practice _____ # of Attorneys in Firm _____

Law School _____ Admitted to the Illinois Bar in (Year)_____ ARDC# _____

## Educator and Law Student Applicant Information

Prefix _____ First _____ Middle _____ Last _____ Suffix _____ Designation _____

Law School _____ Anticipated Graduation Date_____

Address _____

City_____ State _____ Zip _____ County _____

Phone _____ Email _____

## Biographical Information

IDC is committed to the principle of diversity in its membership and leadership. Accordingly, applicants are invited to indicate which one of the following may best describe them:

Ethnicity_____ Gender _____ Birth Date _____

***(Application continued on next page)***

IDC Illinois Defense Counsel

# COMMITTEE INVOLVEMENT

All Substantive Law Committees are open to any IDC member. Event and Administrative Committees are generally small committees and members are often appointed by the Board of Directors. Substantive Law Committees are responsible for writing the Monograph for the *IDC Quarterly* and may submit other Feature Articles. Committees keep abreast of current legislation and work with the IDC Legislative Committee, as warranted. Committees also serve as a resource to seminar committees for speakers and subjects and, if and when certain issues arise that would warrant a specific "topical" seminar, the committee may produce such a seminar.

Please select below the committees to which you would like to apply for membership:

## Substantive Law Committees

- ❍ Civil Practice Law
- ❍ Construction Law
- ❍ Employment Law
- ❍ Insurance Law
- ❍ Medical Malpractice & Healthcare Law
- ❍ Tort Law
- ❍ Toxic Tort Law
- ❍ Trucking & Transportation Law
- ❍ Workers' Compensation Law

## Administrative & Event Committees

- ❍ Diversity Equity & Inclusion
- ❍ Practice Development
- ❍ Legislative
- ❍ Social Media

## Membership Commitment

By providing a fax number and email address you are agreeing to receive faxes and emails from the association that may be of a commercial nature. I certify that:

- ❍ As a **Private Practice** or **Public Sector Attorney**, I am actively engaged in the practice of law, that at the present time a substantial portion of my litigation practice in personal injury and similar matters is devoted to the defense.
- ❍ As a **Claims Professional, Corporation** or **Association Counsel**, I will support the purpose and mission of the IDC.
- ❍ I am currently a **Professor** or **Associate Professor** of law at an ABA accredited law school.
- ❍ I am currently a **Student** enrolled in an ABA accredited law school.

Signed _____ Date _____

## Membership Investment

Membership Dues ..... $ _____

Voluntary Political Action Committee Donation * ..... $ _____

**Total Amount Due** ..... $ _____

* **Recommended Amount:**
<3 years in practice..... $25
4-5 years in practice..... $50
6-9 years in practice..... $75
10+ years in practice..... $100

Please Note: IDC dues are not deductible as a charitable contribution for U.S. federal income tax purposes, but may be deductible as a business expense. The IDC estimates that 2% of your dues are not deductible because of the IDC's lobbying activities on behalf of its members.

## Payment Information

**— Do Not Fax or Email Credit Card Information —**

❍ Enclosed is check # _____ in the amount of $ _____ . ❍ Visa ❍ MasterCard ❍ AmEx

❍ Please charge Credit Card # _____ in the amount of $ _____ Exp. Date ____/____

Name as it appears on the Card _____ Card Security Code_____

Billing Address _____

City_____ State _____ Zip_____County _____

Thank you for your interest in joining the Illinois Defense Counsel. Your application will be presented to the Board of Directors for approval at their next regular meeting. Until that time, if you have any questions, please contact the IDC office at:

**Illinois Defense Counsel**
PO Box 588 • Rochester, IL 62563-0588 • 800-232-0169 • 217-498-2649 • www.IDC.law

# *The Voice of the Defense Bar in Illinois*

Promoting a level playing field in civil litigation

Representing the interests of business and industry in Illinois

Dedicated to improving the quality of the legal profession

To learn more about the Illinois Defense Counsel, Visit us online at

**www.IDC.law**

## What is the IDC?

We are the premier association of attorneys in Illinois representing business, corporate, professionals, and other individual defendants in civil litigation. The IDC is an exceptional community of defense attorneys dedicated to improving the judicial system and the practice of law.

The IDC is a reasoned and independent voice for fairness in the legal system. We work with the business, insurance, and medical communities to ensure a fair and equal justice system for all litigants.

### *The IDC is*

- An advocate for the legal profession
- nearly 600 members strong
- Looked to for advice and support by the judiciary
- A resource for legislators

## How is the IDC Making a Difference?

The IDC strengthens the practice of law and improves the skills of lawyers that defend individuals and businesses in Illinois. We enhance the knowledge of defense attorneys through our nationally respected publication the *IDC Quarterly* and the new *Survey of Law*, by our continuing legal education programs, and committees that focus on specialty practice areas like **Civil Practice**; **Construction Law**; **Employment Law**; **Insurance Law; Medical Malpractice & Healthcare Law, Tort Law**,**Toxic Tort Law, Trucking & Transportation Law and Workers' Compensation Law**.

The IDC is working to protect the Illinois legal system, demanding a level playing field and resisting attempts to dismantle the jury system. The IDC is a respected resource providing:

- Fact sheets on the impact of pending litigation
- Expertise to legislative committees and political leaders
- Amicus briefs on legal issues pending before the Illinois reviewing courts

## IDC members are as diverse as the clients we represent

From big firms and small and all corners of the state, attorneys join the IDC based on our common issues and a common desire to improve our legal system.

Over the past five decades, we have grown from an organization of mostly insurance defense attorneys to a broad-based association of litigators who represent an entire range of business and industry throughout Illinois and the United States. The diversity of our membership and clientele informs our independent and balanced view of Illinois's judicial system and the litigation that affects it.

## What are Our Core Values?

- To promote and support a fair, unbiased, and independent judiciary
- To take positions on issues of significance to our membership, and to advocate and publicize those positions
- To promote and support the fair, expeditious, and equitable resolution of disputes, including the preservation and improvement of the jury system
- To provide programs and opportunities for professional development to assist members in better serving their clients
- To increase its role as the voice of the defense bar of Illinois, and to make the IDC more relevant to its members and the general public
- To support diversity within our organization, the defense bar, and the legal profession

ILLINOIS DEFENSE COUNSEL

P.O. Box 588 • Rochester, IL 62563-0588

Presorted
Standard
U.S. Postage
**PAID**
Permit No. 650
Springfield, IL

# IDC CALENDAR

- **July 17** Artificial Intelligence Symposium: Practical, Corporate, Ethical, and Judicial Insights Into AI | The Outlet, Edwardsville
- **August 13** Executive Committee Meeting | Zoom
- **August 14** Board of Directors Meeting | Zoom
- **August 19** Top Golf Experience with Brillouin | Naperville
- **August 27** IDC/MODL Conference | Busch Stadium, St. Louis
- **September 17** Executive Committee Meeting and SIU-Carbondale Law School Presentation | Carbondale
- **September 18** Board of Directors Meeting and Green Earth Day of Service | Carbondale
- **October 29** Executive Committee Meeting | Chicago Location TBA
- **October 30** Board of Directors Meeting | Chicago Location TBA
- **December 10** Executive Committee Meeting | Chicago Location TBA; Holiday Party | Chicago Location TBA
- **December 11** Board of Directors Meeting | Chicago Location TBA

ILLINOIS DEFENSE COUNSEL

*LAW • EQUITY • JUSTICE*