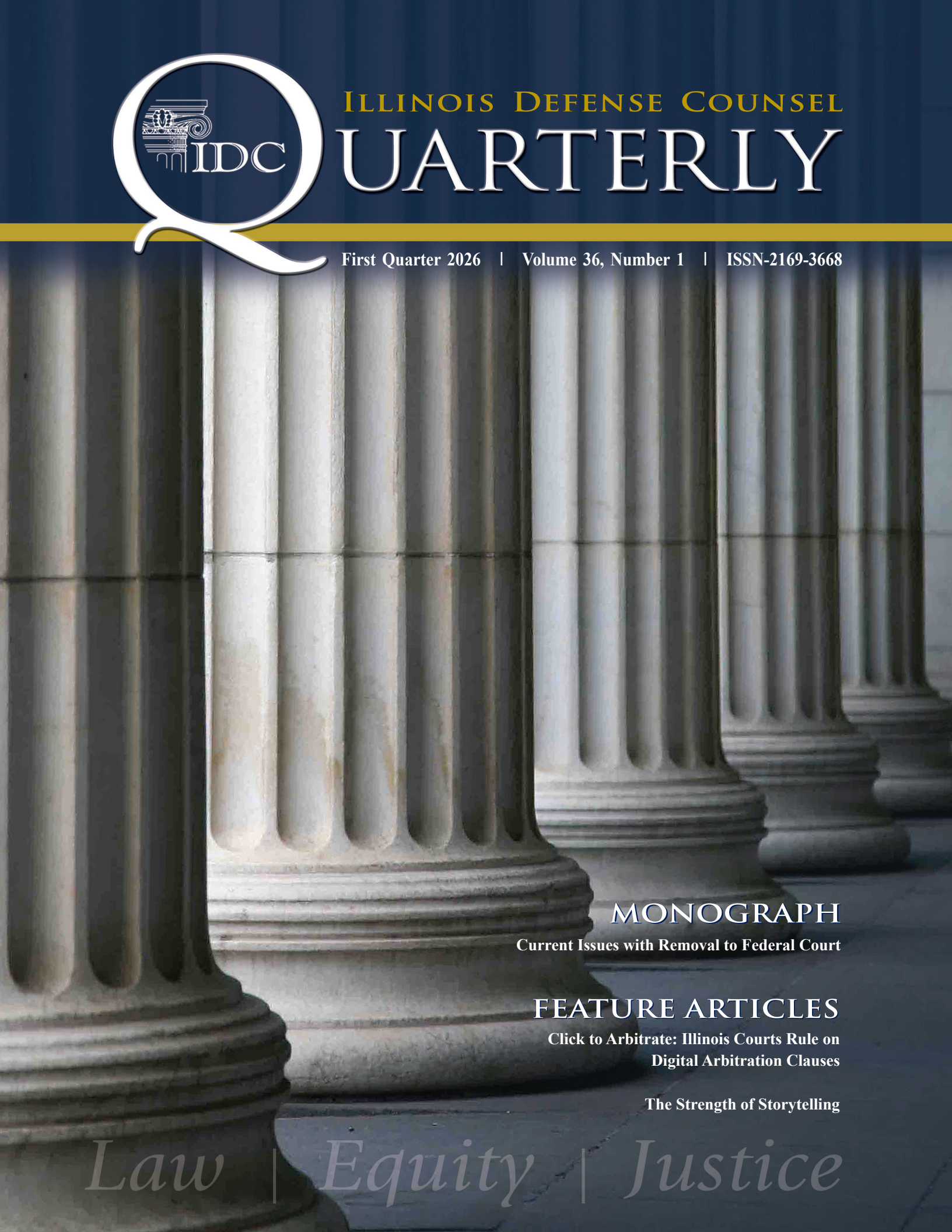

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MONOGRAPH

Current Issues with Removal to Federal Court

FEATURE ARTICLES

Click to Arbitrate: Illinois Courts Rule on Digital Arbitration Clauses

The Strength of Storytelling

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

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President's Message

R. Mark Cosimini
Rusin Law, Ltd., Champaign

As I reflect on the work of Illinois Defense Counsel over the past year and prepare for the upcoming year, one word rises above all others: gratitude.

I am deeply grateful to our Illinois civil defense attorney members, who consistently demonstrate professionalism, integrity, and an unwavering commitment to fairness. In a legal landscape that continues to evolve, your dedication to principled advocacy and collegiality remains the foundation of our organization and the reason it continues to thrive.

I extend sincere thanks to our Board of Directors, committee chairs, and volunteers who generously contribute their time and talents. Your leadership, thoughtfulness, and willingness to serve ensure that our association remains relevant, forward-thinking, and responsive to the needs of our members. The strength of this organization is a direct reflection of your efforts.

I am also grateful to our judiciary, our partners in the legal community, and our sponsors who support our mission and programming. Meaningful professional relationships, grounded in mutual respect, are essential to a well-functioning civil justice system, and we are fortunate to work alongside so many dedicated professionals.

As we begin a new year, IDC is proceeding with an aggressive agenda to provide education and training to our members. Our substantive committees will each provide a seminar focusing on timely issues specific to their areas of expertise. We will also be conducting our renowned deposition and trial academies. Additionally, we are starting a "Bench and Bar" program featuring members of the judiciary who are graciously donating their time to speak with our younger members about courtroom expectations and strategies to make more persuasive presentations.

As we begin a new year, IDC is proceeding with an aggressive agenda to provide education and training to our members. Our substantive committees will each provide a seminar focusing on timely issues specific to their areas of expertise.

Our legislative committee is already gearing up to monitor the activities of the policy makers in Springfield during the upcoming legislative session. It will provide assistance and recommendations to the sponsors of bills and their staffers with the intention of helping identify unforeseen consequences of proposed laws and with a relentless pursuit of fairness.

The IDC amicus committee is consistently analyzing pending litigation at the appellate courts and supreme court to assess whether amicus briefs are appropriate and will add a perspective useful for the courts' consideration.

In conjunction with being grateful for so many people and their efforts, IDC is sharing our blessings by implementing a plan to participate in charitable service projects on a quarterly basis. Most recently, we volunteered at Ronald McDonald House by preparing meals for the families who have a child receiving treatment at the University of Chicago Comer Children's Hospital. Next, our Spirit of the Season fundraiser generated over $1,200 for the Illinois Chapter of the American Foundation for Suicide Prevention. We look forward to contributing to causes that provide hope and aid to those who need a helping hand.

Finally, I want to acknowledge the resilience of our members. Practicing law is demanding, and civil defense work often requires navigating complex issues under significant pressure. Yet, you continue to serve clients, mentor younger lawyers, and contribute to the broader legal community with professionalism and grace.

It is an honor to serve as president of this association. Thank you for your trust, your engagement, and your continued commitment to excellence in civil defense practice across Illinois. I look forward to the year ahead and all that we will accomplish together.

Editor's Note

Jennifer K. Stuart
Amundsen Davis LLC., Chicago

Welcome to the 36th Volume of the *IDC Quarterly*. As we move further into 2026, we are pleased to present an issue rich with the practical analysis and legal scholarship our readers rely on.

Our Monograph for this issue provides an essential examination of the evolving complexities surrounding the removal of cases to Federal Court. We extend our sincere thanks to John Heil, Jr., C. William Busse, Ryne Sack, and Andrew Corkery for their comprehensive "deep dive" into this critical procedural area.

Causation remains a focal point of this edition. Anton J. Marqui explores proximate cause and "lost chance" claims within medical malpractice litigation, while Gregory Odom analyzes causation through the lens of toxic torts. Complementing these pieces, Alex Blair's Product Liability column warns of the dangers of expert "shortcuts" in causation opinions, and Robert Plichta's Feature explores the power of storytelling in expert testimony.

In the realm of Statutory and Municipal Law, James K. Borcia examines the recovery of damages for aggravation and inconvenience under the Illinois Consumer Fraud Act. Thomas G. DiCianni and Kathleen M. Kunkle provide clarity on the Illinois Public Employee Disability Act and the nuances of employment tax withholding. Further, Kevin Young analyzes the intersection of the statute of repose and the Tort Immunity Statute.

Our Procedural and Appellate columns offer vital "lessons learned." Irina Dmitrieva highlights the risks of violating *in limine* orders, while Glenn A. Klinger addresses the perils of forfeiture when failing to preserve issues at the trial level. Edward Grasse rounds out this section in the Amicus column by comparing federal and state standing rules.

We also tackle Modern Workplace and Digital Challenges. This issue features a guide to the enforceability of digital arbitration clauses by Donald Patrick Eckler and Taylor Rathwell, alongside Catherine Geisler's analysis of "Bring Your Own Device" (BYOD) risks. In the Civil Rights and Workers' Compensation columns, Keith B. Hill and Amber D. Cameron explore the modern intersections of social media, workplace violence, and employment law.

Finally, we address Professional Ethics. Donald Patrick Eckler and Laura Beasley investigate the increasing role of non-lawyers in the legal industry, while Kate Schnake navigates the delicate balance between zealous advocacy and unlawful discrimination in jury selection.

As always, the strength of the *IDC Quarterly* lies in the dedication and expertise of our contributors. We are profoundly grateful to the authors who shared their time and insights for this volume, ensuring that our members remain at the forefront of the ever-evolving Illinois legal landscape.

We also want to thank you, our readers, for your continued support and engagement. We hope the articles within this issue serve as valuable tools in your practice and provide fresh perspectives on the challenges we face as defense counsel. We invite you to reach out with your feedback or interest in contributing to future issues. We look forward to a successful and productive year ahead.

Feature Article

Donald Patrick Eckler and **Taylor Rathwell**
Freeman Mathis & Gary, LLP, Chicago

Click to Arbitrate: Illinois Courts Rule on Digital Arbitration Clauses

Illinois courts have historically favored arbitration as an efficient method for resolving disputes. Courts, however, are increasingly scrutinizing arbitration agreements for clarity, fairness, and party intent. In the Fourth District, the recent cases of *Nord v. Residential Alternatives of Illinois, Inc*. and *Mikoff v. Unlimited Development, Inc*. showcase this more nuanced approach. In *Nord*, the court held that the death of a nursing home resident terminated the contract, including its arbitration clause, due to the absence of survival language. The court emphasized that arbitration agreements are governed by standard contract principles and must clearly articulate their terms. As the drafter, the nursing home bore the consequences of ambiguous language. *Nord v. Residential Alts. of Ill., Inc.*, 2023 IL App (4th) 220669.

In contrast, *Mikoff* granted the defendants' motion to dismiss and compel arbitration for a Survival Act claim as the terms of the delegation clause of the arbitration agreement left it up to an arbitrator to determine if the discharge terminated the agreement. *Mikoff v. Unlimited Dev., Inc.*, 2024 IL App (4th) 230513, ¶ 53. The court reaffirmed that under the Federal Arbitration Act ("FAA"), arbitration is a matter of consent. Mikoff clarified that delegation clauses assign arbitrability questions to the arbitrator, and courts must honor this unless the validity of the arbitration agreement itself is directly challenged.

While Illinois courts have long applied these delegation clause and contract formation principles to arbitration agreements, recent cases have added a new layer of complexity as courts grapple with digital and online contracts. These technological developments signal a shift toward a more rigorous judicial review of arbitration clauses.

Peterson v. Devita

In *Peterson v. Devita*, 2023 IL App (1st) 230356, the plaintiff, Andrew Peterson, sustained permanent injuries after falling from an elevated porch at a rental property booked by a friend through Airbnb. *Peterson*, 2023 IL App (1st) 230356, ¶ 2. Peterson sued Airbnb and Airbnb moved to stay proceedings and compel arbitration, arguing that Peterson had accepted its terms of service, including a mandatory arbitration clause, when he created an account on their online platform years earlier, despite never booking a property himself. *Id.* ¶ 2.

The circuit court denied Airbnb's motion and Airbnb filed an interlocutory appeal. *Id.* ¶ 3. The appellate court affirmed, holding that the arbitration agreement did not apply to Peterson's claims. *Id.* ¶ 4. The court reasoned that Peterson's injuries did not arise from his use of Airbnb's platform, and he was neither a party to the booking, not bound by agency through his friend booking the property or equitably estopped from refusing to arbitrate the claims. *Id.* ¶ 4.

In its appeal, Airbnb contended that the trial court erred because Peterson agreed to mandatory arbitration when he created an account through Airbnb and accepted its terms of service and neither the trial court nor the appellate court has authority to rule on arbitrability because the arbitration agreement delegates to an arbitrator. *Id.* ¶ 3.

The court acknowledges the delegation clause but held that before determining the issue of whether the arbitrator is to decide issues of arbitrability, the court must first address whether the defendant's terms of service relate to the allegations in the plaintiff's complaint. *Peterson*, 2023 IL App (1st) 230356, ¶ 21. To analyze this, the court uses the

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provisions of the Federal Arbitration Act ("FAA") and not state law. *Id.* ¶ 22. The FAA emphasizes the fundamental principle that arbitration is a matter of contract. *Id.* (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). Using decisions regarding Airbnb from other jurisdictions, the court here reasoned that "a plaintiff's tort claims should not be subject to the arbitration provision in the absence of evidence they 'ever utilized Airbnb's services.'" *Id.* ¶ 35 (quoting *Airbnb, Inc. v. Rice*, 518 P.3d 88, 93 (2022)). It further stated, "the arbitration provision should apply only when the claims arise from a plaintiff's use of the Airbnb platform and not on the fortuity of a plaintiff having created an account." *Id.* ¶ 35.

The court held this was important because holding otherwise would lead to absurd results and a contract, not fate, dictates arbitrability. *Id.* ¶ 35. It uses the hypothetical of a member of a hotel chain using its Internet site with an arbitration clause like Airbnb. Its argued that this person could attend a wedding at one of the chain's hotels years later, sustain an injury from a falling chandelier, and have to arbitrate, regardless of the time passed or the location of the incident. *Peterson*, 2023 IL App (1st) 230356, ¶ 36. It was further argued that under the agency argument, even if the wedding guest had never made an account with the hotel chain, if the wedding host had an account, they would still have to arbitrate. *Id.*

In *Peterson*, Justice Lavin dissented, arguing that Peterson did agree to arbitrate disputes with Airbnb. *Id.* ¶ 50. The dissent argues that Peterson, by creating and maintaining an Airbnb account, accepted Airbnb's terms of service, which included an arbitration clause. *Id.* ¶ 51. The dissent emphasizes that Peterson's ability to use Airbnb's platform constituted consideration for the contract, even if he did not book a property himself because Airbnb offered Peterson use of the platform and Peterson accepted that offer. *Id.* ¶ 53.

Furthermore, the dissent argues that the plaintiff's friend acted as an agent for Peterson when booking the property, binding Peterson to the arbitration agreement. *Id.* ¶ 54. The dissent argues it is common for friends or family to book travel plans for others, creating an agency relationship where the person booking can bind others to terms including arbitration clauses. *Peterson*, 2023 IL App (1st) 230356, ¶ 54.

The majority rejected this view, warning against the "absurd consequence" of binding individuals to arbitration merely for having an account, regardless of their involvement in the transaction. As the court notes, "a contract, and not fate, dictates arbitrability." Id. ¶ 36.

Geller v. Uber Technologies

In *Geller v. Uber Technologies, Inc.*, 2025 IL App (1st) 241458-U, the First District addressed the enforceability of delegation clauses within phone app arbitration agreements in the context of a wrongful death claim. The appellate court reversed the circuit court's denial of Uber's motion to compel arbitration, emphasizing that the arbitration agreement between the parties clearly delegated the issue of arbitrability to the arbitrator. *Geller*, 2025 IL App (1st) 241458-U, ¶ 1.

The plaintiff's claims stemmed from the death of her husband, Mark Geller, in an automobile accident in which he was a passenger in an uber driver's vehicle. *Id.* ¶ 2. The plaintiff's complaint alleged survival claims on behalf of both her husband's estate and her own claims under the Wrongful Death Act 740 ILCS 180/0.01 et seq. (West 2022) for the loss of her husband. *Id.* ¶ 4. Uber made a motion to compel arbitration, based on the fact that both the plaintiff and her husband had independently agreed to Uber's terms of use when initially signing up for the Rider App, which included mandatory arbitration provisions. *Id.* ¶ 6. The Plaintiff did not dispute that such an arbitration agreement existed in Uber's terms of use, but she challenged its enforceability, arguing it was unconscionable and that her husband's agreement did not bind her personally or as administrator of his estate. *Id.* ¶ 7.

On appeal, Uber argued that the circuit court lacked authority to determine arbitrability because the plaintiff's arbitration agreement included a delegation clause requiring the arbitrator, not the court, to decide whether her wrongful death claims fell within the scope of the agreement. The appellate court agreed. *Id.* ¶ 9.

Central to Uber's argument was the delegation clause, which stated, "the Arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are applicable, unconscionable or illusory and any defenses to arbitration, including waiver, delay, laches or estoppel. If there is a dispute about whether this Arbitration Agreement can be enforced or applies to a dispute, you and Uber agree that the arbitrator will decide that issue." *Peterson*, 2023 IL App (1st) 230356, ¶ 9. Despite this clause, the circuit court ruled that while the estate's survival claims were subject to arbitration under the decedent's agreement, the plaintiff's wrongful death claims were not, as they did not arise from her own

use of Uber. The court did not address the delegation clause. *Id.* ¶ 10.

On appeal, the plaintiff argued that her arbitration agreement, including the delegation clause, was unconscionable. *Id.* ¶ 18. Uber argued that the delegation clause meant it was not up for the court to decide. *Id.* ¶ 9. The appellate court clarified that delegation clauses assign threshold issues, such as whether an arbitration agreement covers a particular controversy, to the arbitrator, but the court noted a critical limitation to this. *Id.* ¶ 20. If the arbitration agreement itself is challenged as unconscionable, courts must first resolve this issue before enforcing a delegation clause. *Id.* ¶ 20. In its reasoning, the court cited U.S. Supreme Court case, *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024), in which the court held that judicial review is required first when there are challenges to the validity of an arbitration agreement, even if different terms in the delegation clause exists. *Peterson*, 2023 IL App (1st) 230356, ¶ 20. Therefore, it was within its right to address the unconscionability argument. *Id.* ¶ 20.

Ultimately the court found the plaintiff's arbitration agreement was neither procedurally nor substantively unconscionable. *Id.* ¶ 29. It reasoned that the terms of use prominently disclosed the arbitration provision in bold, capitalized text, and the agreement was not hidden in fine print. *Id.* ¶ 24. The court emphasized that "consumers have a duty to read contracts to which they agree." *Id.* (citing *Reazuddin v. Gold Coast Exotic Imports, LLC*, 2022 IL App (1st) 210763-U, ¶ 76). The court reasoned that whether or not the plaintiff actually read the terms of use when she signed the Rider App, the arbitration agreement is not so confusing or obscure as to render it procedurally unconscionable. *Id.* ¶ 24. Regarding substantive unconscionability, the court held the agreement was not oppressively one-sided, as it required both parties to arbitrate and did not limit the plaintiff's potential recovery. *Peterson*, 2023 IL App (1st) 230356, ¶¶ 28-29 (citing *Hwang v. Pathway LaGrange Property Owner, LLC*, 2024 IL App (1st) 240534, ¶ 20; *Turner*, 2023 IL App (1st) 221721, ¶ 35).

Having found the agreement enforceable, the court turned to the delegation clause issue. *Peterson*, 2023 IL App (1st) 230356, ¶ 34. Under the FAA, parties can agree to arbitrate gateway issues of arbitrability. *Id.* ¶ 35. (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 67-68 (2019). If an arbitration agreement delegates issues of arbitrability to an arbitrator, a court may not decide those issues. *Id.* ¶ 35 Here, the delegation clause in this case clearly assigned such issues to the arbitrator. The court emphasized that because the plaintiff had not successfully challenged the delegation clause, all arbitrability disputes, including whether her wrongful death claims fell within the scope of the agreement, must be decided by the arbitrator. *Id.* ¶ 36. As the U.S. Supreme Court held, when a "contract contains an arbitration clause with a delegation provision, then, absent a successful challenge to the delegation provision, courts must send all arbitrability disputes to arbitration." *Id.* ¶ 37 (citing *Coinbase, Inc.*, 602 U.S. at 152).

Finally, although the plaintiff argued that her late husband's arbitration agreement did not bind her in her capacity as administrator of his estate, a potentially valid argument (*see Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 60), it was not the question presented to the court. *Peterson*, 2023 IL App (1st) 230356, ¶ 38. The sole question presented was who determines whether her wrongful death claims fall within the scope of her own arbitration agreement. The delegation clause provided the clear answer that the arbitrator decides. *Id.* ¶ 38. The Supreme Court of Illinois has since granted a petition for leave to appeal on September 24, 2025.

Costello v. Urban Air Adventure Park North Riverside

In *Costello v. Urban Air Adventure Park North Riverside*, 2025 IL App (1st) 250219-U, the First District addressed the enforceability of arbitration agreements entered into online. The circuit court denied without prejudice the defendant's motion to dismiss and compel arbitration, and the appellate court affirmed. *Costello*, 2025 IL App (1st) 250219-U, ¶ 1.

The defendants, who operated Urban Air Adventure Park, sought to compel arbitration based on three electronically signed agreements allegedly executed by the plaintiff prior to her visit. *Id.* ¶ 3. The plaintiff had filed suit alleging negligence after sustaining injuries while using a trampoline at the facility in 2021. The defendants attached two Release and Indemnification Agreements and a Membership and Annual Pass Agreement to their motion purported to be signed by the plaintiff, each containing arbitration clauses. *Id.* ¶ 4. However, they failed to include affidavits authenticating the agreements or verifying the plaintiff's electronic signature. *Id.* ¶ 4.

Each release agreement stated that claims, including those for personal injury, "shall be settled by binding arbitration." *Id.* ¶ 5. The last page of each of the release agreements contained an electronic signature with the plaintiff's name, date of birth, and contact informa-

tion. *Id.* ¶ 5. The circuit court allowed the plaintiff to conduct discovery before she responded to the motion. *Costello*, 2025 IL App (1st) 250219-U, ¶ 6. The plaintiff deposed the defendants' corporate representative who described the online registration process, which includes the customers electronically signing agreements, and individually submitting payment, ID, and participant photos. *Id.* ¶ 6. He testified he did not know whether any security measures were in place to verify the identity of the person electronically signing the agreements. *Id.* ¶ 6. He also could not confirm whether the plaintiff had signed her agreements. *Id.* ¶ 6.

The circuit court found a material factual dispute regarding the existence of a valid arbitration agreement and denied the motion. On appeal, the defendants argued that the agreements and deposition testimony sufficiently established that the plaintiff was bound to arbitration. The plaintiff again countered that the defendants failed to meet their burden under Illinois law and did not support the motion with the required affidavit establishing the authenticity of the agreements or verify her electronic signature. The appellate court agreed with the plaintiff. *Id.* ¶ 10.

Both parties cited the Illinois Uniform Electronic Transactions Act ("IUETA"), 815 ILCS 333/1, which governs electronic records and signatures. *Costello*, 2025 IL App (1st) 250219-U, ¶ 11. Under IUETA, an electronic signature is attributable to a person if it was their act, and this may be shown through the efficacy of any security procedure used to verify identity. IUETA 815 ILCS 333/9(a); *Costello*, 2025 IL App (1st) 250219-U, ¶ 11. The defendants argued that their registration process satisfied IUETA's requirements. However, the plaintiff emphasized the absence of any security protocol to confirm her identity. *Costello*, 2025 IL App (1st) 250219-U, ¶ 12. The appellate court found no Illinois precedent interpreting the IUETA on this issue and looked to *Friedmann v. Jefferson Cnty. Bd. of Educ.*, 647 S.W.3d 181, 189-90 (Ky. 2022), where the Kentucky Supreme Court held that electronic signatures were not adequately verified when only basic, publicly available information was collected. *Costello*, 2025 IL App (1st) 250219-U, ¶¶ 13-14.

The court here held that under Section 2-619(a)(9), a motion to dismiss based on an affirmative matter must be supported by an affidavit if the matter is not apparent from the face of the complaint. *Id.* ¶ 15. Further, the affidavit must include facts upon which the defense is based, attach authenticated documents upon which the movant relies and establish that the affiant can testify competently to the information contained in the affidavit. *Id.* ¶ 15; Ill. Sup. Ct. R. 191(a). The court held that the defendants failed to meet this standard, as they did not provide any affidavit or evidence authenticating the agreements or verifying the plaintiff's electronic signature and the corporate representative's testimony did not overcome this deficiency. *Costello*, 2025 IL App (1st) 250219-U, ¶ 16. Accordingly, the appellate court held the defendants did not meet their burden to establish a valid agreement to arbitrate and affirmed the circuit court's denial of the motion. *Id.* ¶ 18.

Johnson v. Human Power of N Company

In *Johnson v. Human Power of N Company*, 767 F.Supp.3d 845 (N.D. Ill., 2025), the U.S. District Court for the Northern District of Illinois addressed whether a consumer had validly assented to an arbitration agreement embedded in online messaging terms. *Johnson,* 767 F.Supp.3d at 848. The plaintiff, Luke Johnson, alleged that Human Power of N Company violated the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. §§ 227 et seq., by continuing to send him promotional text messages after he had unsubscribed. *Johnson,* 767 F.Supp.3d at 849. The defendant moved to compel arbitration based on a clause in its Messaging Terms and Conditions. The court denied the motion, holding that the plaintiff had not unambiguously manifested assent to the arbitration provision and that the defendant failed to provide reasonably conspicuous notice of the terms. *Id.* at 848.

In this case, the dispute centered on a pop-up advertisement on the defendant's website offering 15% off in exchange for signing up for promotional text messages. After clicking the pop-up, the plaintiff was redirected to a separate webpage to enter personal information and consent to receive messages. *Id.* at 848-849. Although the pop-up included a hyperlink labeled "View Terms," the court found that it did not clearly indicate that clicking the button was equivalent to agreement to the hyperlinked terms, including the arbitration clause. *Id.* at 851.

Applying the FAA, the court held that arbitration is a matter of contract and must satisfy three elements: (1) an enforceable agreement to arbitrate; (2) a dispute within the scope of the agreement; and (3) a refusal to arbitrate. *Id.* at 849 (citing *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 752 (7th Cir. 2017)). The plaintiff here disputed only the first element, and the burden was on the defendant to prove the existence of a valid agreement. *Johnson,* 767 F.Supp.3d at 850.

> The majority rejected this view, warning against the "absurd consequence" of binding individuals to arbitration merely for having an account, regardless of their involvement in the transaction. As the court notes, "a contract, and not fate, dictates arbitrability."

The court emphasized that "while the issues raised here—unwanted text messages and hyperlinked terms containing arbitration agreements—are thoroughly modern problems, courts must consider them through the lens of traditional contract interpretation." *Id.* at 850. Under Illinois law, mutual assent requires a "meeting of the minds," and websites must provide users with reasonable notice that clicking a button constitutes agreement to terms. *Id.* at 850 (citing *Sgouros v. TransUnion Corp.*, 817 F.3d 102, 1036 (7th Cir. 2016)). The court found that the defendant's disclosure merely informed users of its website that they were agreeing to receive messages, not that they were assenting to the terms. The hyperlink to the terms was labeled "View Terms" without any indication that clicking the button constituted agreement. *Id.* at 851-852. The court noted that the defendant could have used clearer language where the disclosures explicitly stated that clicking a button constituted agreement to terms, especially because the defendant has complete control over the language of its own website and could have written the disclosure in any way. *Id.* at 852.

Further, the court held that the website did not provide reasonably conspicuous notice. *Id.* at 852. The court evaluated notice from the objective perspective of the "reasonable online shopper—that is a person who is neither an expert nor a novice with technology." *Johnson,* 767 F.Supp.3d at 852 (citing *Domer*, 116 F.4th at 695). It stated that the Seventh Circuit instructs courts to consider five factors when deciding whether a disclosure has afforded fair notice: "(1) the simplicity of the screen; (2) the clarity of the disclosure; (3) the size and coloring of the disclosure's font; (4) the spatial placement of the hyperlink; and (5) the temporal relationship to the user's action." *Id.* at 853 (citing *Domer*, 116 F.4th at 695). Evaluating the factors, the court found that the hyperlink was not sufficiently prominent or proximate to the user's action and the registration and hyperlink were on separate pages. *Id.* at 853-854.

In its holding, the appellate court denied the defendant's motion to compel arbitration, finding that the plaintiff had not agreed to the arbitration clause in the Messaging Terms and Conditions. *Id.* at 854.

Practical Implications for Illinois Practitioners

These recent decisions from Illinois courts signal a heightened judicial scrutiny of arbitration agreements when they are entered into digitally. Practitioners should take note of the following:

Online Contract Formation: *Johnson* and *Peterson* emphasize the importance of clear and conspicuous notice in online agreements. Websites must explicitly inform its users that clicking a button constitutes assent to terms, including arbitration clauses. Vague or broad disclosures will not suffice.

Delegation Clauses: Courts continue to enforce delegation clauses, as in *Geller*, but only when the arbitration agreement itself is not challenged. Practitioners must be prepared to litigate unconscionability or formation issues before arbitrability is delegated.

Affidavit Requirements: As seen in *Costello*, motions to compel arbitration under Section 2-619(a)(9) must be supported by affidavits authenticating the agreement and verifying an electronic signature. Failure to do so may result in denial of arbitration, even if the agreement appears otherwise valid.

Conclusion

Illinois courts are adapting their traditional contract principles to address issues with digital agreements. While arbitration remains a favored method for dispute resolution, courts are demanding greater clarity, procedural fairness, and evidentiary support before enforcing arbitration clauses, especially those embedded within websites and apps.

Thomas G. DiCianni and **Kathleen M. Kunkle**
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Illinois Supreme Court Holds that Public Employers May Withhold Employment Taxes from Payments Made to an Injured Employee under the Illinois Public Employee Disability Act (5 ILCS 345/1(b))

In September of 2025, the Illinois Supreme Court answered a question frequently posed by municipalities: whether section 1(b) of the Illinois Public Employee Disability Act (5 ILCS 345/1(b)) ("Section 1(b)") prohibits public employers from withholding employment taxes from payments made to injured employees under Section 1(b). The Court ruled that it does not. This ruling has significant implications for municipal employers.

In *Bitner v. City of Pekin*, 2025 IL 131039, the Court largely analyzed the plain language of Section 1(b) and determined that public employers are not prohibited from withholding employment taxes from payments made to injured employees under Section 1(b). *Bitner,* 2025 IL 131039, ¶¶ 1, 28-30, 35. In other words, municipalities, as public employers, may legally withhold employment taxes from payments made to injured employees under Section 1(b). *Id*.

Section 1(b) provides: "Whenever an eligible employee suffers any injury in the line of duty which causes him to be unable to perform his duties, he shall continue to be paid by the employing public entity on the same basis as he was paid before the injury, with no deduction from his sick leave credits, compensatory time for overtime accumulations or vacation, or service credits in a public employee pension fund during the time he is unable to perform his duties due to the result of the injury, but not longer than one year in relation to the same injury." 5 ILCS 345/1(b). In short, Section 1(b) guarantees that a public employee who is injured while working will continue to receive his or her pay, unaffected in any way, while that public employee cannot work because of the injury. *Id*. In other words, municipalities are required to continue to pay their employees as they did when their employees were working while their employees cannot work due to a work-related injury. Under Section 1(b), municipalities are prohibited from adjusting or changing an injured employee's pay while that injured employee is off of work due to the injury.

In *Bitner*, the two plaintiffs worked for the City of Pekin (the "City") as police officers and both were injured in the line of duty. *Bitner,* 2025 IL 131039, ¶ 3. They both received payments from the City under Section 1(b); the City continued to pay the plaintiffs their "salaries in the same manner it did before the injuries occurred." *Id*. ¶ 4. In paying the plaintiffs, the City "continued to withhold the plaintiffs' employment taxes, including federal and state income taxes, Social Security taxes, and Medicare taxes." *Id*.

The *Bitner* plaintiffs filed suit, alleging the City violated the Illinois Wage Payment and Collection Act (820 ILCS 115/1 *et seq*.) (the "Wage Act") by withholding employment taxes from their pay under Section 1(b), and that the City "improperly required the plaintiffs to use previously accrued sick, vacation, or compensatory time while they were injured and off duty," which, the plaintiffs alleged, was also a violation of the Wage Act. *Bitner,* 2025 IL 131039, ¶ 5. After motion to dismiss practice, the plaintiffs filed a second amended complaint, removing all references to the Wage Act, and instead alleged a cause of action for declaratory relief seeking a determination that the City "violated [Section 1(b)] when it withheld employment taxes from the plaintiffs' disability payments and

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> [M]unicipalities are required to continue to pay their employees as they did when their employees were working while their employees cannot work due to a work-related injury.

deducted from the plaintiffs[] accrued sick, vacation, or compensatory time." *Id*. ¶ 7.

The trial court granted summary judgment in favor of the plaintiffs. *Id*. ¶¶ 17, 18. The trial court "concluded that [Section 1(b)] prohibits a public employer from withholding employment taxes" from payments made under Section 1(b). *Id*. ¶ 18. The trial court agreed with the plaintiffs, finding payments made under Section 1(b) "'are not income subject to withholding'" under federal law, and that Section 1(b)'s requirement that injured employees be paid "on the same basis" as pre-injury equated to payment of "gross pay" without any deductions, based on "'common sense.'" *Id*. ¶ 18.

The City appealed. The appellate court reversed the decision of the trial court and remanded the matter. *Id*. ¶ 21. While the appellate court "noted that [Section 1(b)] prohibits public employers from deducting sick, vacation, and compensatory time," the appellate court found that "[Section 1(b)] says nothing about taxes and nothing about prohibiting the withholding of employment taxes." *Bitner,* 2025 IL 131039, ¶ 21.

The Illinois Supreme Court "granted the plaintiffs' petition for leave to appeal." *Id*. ¶ 24. The only issue on appeal was whether the appellate court's interpretation of Section 1(b) was correct and whether Section 1(b) prohibits a public employer from withholding employment taxes from payments made under Section 1(b). *Id*. ¶ 26.

In affirming the appellate court's decision, the Supreme Court held that Section 1(b) does not prohibit a public employer from withholding employment taxes from payments made under Section 1(b). *Id*. ¶¶ 27, 35, 37. The Court first looked to the language of the statute itself. "Section 1(b) states, in relevant part, that an eligible employee who has suffered an injury in the line of duty that renders him unable to perform his duties 'shall continue to be paid by the employing public entity on the same basis as he was paid before the injury, with no deduction from his sick leave credits, compensatory time for overtime accumulations or vacation.'" *Id*., at ¶ 29, (quoting 5 ILCS 345/1(b)). The Court explained that "[t]he phrase 'on the same basis' clearly means that an injured employee is to be paid from the regular payroll in the same manner as if the employee was on duty and in active service." *Id*. ¶ 29. The Court concluded: "[t]hus, if a public employer withheld employment taxes from an employee's pay before an injury, it may continue to do so after the injury in order to maintain payment 'on the same basis' as before the injury." *Bitner,* 2025 IL 131039, ¶ 29.

The Court continued its analysis by looking to the text of Section 1(b). The Court noted that Section 1(b) "expressly prohibits public employers from deducting sick leave credits, compensatory time for overtime accumulations or vacation, or service credits in a public employee pension fund. Yet, the statute says nothing about prohibiting the withholding of employment taxes." *Id*. ¶ 30. The Court reasoned that "[u]nder the maxim of *expression unius est exclusion alterius* (the expression of one thing is the exclusion of any another), [Section 1(b)]'s listing of particular prohibitions is an implied exclusion of all others." *Id*. ¶ 30, (citing *Schultz v. Performance Lighting, Inc*., 2013 IL 115738, ¶ 17).

The Court rejected the plaintiffs' argument that Section 1(b) should not be read in this way and that payments to eligible employees under Section 1(b) "are not subject to federal income tax." *Bitner,* 2025 IL 131039, ¶¶ 31-33. The Court noted that the plaintiffs failed to provide any federal legal authority to support their argument and that the plaintiffs failed to provide "any IRS ruling specifically establishing that payments under [Section 1(b)] are exempt from federal income tax." *Id*. ¶ 33.

The Court also considered the practical implications of the plaintiffs' argument. The Court reasoned that the plaintiffs' argument was really a question of "administ[ration]." *Id*. ¶ 34. The Court explained that if an injured employee believes employment taxes have been improperly withheld, "the employee must seek a refund from the IRS or adjust his tax withholding by submitting a new W-4 withholding form to his employer." *Id*. ¶ 33. The Court noted that "the employee's tax liability [is] his own responsibility," and any "taxation question" should be "determined between the employee and the IRS." *Id*. ¶ 34. The Court reasoned that "[r]equiring public employers to determine when employment taxes should and should not be withheld from

[Section 1(b)] payments can create an administrative burden on the employer, particularly in cases where the employee is on repeated, short periods of leave and switching back and forth between being on and off active duty." *Id*. Under the Court's analysis, that "burden" is alleviated because the public employer can "simply continue the payments made to the employee in the same way they were made before the injury occurred." *Bitner,* 2025 IL 131039, ¶ 34.

Thus, the Court concluded, Section 1(b) "unambiguously does not prohibit a public employer from withholding employment taxes from payments made to an injured employee under that provision." *Id*. ¶ 35.

Municipalities, then, as public employers under Section 1(b), may continue to pay injured employees pursuant to Section 1(b) as they did prior to any injuries. In other words, municipalities may continue to pay any injured employees post-injury as they did pre-injury. The Illinois Supreme Court has affirmatively found that municipalities may deduct employment taxes from any payments made to injured employees under Section 1(b).

The impact of *Bitner* is significant to municipal employers. Prior to *Bitner*, it was a common practice for municipalities to pay injured police officers their entire gross pay without income tax deductions for the one year covered by the Public Employee Disability Act, hardly incentivizing officers to return to work before the year ended, even when capable. Ending the immediate tax benefit inherent in that common payment scheme (payment of gross pay without tax deductions) changes that dynamic.

Civil Rights Update

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Seventh Circuit Affirms Termination of Public High School Teacher Over Private Facebook Posts Made While on Vacation

In *Hedgepeth v. Britton*, 152 F. 4th 789 (7th Cir. 2025), the Court of Appeals for the Seventh Circuit upheld the termination of a public high school teacher, Jeanne Hedgepeth, finding that her Facebook posts were not protected by the First Amendment in the context of her employment. The case highlights the challenges public employers face with disciplining employees for off-duty speech on social media.

Jeanne Hedgepeth was a social studies teacher at Palatine High School, where she had worked for twenty years. *Hedgepeth*, 152 F.4th at 792. Before the social media posts that triggered her termination, Hedgepeth had been suspended twice by the district for inappropriate language in the classroom. In 2016, she erupted with profanity at her students after the presidential election. *Id.* In 2019, she again used profane language toward a student, which was recorded. *Id.* After each incident, the district warned her that future use of profanity or another similar incident would result in additional disciplinary measures, including possible termination. *Id.* at 792-93.

In 2020, amid the national protests following the death of George Floyd, Hedgepeth made a series of posts on Facebook. *Id.* at 793. At the time, she was vacationing in Florida. *Id.* The first post, evidently in response to media reports about the protests, included pictures from her vacation with the caption, "I don't want to go home tomorrow. Now that the civil war has begun I want to move." *Hedgepeth*, 152 F.4th at 793. A Facebook friend commented on her post, "Follow your gut! Move!!!!!!!!" to which Hedgepeth replied, "I need a gun and training." *Id.*

In another post, Hedgepeth reposted a meme evoking the high-pressure water hoses used against civil rights protesters in the early 1960s that read, "Wanna stop the Riots? Mobilize the septic tank trucks, put a pressure cannon on em . . . hose em down . . . the end." *Id.* Hedgepeth commented on her post, "You think this would work?" *Id.*

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Finally, Hedgepeth engaged in an online discussion with a former student about race in America. *Id.* at 793. During the discussion, Hedgepeth commented, "I find the term 'white privilege' as racist as the 'N' word." *Id.*

Although Hedgepeth set her Facebook account to "private" and did not accept "friend requests" from current students, about 80% of her roughly 800 Facebook friends were former students. *Hedgepeth*, 152 F.4th at 793.

The school board held public meetings (with many speaking out), and ultimately voted to fire Hedgepeth. *Id.* at 793-794. Hedgepeth requested a hearing before the Illinois State Board of Education, where she was represented by counsel, and argued her termination was wrongful because her Facebook posts were protected by the First Amendment. *Id.* at 794. The hearing officer applied the balancing test under *Pickering v. Board of Education*, 391 U.S. 563 (1968) and found that her dismissal did not violate her First Amendment rights. *Hedgepeth*, 152 F.4th at 794.

Because Hedgepeth spoke, through her Facebook posts, as a citizen on a matter of public concern, the Seventh Circuit applied *Pickering* balancing to weigh her First Amendment interests against the school district's interest in workplace efficiency. Id. at 795. After weighing the facts, the court concluded that the district's interest in addressing actual disruptions and averting future disruption outweighed Hedgepeth's speech interests

Following her posts, the school district received numerous complaints—not only from current students, but also from alumni, parents, and the media. *Id.* After an investigation, Hedgepeth was informed that the district planned to recommend her dismissal. *Id.* The recommendation was based on Hedgepeth's prior disciplinary sanctions and warnings, her Facebook posts, the public reaction to them, and her "lack of any understanding or appreciation for why many people found her comments objectionable." *Id.*

While awaiting decision on her administrative hearing, Hedgepeth sued the district and various board members in federal court, claiming her termination violated her First Amendment rights. *Id.* The district court granted summary judgment in favor of the defendants. *Id.* On appeal, the Seventh Circuit affirmed the judgment of the district court. *Id.* at 799.

Because Hedgepeth spoke, through her Facebook posts, as a citizen on a matter of public concern, the Seventh Circuit applied *Pickering* balancing to weigh her First Amendment interests against the school district's interest in workplace efficiency. *Id.* at 795. After weighing the facts, the court concluded that the district's interest in addressing actual disruptions and averting future disruption outweighed Hedgepeth's speech interests. *Id.* at 796. The court found the district produced "ample" evidence of actual disruption. *Hedgepeth*, 152 F.4th at 799. When the district board voted to fire Hedgepeth, the district had received over 110 emails about her posts. *Id.* at 796. The record contained many examples of students and parents expressing concern about Hedgepeth's fitness as a teacher. *Id.* at 797. The court also found the disruption was not limited to students—it rippled through the community. *Id.* The posts sparked outrage, drew media attention (both local and international), and forced the district into a costly and time-consuming public relations response. *Id.* The record also confirmed that Hedgepeth's posts interfered with core district functions by diverting staff and resources to address concerns from the community and press. *Id.* Finally, the court found the district was entitled to view these disruptions in the context of Hedgepeth's entire employment record—which included two prior similar incidents—and consider the potential for future disruptions. *Hedgepeth*, 152 F.4th at 797. The court observed the district "was not required to wait around for a fourth violation." *Id.*

Lessons from *Hedgepeth*

Evidence of disruption

The appellate court's decision highlights what is needed to justify a restriction of speech in the public

employment context. The court stressed that the disruption must be supported by evidence and not mere speculation. *Id.* at 796. In *Hedgepeth*, the court described the evidence the district produced as "ample." *Id.* at 799. The court noted that the level of disruption needed varies with context. *Id.* at 796. "The more serious and politically charged the message, the stronger the government's justification must be." *Id.* (citations omitted). "By contrast, when the speech is less serious, portentous, and political, a lighter justification by the employer may suffice." *Hedgepeth*, 152 F.4th at 796 (quotations and citations omitted). In *Hedgepeth*, the court found the fact the posts were either jokes or sharing the views of others, and used vulgar language, weakened the speech's interests. *Id.* at 798. The court also noted that employers enjoy more leeway in restricting the speech of public-facing employees. *Id.* Finally, time, place, and manner of speech factor into the analysis. *Id.*

"Special knowledge"

The appellate court's decision also highlights that not all public employee speech on a matter of public concern has the same constitutional value. The court observed that in some cases, *Pickering* balancing must presumptively elevate an employee's expressive interest over the employer's interest in avoiding disruption. *Id.* at 797. For example, where an employee's speech is informed by specialized expertise or knowledge gained through their status as a public employee (an employee learns of misconduct and brings the issue to light). In *Hedgepeth*, the court found that Hedgepeth's speech did not involve special knowledge, and while her speech was "not devoid of constitutional value," the disruption caused by her conduct was sufficient to outweigh her interest in expression. *Id.* at 798.

"Private" social media posts

The appellate court's decision also highlights that speech made outside the workplace may be less disruptive to the efficient functioning of the office, but speech on social media amplifies the distribution of the speaker's message, which increases the potential, in some cases, exponentially, for disruption, thereby favoring the employer's interest in efficiency. Additionally, although social media may be technically private, audience choice may "render any claim to private speech illusory." *Hedgepeth*, 152 F.4th at 798. In *Hedgepeth*, the court found that Hedgepeth's decision to post her comments to her private Facebook friends—80% of whom were part of the high school community—carried a clear risk of amplification. *Id.* The court observed her posts "functioned more like a stage whisper than a secret." *Id.*

The "heckler's veto"

Finally, the appellate court's decision highlights the proper application of the rule against a "heckler's veto." When someone exercises their First Amendment right to free speech, the government is not allowed to shut down the speech just because other people do not like the message. This is known as the rule against a "heckler's veto." In *Hedgepeth*, the court rejected Hedgepeth's argument that her termination amounted to affording the high school community a "heckler's veto" over the content of her speech. *Id.* at 798. The court found this argument failed to account for the unique relationship Hedgepeth had to her audience as a public school teacher and therefore a role model for others in the high school community. *Id.* According to the court, the community members were not outsiders seeking to heckle Hedgepeth into silence, rather they were participants in public education, without whose cooperation public education could not function. *Id.* at 799.

For public employers and public employees alike, *Hedgepeth* offers both a cautionary tale and a roadmap. Public employees should carefully consider how social media posts might interfere with their work. Public employers should be aware that public employees do not relinquish their First Amendment rights as a condition of public service, and may post on social media on matters of public concern as long as their speech is not disruptive to the workplace.

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Workers' Compensation Exclusivity Revisited: What *Kordas* Reveals about Employer Liability After Workplace Violence

On October 8, 2025, the Illinois Appellate Court, Third District, issued a decision addressing the scope of the exclusive remedy provision of the Illinois Workers' Compensation Act. In *Kordas v. Bob's All Bright Electric*, 2025 IL App (3d) 240482, the court 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.

Background

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—namely, that the injury: (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of his employment; or (4) is not compensable under the Act. *Id*. The Act also carves out an exception that allows a civil suit to proceed if the employer intentionally inflicted, commanded, or expressly authorized the injury, even if the injury would otherwise be compensable under the Workers' Compensation Act.

Plaintiff Kamil Kordas (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. Plaintiff alleged his employer, All Bright Electric (All Bright), knew or should have known about the co-worker Thomas Clarizio's (Clarizio) mental health issues and negligently hired and supervised him.

Appellate Court Findings

In *Kordas*, the Illinois Appellate Court, Third District, affirmed summary judgement for employer All Bright, explaining that plaintiff Kordas had failed to meet the burden necessary to circumvent the Workers' Compensation Act's exclusive remedy provision.

Kordas was working on an electrical job with a co-worker, Thomas Clarizio, when Clarizio struck him in the head multiple times with a shovel during what was later described as a psychotic episode. *Kordas*, 2025 IL App (3d) 240482, ¶ 1. After the unprovoked assault, Clarizio, who happened to be the owner's son, fled the worksite in a company van and was later arrested. *Id*. ¶ 3. At the time of the incident, Kordas had been working with and supervising Clarizio on jobsites for approximately 5 years. *Id*. ¶ 6. Clarizio later attributed his attack to his bipolar disorder and failure to take his prescribed medication. *Id*. ¶ 14. Clarizio testified that he had been diagnosed with bipolar disorder in 2020 and hospitalized multiple times for mental health treatment. *Id*. ¶¶ 14-15. Clarizio admitted Kordas had not provoked him in any way and that he could not explain his behavior. *Id*. ¶ 14. Kordas was hospitalized for several days due to his injuries and then sued both Clarizio and their employer, Bob's All Bright Electric, Inc., alleging All Bright of negligent hiring and supervision of Clarizio, failure to protect Kordas, and intentionally concealing Clarizio's dangerous propensities. *Kordas*, 2025 IL App (3d) 240482, ¶¶ 1, 4-5. All Bright, owned by Clarizio's father Bob, acknowledged it knew Clarizio had mental health challenges but denied any knowledge that he posed a danger to others, especially any other employees. *Id*. ¶ 12.

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All Bright moved for summary judgment, arguing the exclusive remedy provision of the Illinois Workers' Compensation Act barred the claim and no exception applied. *Id*. ¶ 16. The circuit court agreed and denied Kordas' motion to reconsider, making the ruling immediately appealable under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). *Id*.

The Illinois Appellate Court, Third District, upheld the ruling, emphasizing the injury to Kordas was "accidental" from the employer's perspective because All Bright had not directed or authorized the assault. *Id*. ¶ 28. The court stressed that although All Bright 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 as risk of injury. *Id*. ¶¶ 29-31.

The court rejected arguments that the attack stemmed from a personal dispute and therefore was outside the scope of employment. The record showed the two men had no relationship outside of work, and any prior tension between them was work-related. *Kordas*, 2025 IL App (3d) 240482, ¶¶ 38-39. Clarizio 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. *Id*.

Finally, the court found no basis that Kordas' injuries were non-compensable under the Act. Although Kordas asserted that his medical bills had not been paid by workers' compensation, he had never pursued benefits under the Act for his injuries and there was no evidence that had he done so his claim would have been denied. *Id*. ¶ 41. Therefore, Kordas did not meet his burden under the fourth exception to the exclusive remedy provision. *Id*.

> *Kordas* reinforces the principle that workers' compensation remains the primary remedy for employees of workplace injuries, including those that arise from mental health episodes. At the same time, it is incumbent on employers to maintain a safe work environment, respond to behavioral concerns, and document concerns as they arise while still respecting employee privacy.

Dissent

Justice Anderson dissented, arguing there remained questions of material fact precluding summary judgement, especially as to whether All Bright's conduct constituted intentional concealment and whether the attack was motivated by personal animosity. *Id*. ¶¶ 46-53. With regard to the first exclusivity provision, he argued there was sufficient evidence in the record to create a question as to whether the employer ignored or even concealed Clarizio's mental health issues to a degree that intentionally placed Kordas in danger. *Kordas*, 2025 IL App (3d) 240482, ¶ 48. A trier of fact could conclude the employer had knowledge Clarizio was involved in prior family altercations, had been hospitalized for mental health reasons, and often failed to take his antipsychotic medication, allowing the employer to knowingly place Kordas at risk. *Id*. In addition, the dissent noted evidence suggesting a question of material fact under the second exception as the working relationship between Kordas and Clarizio was volatile and Clarizio did not like Kordas personally, which could support a finding of personal motive. *Id*. ¶¶ 52-53. While disagreeing with the majority's decision to affirm summary judgement in this matter, the dissent underscored that the exclusivity provision of the Act should not shield employers who knowingly expose their employees to serious risks of harm.

Takeaways

Kordas adds to body of case law examining employer knowledge of risk when determining whether an injury is compensable under the Workers' Compensation Act. As the court confirmed, 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 under Section 5(a): 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.

In determining if the injury was "accidental," courts have focused on whether the employer directed the attack or ignored or concealed a danger to an employee that led to the injury. *Kordas* highlights that employer awareness alone of a risk is insufficient. What level of awareness of a risk is enough to overcome the exclusive remedy provisions of the Act? In determining the level of awareness, *Kordas* focuses on whether the employer knew of the coworker's violent history or that it intentionally concealed such danger. Where there is no record of prior aggression or violence, courts may be reluctant to find that a general awareness of mental instability creates liability on the employer beyond those in the Act.

Kordas reinforces the principle that workers' compensation remains the primary remedy for employees of workplace injuries, including those that arise from mental health episodes. At the same time, it is incumbent on employers to maintain a safe work environment, respond to behavioral concerns, and document concerns as they arise while still respecting employee privacy. The more an employer knows about a credible risk and the closer conduct approaches a disregard or intentional concealment of that risk, the more likely a civil claim against an employer may survive. When a credible threat of harm exists, employers should engage in proactive, good-faith risk mitigation and avoid conduct that could be characterized as intentional concealment while still complying with applicable privacy and employment laws.

Toxic Tort

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Illinois Appellate Court Weighs in on Proximate Cause Instruction for Toxic Tort Cases

Defense attorneys in toxic tort litigation understand the importance of the sole proximate cause defense. Often, a defendant will argue that a plaintiff's medical condition was caused by exposure to another defendant's or a non-party's products, a genetic mutation, or exposure to toxins unrelated to the defendant. For example, in a case involving mesothelioma, the defendant may argue that a BAP1 germline mutation caused the plaintiff's illness rather than exposure to asbestos. This defense has become particularly important based upon recent scientific developments. *See* Nielsen, D.M., *et al.*, *Bayesian Analysis of the Rate of Spontaneous MM Among BAP1Mutant Mice in the Absence of Asbestos Exposure*, Sci. Rep. 15, 169 (2025). Frequently, in cases involving lung cancer, defendants argue that cigarette smoking caused the plaintiff's condition.

The Illinois Supreme Court has recognized a defendant's right to pursue a sole proximate cause defense and introduce evidence to support that defense. *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 448 (2009). Despite the Supreme Court's mandate, plaintiffs' attorneys regularly seek to exclude evidence of other potential causes. If unsuccessful with such an argument, they may try to use jury instructions to defeat or minimize a sole proximate cause argument. Specifically, plaintiffs' attorneys may attempt to introduce the long form of Illinois Civil Pattern Jury Instruction Number 15.01, which defines proximate cause. The long form illustrates that a defendant's conduct may be the proximate cause of a plaintiff's injury, even if there are other causes.

Recently, the Illinois First District Appellate Court addressed an effort to use the long form of IPI Civil No. 15.01 in response to a sole proximate cause argument. In *Evard v. Monsanto Co.*, the plaintiffs alleged that they developed non-Hodgkin lymphoma caused by their

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exposure to the herbicide Roundup and to polychlorinated biphenyls (PCBs), both designed, manufactured, and distributed by Monsanto. 2025 IL App (1st) 241235, ¶ 1. During trial, Monsanto argued that genetic replication errors, not exposure to Roundup or PCBs, caused the plaintiffs' non-Hodgkin lymphoma. During a jury instruction conference, the plaintiffs proposed the long form of IPI Civil No. 15.01, which reads:

> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiffs' injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.

By contrast, Monsanto proposed the short form of the instruction, which reads: "When I use the expression 'proximate cause,' I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury." The trial court agreed and provided the jury with the short form of Instruction 15.01. The trial court believed the short form was appropriate because Monsanto was the only defendant at trial. Ultimately, the jury reached a verdict in favor of Monsanto.

On appeal, the plaintiffs argued that the trial court erred by failing to give the long form of Instruction 15.01. According to the plaintiffs, because proximate cause was the critical issue at trial, the court's failure to give the long form instruction was reversible error.

In analyzing the issue, the First District explained that the first sentence of Instruction 15.01, which constitutes the short form of the Instruction, must always be given. According to the Notes on Use to Instruction 15.01, the long form should be used when there is evidence of a concurring or contributing cause to the injury or death. IPI Civil No. 15.01, Notes on Use (rev. Oct. 2021). In cases where there is no evidence that the conduct of any person other than a single defendant was a concurring or contributing cause, the short form may be given. *Id.*

The Comment to the Instruction states that the long form is appropriate "where there is evidence that something or the acts of someone other than the negligence of the defendant . . . was a proximate cause of the injury or death." IPI Civil No. 15.01, Comment (rev. Oct. 2021). The appellate court has reconciled the Notes on Use and the Comment by finding that the long form seems to be preferred, with suggested use of the short form being discretionary, in situations where there is only one plaintiff and one defendant. *Lewis v. Cotton Belt Route-Saint Louis Southwestern Ry. Co.*, 217 Ill. App. 3d 94, 115 (5th Dist. 1991).

The court explained that simply because the short form may be used in situations where there is only one defendant, that does not prevent a plaintiff from arguing that liability attaches if the defendant's acts were a proximate cause of the plaintiff's injury, even if other causes existed. The court reasoned that the short form adequately informs jurors that they are not limited to determining a single cause of a plaintiff's injury.

As discussed, the trial court issued the short form because Monsanto was the only defendant at trial. Although Monsanto presented evidence of other potential causes of the plaintiffs' injuries —namely, genetic replication errors— there was no evidence that the conduct of any person other than Monsanto was a concurring or contributing cause. Consequently, the short form could be used according to the Notes on Use to IPI Civil No. 15.01.

The court next concluded that it would have been preferable for the trial court to use the long form because this was a complex cause where "cause was very much at issue." The court, however, acknowledged that the short form accurately conveyed the law of proximate cause to the jury and did not limit the jury to determining a single cause of the plaintiffs' cancer. In fact, during closing arguments, the plaintiffs' counsel repeatedly argued that there could be multiple causes of the plaintiffs' cancer and that to establish proximate causation, the jury only had to find that Roundup or PCBs was "a cause," not "the cause." Thus, the court could not say that the trial court abused its discretion.

In making this finding, the court relied on *Campbell v. Wagner*, 303 Ill. App. 3d 609 (4th Dist. 1999). In that case, the plaintiff suffered a perforated colon during a hysterectomy, which she argued could have been caused by a hematoma and her surgeon's negligence. The surgeon and her employer argued that the hematoma caused the perforated colon. While the Fourth District Appellate Court suggested the long form of IPI Civil No. 15.01 might have been preferable, it found no abuse of discretion by the trial court issuing the short form. The court reasoned that the short form was proper because the only person's negligence alleged to have caused the injury was that of the surgeon, even though the hematoma, which no one argued was the result of negligence, was a possible cause of the perforated colon.

The First District also discussed an opinion relied upon by the plaintiffs, *Vlahovich v. Betts Machine Co.*, 45 Ill.

2d 506 (Ill. 1970), where the Illinois Supreme Court found the trial court erred by issuing the short form of IPI Civil No. 15.01. In that case, however, the plaintiff alleged strict liability. The strict liability burden of proof instruction stated that to prove strict liability, the plaintiff had to show the unreasonably dangerous condition at issue was **the** proximate cause of his injury. The Supreme Court reasoned that this instruction, in conjunction with the short form of IPI Civil No. 15.01, unduly restricted the jury's consideration of possible concurrent causes. In *Evard*, the jury was not limited to determining a single cause of the plaintiffs' injuries.

As discussed, the sole proximate cause defense is often an important defense in toxic tort litigation. Defense counsel should take efforts to ensure that the defense is not diluted through jury instruction language. *Evard* provides support for defense counsel planning to make a sole proximate cause argument at trial. Specifically, counsel can rely on this opinion to oppose a plaintiff's attorney's efforts to use the long form of IPI Civil Instruction No. 15.01 as a means of confusing the jury on the issue of causation and the plaintiff's burden of proof.

It is not uncommon in toxic tort litigation for plaintiffs to settle with or dismiss all but one defendant prior to trial, particularly in asbestos litigation. Additionally, if a defendant's sole proximate cause defense is based on a genetic mutation, the defendant is not arguing that another person's conduct contributed to the plaintiff's injury. Therefore, in those situations, use of the short form is consistent with the Instruction's Notes on Use.

Practice Development

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Raise It or Lose It: Appellate Courts Don't Consider What You Don't Say

If you spend enough time reading Illinois appellate decisions, certain themes repeat. One of the most consistent is the court's frustration when a party asks it to resolve an issue that was never presented to the trial judge. We all learned the rule: *arguments not raised below are forfeited.* But *Dunbar v. Carlson*, 2025 IL App (4th) 241143-U, is a fresh reminder that forfeiture is not a formality—it is a professional pitfall. And it is preventable.

Your goal as defense counsel is not simply to win motions or trials. It is to preserve *every issue, theory, or argument* so that, if the case heads north on appeal, the record is built, the issues are preserved, and the client is protected. The appellate court cannot fix an undeveloped record. Nor will it stretch to consider new theories that counsel never raised when it mattered.

Plenty of cases leading up to *Dunbar* deliver the same message: the trial court is the main event. Appellate review is not an opportunity to rewrite the case. *See, e.g., Lewis v. OSF Healthcare Sys.*, 2022 IL App (4th) 220016, ¶ 60 (reaffirming that unraised arguments are forfeited); *Walsh v. Sklar*, 2025 IL App (1st) 231830, ¶ 60 (warning that appellate discretion to overlook forfeiture is narrow and does not erase the forfeiture doctrine). This follows the broader theme of earlier Practice Development pieces: the fundamentals matter. Just as understanding the intersection of litigation and insurance, abiding by discovery rules ethically, or applying citation rules correctly anchors competent practice, preserving issues at the trial level is a core skill every defense lawyer must master.

What *Dunbar* Actually Says

Here is the key passage:

> Because defendants did not present those arguments to the trial court, we deem them forfeited for purpose of this appeal. At oral argument, defense counsel urged us to address these new claims, arguing that this court can affirm the trial court on any basis in the record. Counsel's argument misappropriates a legal principle giving us the discretion to act *sua*

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sponte when affirming a lower court and expands it to give him license to raise new arguments on appeal. This cannot be what *Owen* means; otherwise, the law on forfeiture or waiver would be a nullity.

Dunbar, 2025 IL App (4th) 241143-U, ¶ 28 (citations omitted). The reference to *Owen* comes from the defendants-appellees' reliance on *Owen v. Vill. of Maywood*, 2023 IL App (1st) 220350, ¶ 18, where the court simply observed: "we may affirm on any grounds in the record, regardless of whether the circuit court relied on those grounds or whether its reasoning was correct." That's it. The *Owen* court did not discuss forfeiture. It did not invite new arguments on appeal. It did not assess waiver. *Owen* merely restates the long-standing principle that a reviewing court may affirm a correct result even if the trial court's reasoning missed the mark – a far cry from creating a loophole to introduce new theories on appeal.

In that brief but pointed section, the *Dunbar* court reaffirmed three critical points: (1) no new issues, theories, or arguments may be raised on appeal; (2) the "affirm on any basis in the record" doctrine cannot be stretched to smuggle in unraised material; and (3) forfeiture governs unless the reviewing court—not counsel—chooses to overlook it. Do not expect that lifeline from the court. Ever.

Why Defense Lawyers Still Make This Mistake

1. *Winning one argument and ignoring the rest*: If counsel prevails on a primary theory, they often skip alternative arguments. On appeal, that becomes fatal.
2. *Misusing "any basis in the record"*: This doctrine empowers the court, not counsel. It is not a license to introduce new issues.
3. *Page limits and time pressure*: Briefing constraints lead lawyers to focus narrowly, but narrow is not the same as underdeveloped.
4. *Believing the appellate court will fix it*: The court will not—and *Dunbar* shows it may call out the attempt.

Forfeiture is not a technicality—it is a reflection of how litigation is supposed to work. Trial courts rule on the issues presented, parties litigate with notice, and appellate courts review what actually happened below. When counsel withholds or fails to make arguments at the trial level, the entire structure breaks. This is why forfeiture remains a bedrock doctrine in Illinois appellate practice. It is also why Illinois courts, again and again, decline to consider new theories raised for the first time on appeal.

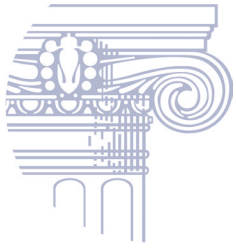
Practice Tips: Avoid Becoming the Next *Dunbar* Example

1. *Build a complete record*: Even if your main argument is strong, include the alternative theories, *e.g.*, statutory interpretation, constitutional issues, contract construction, procedural defects. You never know which one will carry the day.
2. *Raise issues early and clearly*: Judges are far more receptive when arguments appear in the first responsive pleading or opening motion.
3. *Say it plainly*: If preserving an argument solely for appeal, state that on the record. It helps show intentionality, not after-the-fact scrambling.
4. *Use supplemental briefing when needed*: If a new issue emerges, do not wait until reconsideration or appeal. File a short, targeted supplement.
5. *Do not rely on the "any basis in the record" doctrine*: It does not rescue forfeited arguments. It simply allows a reviewing court to affirm without endorsing the trial court's reasoning.

Conclusion: The Trial Court is the Last Place to Be Silent

In earlier articles, I have noted that competency is built through consistent habits—mastering seminal authority, staying abreast of developments, and avoiding shortcuts that undermine credibility. Issue preservation is part of that same discipline. Sloppiness at the trial court level creates real downstream harm: (a) appellate counsel has less to work with; (b) the client faces increased risk; (c) the court loses confidence in counsel; and (d) your credibility suffers. All of it is avoidable.

Dunbar is not a groundbreaking case. It is a clear reminder that Illinois courts expect lawyers to present their arguments in the correct forum, at the correct time, and with the correct level of professional rigor. The takeaway is unmistakable: If you want the appellate court to consider an issue, you must give the trial court the first chance to hear it. Period. Raise it. Preserve it. Protect the record. Your client—and your future self—will benefit.



Amicus Committee Report

Edward K. Grassé
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The Illinois Supreme Court recently heard argument and issued its opinion in *Fausett v. Walgreens Co.*, 20205 IL 131144. *Fausett* involves whether certain federal credit card statutes permit claims by plaintiffs who suffered no actual or concrete injury. The United States Supreme Court has held that plaintiffs who have not suffered an injury are not proper class representatives in federal court. But the Appellate Court, Second District, ruled that Illinois standing rules apply to the interpretation of these federal statutes when suits are brought in Illinois courts. *Fausett v. Walgreens*, 2024 IL App (2d) 230105. The appellate court held that Illinois courts would allow such plaintiffs to act as class representatives.

The United States Supreme Court has held that plaintiffs who have not suffered an injury are not proper class representatives in federal court. But the Appellate Court, Second District, ruled that Illinois standing rules apply to the interpretation of these federal statutes when suits are brought in Illinois courts.

On September 23, 2025, the Illinois Supreme Court heard oral argument, and on November 20, 2025, issued its opinion. The Court first reaffirmed that federal standing rules and Illinois standing rules are distinct. Illinois standing rules govern suits filed in Illinois state courts, even when a case involves the application of a federal statute.

The Court then addressed standing and the distinction between statutory standing and common-law standing. Statutory standing is created by the legislature, and the statute determines "who shall sue[] and the conditions under which the suit may be brought." *Fausett v. Walgreen Co.*, 2025 IL 131444, ¶ 39. Common-law standing "requires an injury in fact to a legally recognized interest." *Id.* The Court concluded that the federal statute at issue did not "define the parties who have the right to sue for statutory damages established in" the statute. *Id.* Accordingly, the plaintiff was required to satisfy common-law standing in order to act as class representative. *Id.*

The Court next considered whether this plaintiff is, in fact, a no-injury plaintiff. Much of the argument focused on whether the court's decision in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, controls. In *Rosenbach*, the court interpreted the term "aggrieved" in the Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq*. BIPA provides a private right of action to an "aggrieved" person for the unlawful use of biometric information. The court held that a plaintiff may bring such an action because BIPA authorizes recovery of actual damages or statutory liquidated damages.

The plaintiff in *Fausett* argued that *Rosenbach* governs and that the complaint alleges an injury sufficient to confer standing. The plaintiff also argued that the statute at issue establishes damages and therefore establishes injury. The defense contended that the plaintiff suffered no cognizable injury and that the statute does not provide for the type of damages recognized in *Rosenbach*.

The Court held that *Rosenbach* and similar cases involve statutory standing and are inapplicable to the plaintiff's claims here. The Court evaluated the plaintiff's alleged injury and found that, at most, she demonstrated an increased risk of identity theft. *Fausett*, 2025 IL 13144, ¶ 39. An increased risk of harm constitutes a speculative future injury and is insufficient to confer standing. *Id.*

This decision is significant for Illinois and for defendants facing similar claims. Had the court ruled for the plaintiff, Illinois would likely have seen a surge of suits brought under comparable federal statutes by no-injury plaintiffs seeking to avoid federal standing requirements. Plaintiffs litigating such claims in Illinois will now need to demonstrate a concrete injury rather than rely on the possibility of future harm.

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.

Feature Article

Robert Plichta
ESi

The Strength of Storytelling

Storytelling is a critical skill that experts must develop as a means of communicating their research, findings, and opinions to the jury. For most legal matters, attorneys rely on the experts to review case information, conduct investigations, and develop opinions based upon the expert's work. In assessing the potential expert's engagement, the attorney considers the expert's background, experience, and past case work. However, storytelling, one of the major skillsets necessary for the expert's presentation, is rarely discussed in the pre-engagement of the expert.

Storytelling provides a unique methodology to engage the human brain where strict verbal information fails to resonate with the jury. Storytelling dates to ancient times where people would share their stories around the campfire. Kenneth J. Lopez, J.D., *10 Essential Legal Storytelling Techniques for Every Litigator* (March 15, 2025), http://persuadius.com/blog/10-essential-legal-storytelling-techniques-for-every-litigator. Resulting from humans' inherent implementation of stories as a primary method for communicating, Britannica Editors, *Psychology and Mental Health* (September 24, 2025), storytelling provides a persuasive visual of the pending issues versus a straight and forward verbal presentation of the facts. Arne van Batenburg, *what makes us believe in stories? Walter Fisher's Narrative Paradigm* (January 10, 2018), https://medium.com/@arnevb/what-makes-us-believe-in-stories-walter-fishers-narrative-paradigm.

The strength of the expert to be an effective communicator and storyteller enables the expert to present information to the jury that bridges the expert's research, analysis and opinions with that of the jury's need to learn and understand the facts and opinions.

Storytelling: The Purpose

Storytelling provides a means for the expert to communicate their research, analysis, and opinions in a universal language for jury members to consider. The expert develops a narrative which they deliver to the jury to provide a message that is relatable. This enables the jury members to reach an understanding of the information, research, and the expert's opinions to educate jury members and to allow them to make a reasonable and educated decision.

A component of storytelling revolves around cognitive psychology of humans. Cognitive psychology is the study of human cognition, where information is acquired and processed by the human, and the perceptions and judgment of the message result from this acquisition. Britannica Editors, *Psychology and Mental Health* (September 24, 2025). Storytelling must rely on the basic understandings of how humans understand and relate to the world. Gary Miles, *The Art of Legal Storytelling* (June 12, 2024), https://www.linkedin.com/pulse/art-legal-storytelling-captivating-juries-winning-cases-gary-miles. To effectively develop the story, experts must consider the underlying process of how humans understand and associate with the world.

Through the implementation of storytelling, an emotional connection can occur linking the expert's research, analysis, and opinions of the case versus a straight and technical presentation. This emotional connection forms a bridge between the expert and the jury. Jerome Bruner identified that a "message presented in a narrative format is 22 times more likely to be remembered over facts presented in isolation." IE Law Society, *Power of Narrative in the Courtroom* (March 27, 2025), https://www.iestork.org/the-power-of-narrative-in-the-courtroom/.

The Inception of the Story

To be an effective storyteller, the expert must begin with integrated facts, scientific investigation, and scene details, collecting all relevant information. The expert must acquire an understanding of the case, the available facts, and the physical characteristics of the case. During the research and analysis process,

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the expert begins to fill in the missing information relying on their knowledge, training, and experience.

As the story begins to solidify, the expert works to develop a strong and cohesive narrative of the facts, research, and scientific analysis, with the goal of developing a factual story. From this acquisition, the expert can begin to develop the roadmap toward their opinions, based on scene data, facts, and scientific analysis. This roadmap then becomes the starting point for their report which they carry over to their deposition and trial testimony.

Storytelling at Trial

When on the witness stand, the expert delivers their story through short narratives addressing and communicating their scientific analysis and research to present opinions to the jury in a relatable format to their daily life. The expert must be savvy enough to quickly interpret the attorney's question, be able to formulate a direct and focused response, and deliver the narrative in a manner where the jury members can understand and relate to the message.

The narrative must rely on the fundamentals of human understanding and cognition. These fundamentals may include engaging and captivating the jury's attention, discussing complex information in simplified fashion, building credibility and trust, enhancing memory retention, and adapting the narrative to relate to everyday life situations.

Experts must also become familiar with their jury audience and provide their narratives at a level that is commensurate with the jury. Using narratives, experts must strive to create a visual understanding and lasting image in the juror's mind.

The narrative must be clear, concise, and descriptive enough to paint a visual representation for the jury to understand and retain, eliminating the overcomplicated and overwhelming narrative.

The expert must present the narrative in a story format to captivate and retain the attention of the jury and avoid using only data or technical jargon. The narrative must be clear, concise, and descriptive enough to paint a visual representation for the jury to understand and retain, eliminating the overcomplicated and overwhelming narrative.

The expert builds credibility of their opinions with the details, research, and analysis they performed to support their narrative and allow the jury to develop a relatable visualization. Sometimes this relatable visualization may include daily activities that the jury members may have encountered in their life with facts of the case. At the expert's disposal and with approval by the attorney, there are visualization techniques that can amplify the narrative. Using visualization, complex scientific and technical information can be presented to complement the narratives with simplicity for better comprehension and increased ability to draw references. Examples of visual aids include storyboards, still images, video and animation, site scanning and surveillance overlays, and the physical object related to the case.

The expert, in using storytelling based on their investigation, research, and scientific analysis, creates a pathway for information to be exchanged between them and the jury members to visualize and to gain specific knowledge and related information to aid them in formulating a comprehensive and educated decision.

Beyond the storytelling, the expert must consider their visual appearance when attending trial. Visual appearance assists the jury in determining the character, reliability, and capabilities of the expert. Additionally, body language when entering the courtroom and while on the stand also influences the jury as to the credibility of the expert.

Even beyond the visual appearance of the expert, the communication style of the expert is critical. The expert's narratives must provide a strong and confident description of their opinions and communicate technical information in a non-technical manner. Further, the expert must focus their attention and responses directly to the jury and not the attorney. Making eye contact with the jury exudes confidence and increases the likelihood that their narrative will impact and bring light to the jury members.

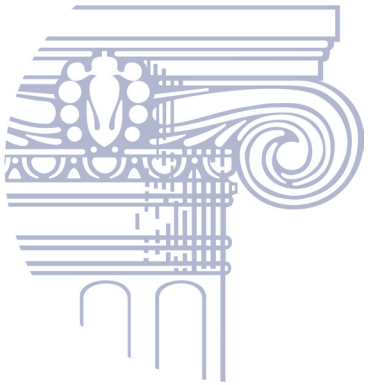
In Summary

Storytelling is an essential skill that the expert witness must develop to effectively communicate their facts, findings and scientific research, bridging complex case facts for jurors to understand through relatable narratives. This skill enhances the persuasiveness and memorability of expert testimony.

- Importance of storytelling for experts: Storytelling engages juries more effectively than pure facts, creating emotional connections that help jurors understand and remember expert opinions. When questioned by the attorney, the expert's narrative should be clear and concise to bring clarity to the topic.

- Elements of effective legal storytelling: Effective storytelling incorporates cognitive psychology principles, humanization, emotional appeal, and structured narratives to present facts in ways that resonate with jurors and aid comprehension.

- Use of visualization and presentation: Experts enhance storytelling with visual aids such as storyboards, animations, still images, and physical objects to simplify complex information. Appearance and communication style also contribute to credibility and juror engagement by avoiding jargon and relating concepts to everyday experiences.



Commercial Law

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Illinois Appellate Court Allows Damages for Aggravation and Inconvenience Under the Illinois Consumer Fraud Act

Wilson v. Napleton's Goldcoast Imports, Inc.,
2025 IL App (3d) 240079

The Third District Appellate Court recently ruled that damages for aggravation and inconvenience are recoverable under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 ("Act").

In *Wilson v. Napleton's Goldcoast Imports, Inc.,* Jeffrey Wilson prevailed in his lawsuit against a car dealership, Napleton's Goldcoast Imports, Inc., arising from his lease of a vehicle. 2025 IL App (3d) 240079, ¶ 1. Wilson accused the dealership of failing to disclose that the vehicle had been in an accident that had caused extensive front-end damage. *Wilson*, 2025 IL App (3d) 240079, ¶ 1. Wilson brought claims under the Act and for common law fraud. A jury awarded Wilson $163,544 in compensatory damages and $1,000,000 in punitive damages. *Id.* The trial court remitted the award to $499,616 ($99,616 in compensatory damages and $400,000 in punitive damages), but did not obtain Wilson's consent to the remittitur. *Id.* The trial court also awarded Wilson $185,411 in attorney fees and $5,040 in costs. Both sides appealed. *Id.* ¶ 2.

The Appellate Court affirmed the finding of liability but reversed the remitted damages judgment as to both compensatory and punitive damages and remanded the case for the trial court to follow proper remittitur procedure as to both compensatory and punitive damages. *Id.* The Appellate Court directed the trial court to give Wilson the opportunity to accept or decline the remitted judgments within a period of the trial court's choosing. Wilson may then elect to consent to both the remitted judgments, neither the remitted judgments, or one but not the other. If Wilson refuses to accept them, then the trial court is to order a new trial on the award(s) to which Wilson does not accept. *Id.* ¶ 41.

In the remitted compensatory judgment, the trial court awarded Wilson $74,616 in out-of-pocket costs and $25,000 for aggravation and inconvenience. *Wilson*, 2025 IL App (3d) 240079, ¶ 58. Napleton argued that the Act only allows damages for actual

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economic injury. The majority of the Appellate Court disagreed, finding that noneconomic harm is recoverable under the Act. *Id.* The majority held that the plain language of Section 10a(a) of the Act, which allows for "actual damages or any other relief which the court deems proper" supported the award for aggravation and inconvenience. *Id.* ¶ 69. The majority also rejected Napleton's argument that the award was not supported by the evidence. Wilson testified that the car was a significant purchase for his family, he tried but was unable to re-trade it, and he maintained the car for several years without being able to drive it.

It should be noted that there was a dissent over the majority's decision on recognizing aggravation and inconvenience damages under the Act. The dissent found that the cases that consider aggravation and inconvenience as a component of compensatory damages rested on an unsteady analytical foundation, the statutory language does not permit vague and incalculable damages, and that awarding aggravation and inconvenience damages is imprudent and contrary to the purposes of the Act. *Id.* ¶ 121.

Construction Law

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Statue of Repose and Tort Immunity Statute Function to Bar Claims against Municipalities

In *DiFoggio v. County of Will Division of Transportation*, summary judgment was upheld for the governmental defendants because the plaintiff's claim for negligent design and construction was barred by a ten-year statute of repose. 2024 IL App (3d) 230261. Although the plaintiff-appellant argued that the subject bridge was defectively designed in that a guardrail or abutment was purportedly missing from the design and construction of the bridge, defendants-appellees were able to prove that the applicable statute of repose applied to bar plaintiff's claims because construction of the bridge was completed more than ten years prior to the filing of the claim. Furthermore, the Illinois Tort Immunity Statute applied to the governmental defendants in this case. The statutes had applicable sections relating to maintenance of roadways and installation of traffic control devices, which also functioned to bar the claims regarding the missing guard rail.

As noted above, this lawsuit stems from a single vehicle accident on a bridge in Will County. On February 17, 2018, plaintiff Dominic DiFoggio was in his vehicle crossing a bridge over a creek in the village of New Lenox, Illinois. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 3. His vehicle slid on ice and snow and collided with a concrete abutment on the southwest corner of the bridge. *Id.* The southwest corner of the bridge was the only corner of the bridge without a guardrail. *Id.* ¶ 7. That is, all other corners of the bridge had guardrails that would have prevented collision with the concrete abutment in question. *Id.*

On February 11, 2019, plaintiff filed suit against Will County, the Will County Division of Transportation, two contractors, New Lennox Township, the Illinois Department of Transportation ("IDOT"), and the State of Illinois. Shortly after filing suit, New Lennox Township, IDOT, and the State of Illinois were dismissed as defendants. *Id.* ¶ 4. After a ruling following motions to dismiss determined that plaintiff could not assert a cause of action for failure to remove snow and ice but could assert a cause of action for negligent design and maintenance, plaintiff filed an amended complaint on December 22, 2020 against Will County, Will County Division of Transportation, and two private contractors. *Id.* ¶¶ 5-6.

About the Author

Kevin H. Young is an associate attorney in 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.

Brian Gieske, Will County's Assistant Engineer, testified in his deposition that his duties included constructing bridges but not inspecting or maintaining them. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 8. Furthermore, a private engineering company inspects bridges in Will County, and the Will County Division of Transportation is responsible for maintaining the bridges. *Id.* There was no guardrail on the southwest corner of this particular bridge because there was a junction between the bridge and a railroad access road at that location. *Id.* ¶ 8. Mr. Gieske was not aware of any attenuating device or barrier that could be added that would still allow access to the access road but protect the concrete abutment. *Id.* Additionally, installation of an attenuating device or barrier on the bridge would be a "maintenance issue." *Id.*

John Cairns, the Maintenance Director for the Will County Division of Transportation, testified that repairs and installation of guardrails would be performed by an outside contractor. *Id.* ¶ 9. He had no knowledge of anyone in his department ever being called to correct a safety problem on a bridge in Will County. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 9. Furthermore, he testified that Mr. Gieske has no maintenance duties. *Id.*

After enumerating the standard for summary judgment under 735 ILCS 5/2-1005, the appellate court noted that for purposes of economy to the parties and the courts, the appellate court can affirm a trial court's summary judgment ruling on any basis appearing in the record, even if the trial court did not rely on that particular basis in reaching its decision. *Id.* ¶ 13; *Tuna v. Wisner*, 2023 IL App (1st) 211327, ¶ 55.

If a plaintiff cannot establish an element of their cause of action, summary judgment for the defendant is proper. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 14; *Ross Advertising, Inc. v. Hartland Bank & Trust Co.*, 2012 IL App (3d) 110200, ¶ 28. The question of duty is one of law, and a motion for summary judgment can be determined by the court and in favor of the defendant based on the issue of duty. *In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1080 (1st Dist. 2001). Additionally, summary judgment is routinely granted specifically in the context of the Tort Immunity Act. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 15; *Gresham v. Kirby*, 229 Ill. App. 3d 952, 957-58 (4th Dist. 1992).

On appeal, plaintiff argued that the bridge in Will County was negligently designed and constructed without a guardrail on its southwest corner. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 17. The defendants countered this argument by pointing to the statute of repose, as the bridge was designed and built more than ten years before plaintiff filed his complaint. *Id.* That is, a negligent design and construction claim would be superseded by the statute of repose such that the claim is defeated. *Id.*

Illinois has various statutes of repose for various actions. Construction cases are governed by a ten year statute of repose. 735 ILCS 5/13-214(b). Legal malpractice cases must be brought within six years. 735 ILCS 5/13-214.3. Products liability cases are ruled by a twelve year statute of repose from the first date of sale of the product. 735 ILCS 5/13-213(b). Medical malpractice cases must be brought within four years of the purported malpractice. 735 ILCS 5/13-212(a). Accountant malpractice cases are governed by a five year statute of repose. 735 ILCS 5/13-214.2.

Under the applicable construction statute of repose in the *DiFoggio* case, "no action . . . may be brought against any person for an act . . . in the design . . . or a construction of an improvement to real property after ten years have elapsed from the time of such act or omission." 735 ILCS 5/13-214(b); *DiFoggio*, 2024 IL App (3d) 230261, ¶ 18. The statute specifically applies to local governments engaged in construction in roadway activities. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 18; *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 869 (1996). The public policy purpose behind the statute is to insulate those in the construction industry from defending against stale claims. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 18; *Wright v. Board of Education of Chicago*, 355 Ill. App. 3d 948, 955 (2002).

The contemplated construction statute of repose will apply to both explicit and implicit design defect claims. On the face of the statute, the ten-year limitation is in effect for construction cases involving overt claims of design defects. 735 ILCS 5/13-214(b). That said, a plaintiff who attempts to avoid a closed-door application of the statute by indirectly alleging a design defect claim will be rebuffed. Even if the plaintiff avoids using the term "design defect" in the pleadings but alleges the gist of a design defect claim, the statute applies. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 19; *O'Brien*, 285 Ill. App. 3d at 870. When a plaintiff's claim is that a dangerous condition existed on completion or construction and it has remained unchanged, it is a claim for defective design, and the statute of repose applies. *Id.*; *Wright*, 335 Ill. App. 3d at 957-958; *DiFoggio*, 2024 IL App (3d) 230261, ¶ 19.

In the *DiFoggio* case, the plaintiff attempted to couch his complaint in terms of negligent maintenance of the bridge

and roadway, when it is really a claim for design defect. 2024 IL App (3d) 230261, ¶ 20. Because the bridge was completed in 2007, the plaintiff had until 2017 to bring his claim. *Id.* Plaintiff did not file his complaint until 2019, and therefore, his complaint was time barred. *Id.*

With regard to his next argument, negligent maintenance, plaintiff argued that Will County was required to install the absent guardrail. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 22. In responding to this argument, the appellate court reviewed the applicable section of the Illinois Tort Immunity Act. *Id.* at ¶¶ 23-24. Under Section 3-102(a) of the Tort Immunity Act, "a local public entity . . . shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in a reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a).

The statute functions to hold that although a governmental entity can be responsible for negligent construction, it has no duty to undertake such improvements initially. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 24; *Ross v. City of Chicago*, 168 Ill. App. 3d 83, 87 (1988). Furthermore, liability only arises when the governmental entity undertakes an improvement and the improvement itself creates an unreasonably dangerous condition. *Id.*; *DiFoggio*, 2024 IL App (3d) 230261, ¶ 24. This is in line with the idea that "a municipality is not considered to be an insurer against all accidents occurring on the public way; rather, a municipality is required to maintain its streets in a reasonably safe condition for the amount and kind of travel which may fairly be expected on them." *Ross*, 168 Ill. App. 3d at 87; *Warchol v. City of Chicago*, 75 Ill. App. 3d 289, 290 (1st Dist. 1979).

In this case, Will County had no duty to erect a guardrail at the southwest corner of the bridge because the duty to maintain does not include the duty to erect an improvement. Even when that guardrail is installed at the three other corners of the bridge, there is no duty to install a guardrail at the fourth corner.

In considering plaintiff's arguments as to maintenance and whether the failure to install a guardrail or other abutment constitutes maintenance, the appellate court then looked at the definition of maintenance as defined by Black's Law Dictionary and controlling Illinois appellate case law. *DiFoggio*, 2024 IL App (3d) 230261, ¶¶ 25-26. Maintenance means "acts of repairs and other acts to prevent a decline, lapse, or cessation from existing state or condition . . . [to] keep in repair; keep up; preserve." *DiFoggio*, 2024 IL App (3d) 230261, ¶ 25; Black's Law Dictionary 859 (5th ed. 1979).

The court then noted the delineation between maintenance and new construction or new improvements. Maintenance does not require the undertaking of public improvements, such as the erection or extension of barriers or guardrails. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 26; *Harding v. Chicago Park District*, 34 Ill. App. 3d 424, 429 (1975). Furthermore, a local government's duty to maintain does not apply to installation of improvements at a particular location simply because those improvements are present elsewhere. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 26; *Ross*, 168 Ill. App. 3d at 89.

In this case, Will County had no duty to erect a guardrail at the southwest corner of the bridge because the duty to maintain does not include the duty to erect an improvement. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 27. Even when that guardrail is installed at the three other corners of the bridge, there is no duty to install a guardrail at the fourth corner. *Id.*

Plaintiff attempted to argue that Mr. Gieske, Will County's Assistant Engineer, testified that installation of the guardrail is a maintenance issue. *Id.* ¶ 28. The appellate court gave little weight to that testimony for several reasons. First of all, Mr. Gieske is the Assistant Engineer responsible for construction, not maintenance. *Id.* ¶ 29. Furthermore, Mr. Cairns, the Will County Division of Transportation's maintenance supervisor, rebutted that testimony head-on. Mr. Cairns testified in deposition that he had direct knowledge as to maintenance and stated that a guardrail installation does not constitute maintenance. *Id.*

In its last section of analysis, the Court looked at an additional procedural rule that allows the appellate court to

affirm summary judgment even when a particular basis is not raised by the parties. *Id.* ¶ 30; *Golden Rule Insurance Co. v. Widoff*, 291 Ill. App. 3d 112, 117 (1997). This is consistent with appellate procedure in Illinois. It is not the appellate court's "burden nor obligation to provide argument in support of issues raised by an appellant." *People v. Duckworth*, 2014 IL App (5th) 230911, ¶ 7. Furthermore, the appellate court cannot consider theories of recovery omitted in the trial court if contrary evidence may have also been offered to overcome the contemplated theory. *Sheldon v. Colonial Carbon Co.*, 116 Ill. App. 3d 797, 803 (1st Dist. 1983). Such was not a circumstance in the DiFoggio court, because no proof could be offered to show the invalidity of this section of the Tort Immunity Act.

The DiFoggio court noted that under a separate section of the Tort Immunity Act, neither "a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide . . . traffic separating or restraining devices or barriers." 745 ILCS 10/3-104; DiFoggio, 2024 IL App (3d) 230261, ¶ 30. That section of the statute absolutely immunizes local governments for failure to erect traffic control devices or barriers on roadways and bridges. *Id.* ¶ 31; *Bernabei v. County of LaSalle*, 236 Ill. App. 3d 958, 963 (1992). In this case, pursuant to that section of the statute, Will County is immune from liability to plaintiff's injury caused by absence of a guardrail. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 31.

Product Liability

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Seventh Circuit Upholds Barring of Plaintiff's Experts Due to Failure to Prove Product Defect and Unreliable Methodology in Uniform Dye Exposure Matter

On October 23, 2025, the United States Court of Appeals for the Seventh Circuit affirmed the United States District Court for the Western District of Wisconsin excluding the opinion of Plaintiffs' product defect and causation experts pursuant to Federal Rule of Evidence 702 in a case wherein airline employees alleged they were sickened by chemicals and dye leaching from their new uniforms. *Gilbert v. Lands' End, Inc.*, No. 23-3162, 2025 U.S. App. LEXIS 27778.

Hundreds of Delta Airlines employees sued Lands' End, Inc. after the clothing manufacturer contracted with the airline to supply new uniforms. *Gilbert*, 2025 U.S. App. LEXIS 27778, at *2. One group of plaintiffs, known as the "Gilbert plaintiffs," sought compensation for staining of their personal property pursuant to the express warranties in Lands' End's contract with Delta. *Id.* at *4. A second group, known as the "Andrews plaintiffs," brought a product liability lawsuit alleging a variety of personal injuries allegedly caused by exposure to the dye, including headaches, anxiety, and breathing difficulties. *Id.* at *3. The district court consolidated the cases filed by both groups of Plaintiffs and subsequently granted Lands' End summary judgment. *Id.*

No Evidence of a Defect

The Court of Appeals spent the majority of the opinion focusing on the causation evidence offered by the Andrews plaintiffs' product defect and causation experts. Applying Wisconsin substantive law, the Court noted that expert testimony would be necessary to prove the existence of a product defect because such a finding would necessarily involve evaluating scientific test results on the uniforms. *City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.*, 148 N.W.2d 13, 16-17 (Wis. 1967). Although plaintiffs' textile expert concluded that Lands' End garments employed a defective dye process and leached various chemicals and heavy metals, he did not opine "whether, how,

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or at what concentrations such a chemical transfer would qualify as a defect." *Gilbert*, 2025 U.S. App. LEXIS 27778, at *9. Indeed, the textile expert admitted at this deposition that the same compounds "were routinely found in garments and were not present at concerning levels in the tested uniforms." *Id.* at *10. As such, the Court upheld the district court's ruling that plaintiffs had not demonstrated a genuine factual dispute as to the existence of a defect. *Id.* at *13.

Methods vs. Conclusions

Although the Court acknowledged that failure to prove a product defect was fatal to Andrews plaintiffs' claim as a threshold matter, the Court also upheld the district court's ruling that plaintiff's causation expert failed to reliably apply epidemiological methods and frameworks. *Id.* The Court noted that it would be proper to exclude an expert's opinion under Rule 702 if the experts *methods* were unreliable but would be improper for a court to bar an expert if it found the expert's *conclusions* unreliable. "District courts can 'usurp[] the role of the jury ... if [they] unduly scrutinize[] the quality of an expert's data and conclusions rather than the reliability of the methodology the expert employed.'" *Id.* at *17 (citing *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F. 3d 796, 806 (7th Cir. 2013)). Of particular interest to practitioners, the Court discussed the December 2023 amendments to Federal Rule of Evidence 702, which in "the expert's opinion reflect[] a reliable application of the principles and methods to the facts of the case." *Gilbert*, 2025 U.S. App. LEXIS 27778, at *9 n.3 (citing Fed. R. Evid. 702). Counsel for Lands' End argued that the amendment and advisory comments demonstrated that it was permissible to challenge "the sufficiency of an expert's basis" as well as "methodology" under Rule 702. *Id.* The Court seemed to acknowledge that the December 2023 amendments represented a more permissive standard in "tension" with the *Manpower* precedent's distinguishing of an expert's conclusions from their methodology. *Id.* Naturally, the Court did not expressly overrule *Manpower* in the footnote but merely stated that its conclusion in the instant case would be the same even under the stricter *Manpower* precedent. *Id.* Nonetheless, the footnote indicates a potential willingness of the Seventh Circuit to entertain Rule 702 challenges if an expert's *conclusions* are not sufficiently based on the evidence.

Failure to Reliably Apply Data Analysis Principles

The Court faulted plaintiffs' causation expert's methodology for (1) uncritical reliance on potentially biased questionnaire data, and (2) improperly distilling a nine-step epidemiological analysis into three steps. *Id.* at *16-27. The expert relied "exclusively" on data collected from questionnaires sent by Lands' End during discovery to the Delta employees engaging in litigation against it. *Id.* at *16. The district court found that the questionnaire could produce biased results in that it was only sent to employees who had a financial interest in the outcome of the litigation and was designed with discovery in mind, not epidemiology. *Gilbert*, 2025 U.S. App. LEXIS 27778, at *16.

Plaintiffs' causation expert failed to acknowledge or make any efforts to control for these obvious biases in the data. *Id.* at *19. The Court stated that "simply acknowledging potential weaknesses in the data and considering a remedy may have been sufficient" to satisfy Rule 702. *Id.* The expert also utilized an epidemiological framework known as a "Bradford-Hill analysis," which is widely used to determine a causal relationship between an individual's symptoms and a potential cause. *Id.* A traditional Bradford-Hill analysis consists of nine criteria: "(1) plausibility; (2) strength of association; (3) consistency; (4) biological gradient (dose-response relationship); (5) specificity of the association; (6) analogy; (7) temporality; (8) experiment (cessation of exposure); and (9) coherence." *Id.* at *22, citing Austin Bradford-Hill, *The Environment and Disease: Association or Causation?*, 58 Proc. Royal Soc'y Med. 295, 295-99 (1965).

The causation expert used by the Andrews plaintiffs in *Gilbert*, however, used a "distilled" version of the Bradford-Hill analysis that only considered three of the factors. *Gilbert*, 2025 U.S. App. LEXIS 27778, at *22. Although merely distilling the variables down was not *per se* improper, in this case the expert failed to provide reasoning or evidence as to how the three variables were appropriate substitute for the traditional nine variables. *Id.* The expert also relied on an alternative epidemiological framework, "the Naranjo algorithm," but since it relied on the same uncritical analysis of the questionnaire data, the Court found that the conclusions derived from the algorithm were flawed as well. *Id.* at *26.

Applying Choice of Law Principles With Respect to Express Warranties

After finding that the district court did not abuse its discretion by excluding the opinions of the Andrews plaintiffs' experts and granting summary judgment, the Court turned to the express

warranty claims for property damage pursued by the Gilbert plaintiffs. *Id.* at *27. The express warranty was located in the contract between Delta Airlines and Lands' End, and stated that "if at any time, for any reason . . . any actively employed Employee is not 100% satisfied with their Products (even if they have been washed, worn and/or embroidered), they can return them at any time . . . for a refund or exchange." *Id.* Lands' End had successfully moved for summary judgment with the district court by simply pointing out that none of the Gilbert plaintiffs returned their uniforms as required by these terms. *Id.* at *28. The contract also had a choice of law provision which mandated Delaware law. *Gilbert*, 2025 U.S. App. LEXIS 27778, at *28. Because Wisconsin law honors choice of law provisions in contracts unless public policy would be implicated, the *Gilbert* court applied Delaware's version of the Uniform Commercial Code. *Id.* at *29. Delaware law holds that a warranty can be limited by contractual language so long as the language does not completely negate the warranty. *Id.* The Court found the contract reasonably limited the express warranty language, and upheld summary judgment because the plaintiffs did not return their uniforms for a refund. *Id.* at *30.

Correlation will always be presented as a substitute for causation, but the Seventh Circuit's reasoning in *Gilbert* demonstrates that experts should not take shortcuts in developing causation opinions. Further, it signals a willingness for the Seventh Circuit to consider challenges to experts' conclusions.

Legal Ethics

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Drawing the Line in Jury Selection: Unlawful Discrimination vs. Legitimate Advocacy

Jury selection is one of the most engaging and exciting parts of trial. The jurors ultimately selected become the lens through which every fact, witness, and case theme is viewed. The selection process is essentially a mix of people-watching and a search for patterns that will hopefully benefit the client's case. A potential juror's demeanor, educational background, relevant life experience, and personal hobbies can give an attorney a glimpse into how that juror may react to certain trial themes, how they may weigh witness credibility issues, or even whether they may naturally connect with one set of lawyers over the other. But, what can an attorney legally and ethically consider when asserting a peremptory challenge? This issue was recently addressed by the American Bar Association's Standing Committee on Ethics and Professional Responsibility Formal Opinion 517.

The key takeaway of the Opinion is that if a lawyer knows, or reasonably should know, that a peremptory strike would constitute unlawful discrimination under applicable law, using that strike violates Rule 8.4(g). As we know, Rule 8.4(g) prohibits discrimination and harassment in conduct related to the practice of law. At the same time, however, the Opinion notes that "legitimate advocacy" remains protected, and that not all "discriminatory" strikes are unlawful in this context if those strikes are permitted under a jurisdiction's substantive law.

The Legal Landscape: Batson and Rule 8.4(g)

Formal Opinion 517 begins by analyzing Supreme Court precedent in *Batson v. Kentucky,* 476 US. 79 (1986). *Batson* was a landmark case that established that the Equal Protection Clause of the Fourteenth Amendment prevented the use of peremptory challenges to remove potential jurors based solely on their race. *Batson* was later applied in criminal and civil matters and the Equal Protection Clause in this context was extended to protected traits such as race, gender, religion and sexual orientation. Notably, some states have enacted broader statutory or rule-based restrictions.

At the same time, however, the Opinion underscores that not all forms of discrimination in peremptory use are unlawful as courts have permitted strikes based on age, marital status, or socio-economic status in certain jurisdictions.

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See, e.g., Sanchez v. Roden, 808 F.3d 85, 90 (1st Cir. 2015) ("Age is not a protected category under *Batson*"); *United States v. McAllister*, 693 F.3d 572, 579 (6th Cir. 2012) (unemployment is a permissible ground for striking a juror); *United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) ("Peremptory challenges based on marital status do not violate Batson").

Model Rule 8.4(g), which is similar to Rule 8.5(j) of the Illinois Rules of Professional Conduct, prohibits discrimination and harassment in conduct related to the practice of law but preserves "legitimate advice or advocacy consistent with these Rules." The Opinion rejects any reading that would treat conduct already unlawful under jury selection law as "legitimate advocacy." Conversely, the Committee cautions against using Rule 8.4(g) to create a free-floating ethics ban on strikes that are otherwise lawful under governing jury selection standards.

Ethical Guardrails

The Opinion centers on four issues that collectively establish the ethical guardrails for peremptory challenges.

The first is establishing the line between unlawful discrimination and legitimate advocacy. Peremptory strikes that violate governing law are not legitimate advocacy and fall squarely within the conduct prohibited by Rule 8.4(g). The standard is not whether the lawyer personally intended to discriminate. Rather, the standard is whether the lawyer knew or reasonably should have known that the strike was unlawful under the substantive law of jury selection.

The second issue is the objective standard of whether a lawyer "knows or reasonably should know," which is defined as what a lawyer of reasonable prudence and competence would ascertain. In practice, this means:

If the lawyer exercises peremptories based on reasons that the lawyer understands and that are lawful under applicable *Batson* and state law, there is no Rule 8.4(g) issue.

If the lawyer's stated reasons are legally mistaken, or if neutral reasons are pretextual, the question becomes whether a reasonably prudent and competent lawyer should have recognized the unlawfulness. When red flags are apparent, a duty of inquiry exists. This is particularly true when the strikes are proposed by clients, consultants, or software, including AI.

If a client discloses a discriminatory purpose, the lawyer cannot not act on it. Client instruction does not trump unlawful conduct.

The third issue is the evidentiary weight *Batson* rulings in attorney discipline. Of course, a trial judge's *Batson* finding, on its own, does not conclusively establish a violation of Rule 8.4(g) because disciplinary proceedings may apply different burdens of proof. Additionally, a disciplinary proceeding can provide a lawyer the opportunity to develop a fuller, more complete record, including the disclosure of privileged strategy if appropriate under Rule 1.6(b)(5) ("[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary… to respond to allegations in any proceeding concerning the lawyer's representation of the client.") Ill. R. Prof. Conduct 1.6(b)(5). However, while the existence of a *Batson* finding does not automatically warrant discipline, such a finding is not irrelevant either. It may trigger review, particularly where the record reveals knowledge or recklessness as to unlawful peremptory practices.

Finally, the Opinion addresses the permissibility of "discriminatory but lawful" strikes. Candidly, "discriminatory but lawful" may seem inherently contradictory. But if certain juror attributes are not prohibited grounds for peremptory challenges under applicable law, then a lawyer's use does not violate Rule 8.4(g). This is consistent with a long-recognized distinction between 1) constitutionally or statutorily forbidden grounds and 2) other demographic or experiential attributes that courts have permitted trial lawyers in certain jurisdictions to consider, such as age, marital status, or socioeconomic status.

Practice Pointers

For litigators, the Opinion translates into several practice pointers. First, litigators should refine their jury selection frameworks and training. Counsel teams should likewise refresh their *voir dire* playbooks to reflect the Opinion's knowledge standard and "duty of inquiry." This could include protocols for generating and documenting race-neutral and gender-neutral reasons for strikes, guidance on evaluating patterns that could draw *Batson* challenges, and procedures to implement when advice from clients, consultants, or software raises concerns.

Second, litigators should vet and monitor jury consultants. While consultants remain valuable partners, we need to ensure that their methodologies and scoring rubrics are designed to avoid unlawful and discriminatory criteria. Perhaps consider including terms in the engagement letter that expressly prohibit discriminatory bases and require transparency around factors used in rankings or recommendations.

Third, establish some form of governance when utilizing AI or other analytics tools. While AI can certainly help build the profile of an ideal juror or even rank jurors, we still need to recognize the risks of bias embedded in the programing of the AI tool. Lawyers must acquire a reasonable understanding of software tool risks. When AI tools generate recommendations, we should be prepared to articulate the case-specific (and lawful) reasons for any strike, independent of the AI tool's score.

Fourth, document all legitimate, non-discriminatory reasons for peremptory strikes contemporaneously. After all, documentation is the quiet hero of defensibility, and capturing in real time the neutral, non-discriminatory, and case-related reasons for each peremptory strike not only allows an attorney to respond to any *Batson* inquiries but it also helps demonstrate the absence of misconduct in any subsequent disciplinary review.

Fifth, align client expectations with ethical limitations. While clients may sometimes press for strategies that edge toward or cross ethical lines, lawyers should proactively explain what the law permits and prohibits in jury selection and why protected classifications are off-limits. If a client suggests employing impermissible criteria, lawyers should decline and steer toward permissible selection theories grounded in case needs rather than demographic stereotypes. Consider documenting these boundary-setting discussions, particularly in high-stakes matters.

Finally, account for jurisdictional variations. While the federal constitutional framework is generally familiar, some states have expanded protections for classes beyond race and gender, or established specific procedures governing peremptories.

Appellate Practice Corner

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"Ask Permission, Not Forgiveness": The Appellate Court's Message to Trial Counsel in *Harrell v. City of Chicago*

A recent decision from the Illinois Appellate Court, First District, underscores the severe consequences that can follow from disregarding pretrial court orders, regardless of whether counsel believes those orders are wrong. In *Harrell v. City of Chicago*, 2025 IL App (1st) 240119, the appellate court affirmed the trial court's decision to vacate a $10.2 million jury verdict in a police chase case, based on counsel's repeated violations of *in limine* rulings and improper closing argument. The opinion is a cautionary reminder that pretrial rulings bind the parties throughout trial and must be followed unless modified by the court.

The underlying case stemmed from a tragic police pursuit on Chicago's South Side. Officers heard gunshots several blocks away and soon saw a white Kia Sorrento speeding out of an alley near the source of the shots. *Harrell*, 2025 IL App (1st) 240119, ¶ 5. Believing the Kia might be connected to the shooting, officers initiated a traffic stop, approached the vehicle with guns drawn, and removed a rear-seat passenger. *Id.* ¶¶ 5, 13. At that point, the driver suddenly accelerated, fleeing the stop. Two Chicago Police Department (CPD) officers pursued the Kia for roughly six blocks, reaching speeds of up to 60 mph, without activating their siren. *Id.* ¶¶ 5, 13. During the chase, the Kia ran a stop sign and collided at high speed with a vehicle driven by Stacy Harrel, with her daughter Kimberlyn as a passenger. *Id.* ¶¶ 5-6. Stacy was killed and Kimberlyn suffered serious injuries. *Id.* ¶ 6. A firearm was later found inside the Kia, but the driver and front-seat passenger fled the scene and were never located. *Id.* ¶¶ 5, 13.

Plaintiffs brought a wrongful death and personal injury action against the City of Chicago, alleging that the CPD officers' conduct was willful and wanton and directly caused the collision. *Harrell*, 2025 IL App (1st) 240119, ¶ 7. They asserted that the officers: (i) stopped the Kia without any basis to suspect its involvement in the shooting; (ii) failed to properly secure the vehicle once stopped; and (iii) violated CPD policy in multiple respects, including by pursuing a fleeing vehicle at high speeds without activating a siren. *Id.* ¶ 14. At trial, plaintiffs presented testimony from plaintiffs and their family members, the five CPD officers involved, and plaintiffs' police-practices

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The appellate court stressed that "after the trial court had ruled that topic off-limits, right or wrong, based on relevance," plaintiffs' counsel "was dutybound to respect the trial court's ruling," yet they persisted in the prohibited questioning. More significant, the appellate court held, were plaintiffs' questions about the post-crash investigation, which the *in limine* order expressly prohibited.

expert. *Id.* ¶ 12. Defendants called no witnesses. *Id.* The jury returned a verdict of $10.2 million for plaintiffs. *Id*. ¶ 16.

Before trial, the court entered two key *in limine* orders. First, it barred any evidence or argument suggesting that CPD's post-accident investigation was inadequate or negligent, finding such matters irrelevant as to whether the officers acted willfully and wantonly in initiating the stop and engaging in the pursuit. *Id*. ¶¶ 9, 44. Second, the court barred plaintiffs' expert from opining that the officers lacked probable cause to stop the Kia, explaining that this is a question of law for the court, not subject for expert testimony. *Harrell*, 2025 IL App (1st) 240119, ¶ 59.

After the verdict, defendants moved for a new trial, arguing that plaintiffs' counsel repeatedly violated both rulings and compounded the prejudice through improper burden-shifting arguments in closing. *Id*. ¶ 16. The trial court agreed, finding that plaintiffs' counsel had "continuously and blatantly disregarded" the court's pretrial orders, and granted a new trial. *Id.* Plaintiffs sought and obtained interlocutory review under Supreme Court Rule 306.

Violations of *In Limine* Rulings

The appellate court began by emphasizing that not every violation of a motion *in limine* entitles a party to a new trial. *Id*. ¶ 42. A new trial is warranted "only where the order is specific, the violation is clear, and the violation deprived [a party] of a fair trial." *Id*. (citing *Bakes v. St. Alexius Med. Ctr*., 2011 IL App (1st) 101646, ¶ 40). Here, the court found that standard satisfied.

The court first addressed plaintiffs' questioning of police officers about the shooting incident and the officers' failure to investigate the alley before initiating the stop and chase. *Harrell*, 2025 IL App (1st) 240119, ¶ 46. Although the court acknowledged that this line of questioning was "no clear violation" of the pretrial order -- since the order barred only evidence relating to the *post-crash* investigation -- the trial judge had nonetheless ruled during trial that the topic was irrelevant and off limits. *Id*. ¶¶ 47-50.

The appellate court stressed that "after the trial court had ruled that topic off-limits, right or wrong, based on relevance," plaintiffs' counsel "was dutybound to respect the trial court's ruling," yet they persisted in the prohibited questioning. *Id*. ¶ 52. More significant, the appellate court held, were plaintiffs' questions about the post-crash investigation, which the *in limine* order expressly prohibited. *Id*. ¶¶ 54-57. Despite that clear ruling, plaintiffs questioned officers about the recovery of the gun found inside the Kia, including whether it was associated with any passenger. *Id.* ¶ 54. Counsel then questioned the expert about whether the gun belonged to anyone in the vehicle, whether fingerprints were found, whether the gun had been used in a crime that night, and whether it had been discharged. *Id*. ¶ 55. None of this information had any bearing on what officers knew at the time of the stop or pursuit, and all of it fell squarely within the prohibited category. These, the court held, were "flagrant violations of the pretrial order barring evidence of post-accident investigation." *Harrell*, 2025 IL App (1st) 240119, ¶ 57.

Plaintiffs also repeatedly violated the order barring expert testimony on legal questions. *Id*. ¶¶ 59-69. During direct examination of their police-practices expert, counsel asked whether there was "any reasonable basis to believe the Kia was involved with any shooting" and what his "opinions" were on the legality of the stop. *Id*. ¶¶ 63-64. The expert responded that the officers "did not have reasonable suspicion to pull that vehicle over." *Id*. ¶ 63. Counsel pressed further, asking whether there was "any support for probable cause," prompting yet another prohibited legal opinion that the officers lacked reasonable suspicion. *Id*. ¶ 64. Although objections were sustained, the jury had already heard the impermissible testimony.

Plaintiffs argued on appeal that officers had "opened the door" by

mentioning reasonable suspicion during their testimony. *Id*. ¶ 70. The appellate court firmly rejected that position, holding that counsel cannot simply assume a witness has opened the door to otherwise inadmissible testimony:

> There may be times when asking for forgiveness, not permission, is the better approach, but not when arguably violating a judge's pretrial order.

Harrell, 2025 IL App (1st) 240119, ¶ 78.

If counsel believes testimony has opened the door, the proper course is to stop and raise the issue with the court—not to proceed unilaterally. The court emphasized that *in limine* rulings bind the parties throughout trial unless the judge modifies them, and counsel's belief that the jury already heard similar information does not excuse further violations. *Id.*

Improper Closing Argument

The appellate court also found substantial prejudice from plaintiffs' closing argument, in which counsel repeatedly criticized the City for failing to call witnesses or an expert to rebut plaintiffs' police-practices expert. *Id*. ¶¶ 82-88. Counsel told the jury: "You'll notice in this case that the City called no witnesses," and "No witness came in and said that the policy was properly executed or didn't apply in this case. You know why? Because the City couldn't find one." Counsel also argued, "If there was someone on the City side who was going to come in," suggesting that defendants had a duty to present contrary testimony. *Id.* ¶ 83.

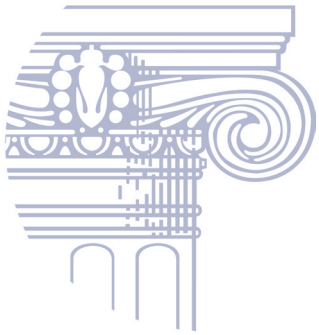
The appellate court held that these arguments improperly shifted the burden of proof. *Id*. ¶ 88. While plaintiffs may permissibly note that their expert's testimony was unrebutted, they may not fault the defense for failing to call witnesses. *Id*. ¶ 85. As the court noted, "the plaintiff always has the burden of proof in a civil action," and suggesting that defendants failed to do their job crosses the line. *Harrell*, 2025 IL App (1st) 240119, ¶ 86. The court summarized that "counsel's arguments in closing, at times, clearly crossed the line from arguing that their evidence was unrebutted to shifting the burden onto defendants," and also noted that counsel continued pressing the argument even after objections were sustained, in "open defiance of the trial court's rulings." *Id*. ¶ 88.

Considering the cumulative effect of the *in limine* violations and improper burden-shifting arguments, the appellate court held that "the trial court did not clearly abuse its discretion in determining that the combination of improper testimony and closing argument denied defendants a fair trial." *Id.* ¶¶ 90-92.

Practice Pointers

Harrell offers several concrete practice lessons. Counsel must treat *in limine* rulings as binding throughout trial—even if they believe the rulings are incorrect—unless and until the court revisits them. Counsel may not unilaterally conclude that a witness has "opened the door" to prohibited testimony; any such issue must be raised with the judge. While it is permissible to emphasize that one's own evidence is unrebutted, it is impermissible to fault defense for failing to call witnesses, as doing so improperly shifts the burden of proof. Finally, continuing to pursue prohibited lines of questioning or argument after the court sustains objections is particularly prejudicial and can result in reversal—even of a multimillion dollar verdict.

There may be times when asking for forgiveness, not permission, is the better approach, but not when arguably violating a judge's pretrial order.



Evidence and Practice Tips

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Creating the Record on Appeal: Beware of Pitfalls in Relying on a Bystander Report

Appealing from a lower court decision believed to be made in error often comes with the exciting prospect of articulating a masterful brief with the potential of not only securing a victory for your client, but also participating in the creation of a binding legal precedent in your jurisdiction. After timely filing the notice of appeal and other necessary documents, there is also a requirement to ensure that the record of appeal gets properly filed to the appellate court. This includes a record of any court proceedings leading to the decision under appeal. Ideally, any such court proceedings will have a transcript from a court reporter. But what happens if there was no court reporter at the hearing, but the hearing included important arguments and rulings by the Court? Illinois rules provide for such a situation, as the appellant can rely on a bystander report.

Notably, a record of the proceedings is not always a necessity where the appellate court is asked to review a decision made solely on the pleadings, such as an appeal from a complete dismissal of the complaint. See *Gonella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (1st Dist. 2003) (declining to dismiss appeal from dismissal in the absence of a transcript because "[t]his appeal confronts solely a question of law, that being whether the pleadings, affidavits, and other documents on record warranted a dismissal pursuant to section 2-619.") Leaving out a transcript or acceptable substitute can be risky where any evidence may have been adduced during the proceedings, as it is well settled that "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill.2d 389, 392 (1979).

To that end, while a bystander report is a viable option in the absence of a transcript, an appellant must be mindful of the importance of establishing its accuracy before the court when seeking certification. Under Ill. S.Ct. Rule 323(c):

> [W]hile a bystander report is a viable option in the absence of a transcript, an appellant must be mindful of the importance of establishing its accuracy before the court when seeking certification.

About the Authors

Jonathan L. Federman is senior counsel 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.

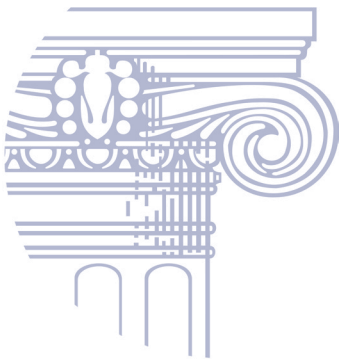
(c) Procedure If No Verbatim Transcript Is Available (Bystander's Report). If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. In any trial court, a party may request from the court official any recording of the proceedings. The court official or any person who prepared and kept, in accordance with these rules, any recording of the proceedings shall produce such recording to be provided at the party's expense. Such recording may be transcribed for use in preparation of a bystander's report. The proposed report shall be served on all parties within 28 days after the notice of appeal is filed. Within 14 days after service of the proposed report of proceedings, any other party may serve proposed amendments or an alternative proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so certified shall be included in the record on appeal.

While a transcript is a preferred method of ensuring a complete and accurate record, a proper bystander report serves as a backstop to ensure the appellate court has the opportunity to review the complete record. Litigants must know the procedures to properly request a bystander report, as well as be prepared to challenge an improper proposed bystander report, if the proposed bystander report is not an accurate reflection of the proceedings.

As the rule indicates, the bystander report must be served within 27 days after the notice of appeal is filed, and must be made in the trial court.

As noted in a recent rule 23 order, however, a court is not required to certify a bystander report that the court believes is inaccurate, even though it may be the only one available. *Hawkins v. Rose*, 2025 IL App (5th) 241331-U (quoting *People v. McKee*, 25 Ill. 2d 553, 557 (1962)). Affidavits from the appellant—or any other party—are not acceptable substitutes for transcripts or bystander reports, and will be refused. *Id.* ¶ 17. Thus, if the opposing party is not cooperative, there is no guarantee that the court will deem a one-sided report sufficiently accurate for certification. As such, it is in the best interest of a litigant to have a court reporter at all hearings on motions which may lead to a decision under appeal, and if that is not possible, to take all possible measures to ensure a bystander report is as accurate as possible.

Bystander reports are alternatives to transcripts. While a transcript is a preferred method of ensuring a complete and accurate record, a proper bystander report serves as a backstop to ensure the appellate court has the opportunity to review the complete record. Litigants must know the procedures to properly request a bystander report, as well as be prepared to challenge an improper proposed bystander report, if the proposed bystander report is not an accurate reflection of the proceedings.



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Appellate Court Rejects "Fatal Gap" in Proximate Cause

The loss of chance concept refers to the harm resulting to a patient when negligent medical treatment is alleged to have damaged or decreased the patient's chance of survival or recovery, or to have subjected the patient to an increased risk of harm. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 98 (1997). This proximate cause theory applies to cases where a medical provider's malpractice deprives the plaintiff of a chance to survive or recover from a health problem, lessens effectiveness of treatment, or increases the risk of an unfavorable outcome. *Holton* 176 Ill. 2d at 111. Under the lost chance doctrine, the plaintiff must only show with a reasonable degree of medical certainty that the malpractice lessened the effectiveness of treatment to the plaintiff. *Id.* at 117-18.

The Illinois Fourth District Appellate Court recently addressed a challenge to proximate cause in a medical malpractice claim grounded in the lost chance doctrine in *Dunbar v. Carlson, M.D.,* 2025 IL App (4th) 241143-U. The plaintiff filed suit against the defendant doctor and medical group alleging medical negligence resulting in her husband's myocardial infarction and death. The defendants were granted summary judgment by the trial court. The plaintiff appealed arguing a genuine issue of material fact relating to proximate cause, namely, whether Dr. Carlson's approach in treating Smith increased the risk he would suffer a myocardial infarction and deprived him of a chance at earlier treatment that could have been successful. *Dunbar,* 2025 IL App (4th) 241143-U, ¶¶ 2-3.

The decedent, Bruce Smith, established care with the defendant, Dr. Carlson, in January 2017 and he suffered a heart attack and passed away on August 23, 2017. Evaluation in January of 2017 revealed hypertension and advancing kidney disease, and an ultrasound in February 2017 confirmed severe hydronephrosis. Dr. Carlson prescribed various medications to treat Smith's hypertension, including lisinopril, hydrochlorothiazide and terazosin, but Smith's blood pressure remained elevated. Smith was never prescribed a statin for blood pressure control. By May 2017, Smith's bladder and kidney function worsened. Lisinopril and hydrochlorothiazide were put on hold due to the risk to worsen kidney function and Dr. Carlson referred Smith for urology and nephrology consultations. *Id.* ¶¶ 5-6.

Smith's treating nephrologist, Dr. Rosborough, completed an initial evaluation in May 2017. He assessed Smith for acute on chronic kidney disease. Dr. Rosbough opined that Smith's blood pressure management was completely appropriate and he did not think Smith presented with any urgent or emergent conditions requiring treatment right away. *Id.* ¶ 19. Smith's treating urologist, Dr. Padilla, also evaluated Smith in May 2017. She treated urinary retention and bilateral hydronephrosis, both of which can affect a patient's blood pressure. Smith's condition was stable and did not significantly worsen or improve, although lab results showed some improvement. Dr. Padilla indicated Smith was not in need of urgent or emergent urological intervention. *Id.* ¶ 21.

The plaintiff disclosed two experts: Dr. Nelson, a family medicine physician with added qualifications in hypertension; and Dr. Budoff, a cardiologist. Dr. Nelson opined Dr. Carlson's failure to treat Smith's blood pressure with a statin medication and provide urgent referral to a urologist or nephrologist in February 2017 were deviations from the standard of care. Dr. Nelson explained how Smith's heart and kidney diseases were related and opined it was more likely than not that if Smith had received earlier treatment, he would not have suffered a fatal heart attack within eight to nine months of his initial visit with Dr. Carlson. *Id.* ¶¶ 10-11. Similarly, Dr. Budoff opined that Dr. Carlson should have been adjusting Smith's medications to bring down his blood pressure more aggressively and it was a deviation to not prescribe a statin. *Id.* ¶ 14. Dr. Budoff further opined that there would have been a significant reduction in a cardiovascular event had a statin been initiated in Janu-

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ary 2017, and with better blood pressure control, it was more likely than not Smith would not have had a fatal heart attack in August of 2017. *Dunbar,* 2025 IL App (4th) 241143-U, ¶ 15.

At the trial court level, the defense moved for summary judgment arguing a "fatal gap" in proximate cause as the plaintiff had failed to provide testimony from a nephrologist or urologist regarding what treatment Smith would have received had he been referred earlier than May 2017. The plaintiff countered that the alleged mismanagement was not limited to the nephrology and urology referrals and highlighted the failure to prescribe a statin and expert testimony supporting proximate cause for Smith's death. *Id.* ¶ 24. Summary judgment was granted without substantive comment from the court. *Id.* ¶ 25.

On appeal, the Court reasoned that the plaintiff's case could not be reduced to whether the Dr. Carlson's referral to a nephrologist and urologist was timely. *Id.* ¶ 50. The plaintiff presented expert testimony providing two opinions, to a reasonable degree of medical certainty, that Dr. Carlson's alleged deviations from the standard of care increased the risk of harm and lessened the effectiveness of treatment. Specifically, Dr. Nelson opined that had Smith received earlier referral to a urologist and nephrologist, better blood pressure management, and statin prescription he would not have suffered a fatal myocardial infarction within 8-9 months of his first visit to Dr. Carlson. *Id.* ¶ 53. Dr. Nelson noted use of a statin in and of itself would have impacted stabilization of the plaque that ruptured. *Id.* Dr. Budoff was also critical of Dr. Carlson's blood pressure management and opined Smith would have had significantly lower cardiovascular risk with better blood pressure medication. *Dunbar,* 2025 IL App (4th) 241143-U, ¶ 54. It was the Appellate Court's view that expert testimony undoubtedly created a question of fact and summary judgment was reversed. *Id.* ¶ 55.

Holton v. Memorial Hospital

In *Holton,* the Illinois Supreme Court was tasked to resolve whether application of the "loss of chance" doctrine in medical malpractice cases lessens the plaintiff's burden of proving proximate cause. *Holton,* 176 Ill 2d at 98. The plaintiff in *Holton* alleged the defendant hospital nursing staff failed to report progression of her decline into paresis (partial paralysis) to her treating physicians, resulting in a delay in detection and treatment to avoid paralysis. The defendant hospital asserted it was entitled to judgment as a matter of law for failure of plaintiff to present expert testimony to support her claim that an earlier call to Holton's physicians would have prevented her eventual paralysis. The Court noted testimony from Holton's physicians that they based their erroneous diagnosis and treatment decisions on inaccurate and incomplete information. Holton's physicians further opined if paresis is detected and treated early enough, there is good probability for avoiding or minimizing paralysis. The hospital argued Holton's physicians rendered ineffective treatment both before and after being notified of her change in condition such that plaintiff did not establish that her physicians would have acted differently had they been notified earlier. *Id.* at 107-109.

The Illinois Supreme Court disagreed. By the time Holton's physicians were notified of the change in condition, Holton had already suffered complete loss of motor control below the waist. There was sufficient testimony indicating the doctors would have undertaken a different course of treatment had they been accurately and promptly apprised. *Id.* at 109. The evidence permitted an inference that the defendant's negligence prevented plaintiff's physicians from correctly diagnosing and treating her condition. The plaintiff was not required to show a different outcome would have occurred but rather that the delay in diagnosis lessened the effectiveness of treatment *Id.* at 110.

Conflict with First District Principle

The defense in *Dunbar* cited three First District cases in support of summary judgment: *Aguilera v. Mount Sinai Hospital Medical Center*, 293 Ill. App. 3d 967 (1997); *Townsend v. University of Chicago Hospitals*, 318 Ill. App. 3d 406 (2000); and *Guerra v. Advanced Pain Centers S.C.*, 2018 IL App (1st) 171857. *Dunbar,* 2025 IL App (4th) 241143-U, ¶ 40. In *Aguilera*, the First District held the absence of expert testimony from a neurosurgeon regarding an analysis of whether an earlier CT scan would have led to surgical intervention or other treatment that may have contributed to the decedent's recovery creates a gap in evidence of proximate cause fatal to the plaintiff's case. *Aguilera*, 293 Ill. App. 3d at 975. Similarly, in *Townsend*, the lack of expert testimony from a urologist or interventional radiologist regarding the course of treatment for an undiagnosed kidney stone left the jury to speculate about proximate cause. *Townsend,* 318 Ill. App. 3d at 414. Finally, in *Guerra*, the lack of testimony from an addictionologist regarding how an addictionologist's intervention would have prevented the decedent's suicide led to a missing link between the alleged deviations and

proximate cause. *Guerra,* 2018 IL App (1st) 171857, ¶ 34.

The lack of expert testimony from a urologist or nephrologist in *Dunbar* would appear to prove fatal in connecting allegations that earlier urology or nephrology intervention would have increased Smith's chance to survive. Interestingly, however, the *Dunbar* court was not persuaded to follow *Aguilera, Townsend* or *Guerra*. Rather, the Fourth District Court found *Holton's* rule "echoed" through Dr. Nelson's and Dr. Budoff's testimony, as both opined Dr. Carlson's malpractice lessened the effectiveness of treatment to Smith and/or increased his risk of harm. *Dunbar,* 2025 IL App (4th) 241143-U, ¶ 55. The *Dunbar* court further found that that the case was about more than urology or nephrology referrals, but still, it was not left to speculate as to what would have happened if Dr. Carlson acted quicker in sending Smith to these specialists. *Id.* ¶¶ 50-51. It could be reasonably inferred that earlier treatment of Drs. Rosborough and Padilla would have been the same and just as effective in alleviating Smith's symptoms. *Id.* For purposes of the lost chance doctrine and surviving summary judgment, the expert testimony offered in *Dunbar* was deemed sufficient for a fact finder to conclude Dr. Carlson's decisions about medications, as well as delay about referrals, proximately caused Smith's death. *Id.* ¶ 55.

Civil Practice and Procedure

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Rewriting the Business of Law Through Non-Lawyer Involvement

The once clear boundary between the legal profession and non-lawyer controlled outside capital has been continually eroded over the past three decades and may soon be eviscerated completely. What began as case-by-case funding matured into a global asset class in which specialized funders and institutional credit provide capital against single matters and portfolios, reshaping incentives and litigation dynamics in the process. Marta-Ann Schnabel, *et al.*, DRI Ctr. for L. & Pub. Pol'y, Nonlawyer Investment in the Legal Economy (2024). One of the impacts is mass advertising, portfolio funding, and data-driven origination of claims have accelerated those changes, as critics document the proliferation of unsupported filings and consumer lending at high effective rates in personal injury matters. Am. Tort Reform Ass'n, Sanctionable: The unsupported, exaggerated, and suspicious claims plaguing our nation's courts (October 2025).

England and Australia paired these developments with structural reforms that permitted non-lawyer ownership of law firms through Alternative Business Structures (ABS). This led to, publicly listed practices and integrated professional services models, in which the Big Four added legal arms and plaintiff firms scaled through external equity. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; David B. Wilkins & Maria J. Esteban Ferrer, Harvard Law School Center on the Legal Profession, The Integration of Law into Global Business Solutions, (2017). However, those legal systems do not have anything

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resembling the American tort system and the United States is the only civil justice that uses juries.

In the United States, the profession largely maintained its stance under Model Rule 5.4's prohibition on fee sharing with non-lawyers until state-level experimentation in Utah and Arizona created opportunities. These developments have been complemented by Puerto Rico's broad authorization and Washington's long-term pilot, with Tennessee actively evaluating reforms. Sara Merken, *Washington becomes latest state to test legal practice reforms*, Reuters, Sept. 24, 2025; Emily R. Siegel, *Tax-Friendly Puerto Rico Approves Non-Lawyer Owners of Law Firms*, Bloomberg Law, June 24, 2025; David Schultz, *Law Firm Ownership Model Eyed for 'Scary' Shakeup in Tennessee*, Bloomberg Law, Nov. 3, 2025.

Along the way, management services organizations (MSOs), have emerged as the preferred vehicle to channel outside investment into non-legal operations while preserving traditional lawyer ownership of the practice itself. Trisha Rich and Leonard Charles Brahin, *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Jacob Shamsian, *It's illegal in most states for private equity to buy a law firm. Lawyers have figured out a workaround*, Business Insider, July 6, 2025.

The stakes are not theoretical. Major funders and asset managers, including Burford Capital and Fortress Investment Group, now back significant volumes of litigation risk and, in Arizona, have moved directly into law firm equity under the ABS regime and through MSOs. Emily Siegel, *Fortress Law Firm Deal Is First for Major US Asset Manager*, Bloomberg Law, Aug. 27, 2025; Erin Mulvaney and Mark Maurer, *KPMG Wants to Be the First Accounting Giant to Own a U.S. Law Firm. Here's Why.*, Wall Street Journal, January 20, 2025; Stephen Foley and Kaye Wiggins, *Burford Capital seeks to buy equity stakes in US law firms*, Financial Times, August 16, 2025.

At the same time, the bar has observed high-profile inquiries and public deliberations as marquee firms and investors test MSO models and adjacent structures designed to respect Rule 5.4 while bringing operational capital into the profession. Tatyana Monnay, *McDermott's Outside Investor Talks Augur Big Law Transformation*, Bloomberg Law, Nov. 14, 2025; Roy Strom and Emily Siegal, *Big US Law Firms Cool to Idea of Bringing on Burford's Billions*, Bloomberg Law, September. 3, 2025; William Rabb, *Litigation Funder's Plan to Invest in Law Firms Called 'Bad Policy,' With Big Impacts*, Insurance Journal, August 21, 2025.

This article traces that evolution and assesses the profession's responses, the ethical implications for lawyer independence and conflicts, and the financial consequences of outside capital under models that can strip equity out of the traditional partnership. It also draws lessons from accounting and healthcare, where MSOs have already transformed professional services, and closes with a cautionary tale from Alabama and continuing concerns over the laxity of oversight in Arizona's ABS regime. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Am. Tort Reform Ass'n, Sanctionable: The unsupported, exaggerated, and suspicious claims plaguing our nation's courts (October 2025).

Model Rule 5.4 and the Traditional Fence

For more than a century, the central premise of U.S. lawyer regulation has been professional independence. Model Rule 5.4 preserves that independence by prohibiting fee sharing with non-lawyers and by barring non-lawyers from owning or controlling law firms, based on the judgment that aligning professional advice with investor interests risks eroding loyalty, confidentiality, and the primacy of client interests. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025. The rule has been reconsidered repeatedly, from the ABA's Commission on Multidisciplinary Practice in 1999, through the Ethics 20/20 initiative in 2011–2012, to subsequent innovation efforts, yet each time the profession declined to discard the core prohibition on non-lawyer ownership for lack of empirical evidence that doing so would benefit clients or expand access without compromising ethics. *Id.* The result was incremental innovation: greater outsourcing, the rise of alternative legal service providers, and the growth of third-party litigation finance, all without dismantling Rule 5.4's wall between legal judgment and outside ownership. *Id.*

England and Australia: Fee Sharing, Public Listings, and the Global Template

England and Wales, through the Legal Services Act 2007, and Australia embraced reforms allowing non-lawyer

> For more than a century, the central premise of U.S. lawyer regulation has been professional independence. Model Rule 5.4 preserves that independence by prohibiting fee sharing with non-lawyers and by barring non-lawyers from owning or controlling law firms, based on the judgment that aligning professional advice with investor interests risks eroding loyalty, confidentiality, and the primacy of client interests.

ownership of law firms and multidisciplinary practices through ABS, including public listings. That shift enabled the Big Four to build substantial legal networks and encouraged the scaling of consumer-facing and plaintiff-side firms with external equity. *Id.*; David David B. Wilkins & Maria J. Esteban Ferrer, Harvard Law School Center on the Legal Profession, The Integration of Law into Global Business Solutions, (2017). Funders professionalized and expanded alongside these structural changes, normalizing non-lawyer investment in law across common-law jurisdictions and furnishing a road map for U.S. reform advocates. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025. The transatlantic spillover arrived in subtler ways even before U.S. states changed their rules. Multinational firms managed divergent ethics regimes across offices, and funding practices once maligned as champerty gained acceptance within regulated boundaries. By the time Utah and Arizona began their structural experiments, the global market had already demonstrated both the possibilities and the pitfalls of integrating outside capital with legal services. *Id.*; Am. Tort Reform Ass'n, Sanctionable: The unsupported, exaggerated, and suspicious claims plaguing our nation's courts (October 2025).

U.S. Openings: Utah, Arizona, Puerto Rico, and Pilot Programs

Utah's regulatory sandbox and Arizona's permanent ABS program provided the first modern U.S. footholds for non-lawyer ownership. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Sara Merken, *Washington becomes latest state to test legal practice reforms*, Reuters, Sept. 24, 2025. Utah's experiment authorized novel service models under supervisory oversight. Arizona went further, abolishing its version of Rule 5.4 and licensing ABS entities that combined lawyers and non-lawyers as owners and managers.

Early approvals included personal injury and mass-tort platforms, law-adjacent marketing entities, and litigation finance affiliates. In 2025, Arizona approved KPMG Law, marking the first U.S. Big Four entry into legal practice through ABS. Erin Mulvaney and Mark Maurer, *KPMG Wants to Be the First Accounting Giant to Own a U.S. Law Firm. Here's Why.*, Wall Street Journal, January 20, 2025; Emily Siegel, *Heavyweight Investors Line Up for Law Firm Ownership Ventures*, Bloomberg Law, Oct. 15, 2025.

Puerto Rico subsequently authorized non-lawyer ownership up to a 49 percent cap, pairing a streamlined disclosure regime with annual sworn statements and governance basics, a combination that, alongside tax incentives, is positioning the territory as a hub for litigation finance and affiliated services. Emily R. Siegel, *Tax-Friendly Puerto Rico Approves Non-Lawyer Owners of Law Firms*, Bloomberg Law, June 24, 2025. Meanwhile, Washington greenlit a decade-long pilot to test reforms with Supreme Court oversight, and Tennessee initiated a review of loosening ownership restrictions to expand access and competition. Sara Merken, *Washington becomes latest state to test legal practice reforms*, Reuters, Sept. 24, 2025; David Schultz, *Law Firm Ownership Model Eyed for 'Scary' Shakeup in Tennessee*, Bloomberg Law, Nov. 3, 2025.

These regimes have moved capital off the sidelines. Arizona reports triple-digit growth in approvals since inception, with a material share of licenses backed by private equity, funders, or marketing platforms oriented around high-volume consumer claims. Emily Siegel, *Heavyweight Investors Line Up for Law Firm Ownership Ventures*, Bloomberg Law, Oct. 15, 2025. Even in states maintaining traditional prohibitions, MSO structures have proliferated, allowing investors to

purchase non-legal back-office assets and deliver services at scale while the law firm remains 100 percent lawyer owned. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Jacob Shamsian, *It's illegal in most states for private equity to buy a law firm. Lawyers have figured out a workaround*, Business Insider, July 6, 2025.

The Rise of the MSO: A Structural Workaround Becomes a Strategic Model

An MSO is a separate legal entity, typically owned wholly or partially by non-lawyers, that provides business services to a law firm—finance and accounting, marketing, IT and cybersecurity, HR and recruiting, real estate and facilities, data analytics, and increasingly technology platforms and AI tools. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025. Properly structured, the MSO does not practice law, does not employ lawyers to render legal services, and does not control legal strategy or professional judgment. The lawyer-owned firm contracts with the MSO at fair market value, often on a long-term basis. Investors take equity in the MSO, funding modernization and scale that most partnerships cannot self-finance without sacrificing distributions. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Jacob Shamsian, *It's illegal in most states for private equity to buy a law firm. Lawyers have figured out a workaround*, Business Insider, July 6, 2025. This model echoes healthcare and accounting, where MSOs and analogous structures underwrite consolidation, standardization, and capital-intensive upgrades. Emma Cueto, *Healthcare's Lessons for Law About Private Equity Unclear*, Law360, October 9, 2025.

In law, the appeal is straightforward: professionalized operations, centralized systems, amortized investment in enterprise technology, improved talent platforms, and predictable services revenue for investors. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Cecy Graf, *Burford's MSO Play: Law Firms Are Out of Excuses*, The American Lawyer, Sept. 29, 2025. The structural nuance matters. Fee splitting remains prohibited in most jurisdictions, and any MSO arrangement must be designed to avoid a disguised equity stake in legal fees. Recent guidance confirms that lawyers may contract with non-lawyer-owned MSOs for administrative services, provided the MSO does not interfere with professional judgment, direct client representation, or share legal fees, most notably in Texas Committee on Professional Ethics Opinion No. 706, which has been cited as persuasive even outside Texas. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; William Rabb, *Litigation Funder's Plan to Invest in Law Firms Called 'Bad Policy,' With Big Impacts*, Insurance Journal, August 21, 2025.

Capital at the Gate: Funders, Asset Managers, and High-Profile Interest

Large-scale litigation finance and structural reform are converging. Burford Capital has publicly signaled an intention to invest in MSOs and minority stakes, using operational vehicles to avoid direct fee splitting while providing balance-sheet capital for AI, data infrastructure, cybersecurity, and lateral growth. Stephen Foley and Kaye Wiggins, *Burford Capital seeks to buy equity stakes in US law firms*, Financial Times, August 16, 2025; Cecy Graf, *Burford's MSO Play: Law Firms Are Out of Excuses*, The American Lawyer, Sept. 29, 2025. Burford has touted the stability of recurring MSO revenues relative to case-driven returns, describing its strategy as owning the legal industry's "plumbing." Cecy Graf, *Burford's MSO Play: Law Firms Are Out of Excuses*, The American Lawyer, Sept. 29, 2025; Roy Strom and Emily Siegal, *Big US Law Firms Cool to Idea of Bringing on Burford's Billions*, Bloomberg Law, September. 3, 2025.

Fortress Investment Group, an asset manager with billions committed to legal assets, acquired a 20 percent ABS interest in an Arizona plaintiffs' firm, the first known direct equity investment by a major U.S. asset manager in a law practice under that model. Emily Siegel, *Fortress Law Firm Deal Is First for Major US Asset Manager*, Bloomberg Law, Aug. 27, 2025. Other institutional investors, including credit funds, family offices, and venture platforms, are entering ABS and MSO deals, with a notable concentration in mass tort and personal injury given their marketing and volume-driven economics. Emily Siegel, *Heavyweight Investors Line Up for Law Firm Ownership Ventures*, Bloomberg Law, Oct. 15, 2025; Jacob Shamsian, *It's illegal in most states for private equity to buy a law firm. Lawyers have figured out a workaround*, Business Insider, July 6, 2025.

Conversations around brand-name firms have quickened. McDermott's

public acknowledgment that it is fielding inbound interest in an MSO-style split, lawyer-owned practice plus investor-owned services, signaled that Big Law is no longer dismissing such structures out of hand. Tatyana Monnay, *McDermott's Outside Investor Talks Augur Big Law Transformation*, Bloomberg Law, Nov. 14, 2025. Many large firms remain skeptical that they need outside capital or are reluctant to cede any measure of control, but open consideration by a top twenty firm has normalized MSO discussions across boardrooms that even a year ago might have declined a meeting. Roy Strom and Emily Siegal, *Big US Law Firms Cool to Idea of Bringing on Burford's Billions*, Bloomberg Law, September. 3, 2025.

Ethical Implications: Lawyer Independence, Conflicts, Confidentiality, and the Equity Question

Non-lawyer capital changes incentives. The principal ethical risks fall into four categories. First, independence. Pressures for return, tighter staffing ratios, faster billing cycles, and more aggressive collections can influence practice decisions, even if formally firewalled. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Emma Cueto, *Healthcare's Lessons for Law About Private Equity Unclear*, Law360, October 9, 2025. Business-side policies inevitably shape client selection, fee arrangements, and litigation posture. Governance must keep MSO influence squarely on operations, not on legal strategy. Written protocols, independent ethics oversight, and tested escalation procedures are essential. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025.

Second, conflicts. When asset managers back multiple firms or portfolios, especially in mass torts and opt-out class contexts, cross-holdings can create subtle alignment problems. MSO contracts should address conflict identification and resolution, including information barriers and remedies if conflicts become unmanageable. Funding agreements also raise conflict and control questions where terms purport to reserve rights on settlement decisions or lawyer selection. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Am. Tort Reform Ass'n, Sanctionable: The unsupported, exaggerated, and suspicious claims plaguing our nation's courts (October 2025).

Third, confidentiality. MSOs and funders must implement rigorous data access and handling controls. If counsel-side funding or MSO systems capture privileged strategic assessments, those materials must remain protected; contractual and technical safeguards should be audited regularly; and discovery risks accounted for given evolving law on funder and vendor discovery. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Michael S. Levine and Natalie Reed, Hunton Andrews Kurth, *ISO Approves Litigation Funding Disclosure Endorsement*, November 5, 2025.

Fourth, equity stripping and firm finance. Converting a law firm's business functions into a separate investor-owned entity allows outside investors to capture value previously retained by partners. This can be economically rational—partners receive capital to modernize or for succession, but it can also hollow out the firm if service fees are set above market or if "success economics" become de facto fee sharing. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Jacob Shamsian, *It's illegal in most states for private equity to buy a law firm. Lawyers have figured out a workaround*, Business Insider, July 6, 2025. Undercompensated practices may face pressure to chase higher-margin matters inconsistent with client needs or the firm's mission.

The profession should be candid: equity rarely enters a system without exerting leverage over it. Emma Cueto, *Healthcare's Lessons for Law About Private Equity Unclear*, Law360, October 9, 2025; *Nonlawyer Investment in the Legal Economy*, DRI Center for Law & Public Policy, (2024). If MSO arrangements are to succeed ethically, they must preserve the core of partnership: professional judgment, fiduciary loyalty, and client-first decision making, with transparent economics that reflect services rendered rather than covert participation in legal fees. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025. How that can be effectively, remains an open question.

System Responses: Retrenchment, Guardrails, and Market Transparency

Not all jurisdictions are moving rapidly toward non-lawyer ownership. Several prominent responses illustrate

a measured pendulum swing. Utah has curtailed portions of its sandbox as it evaluates outcomes and consumer protection. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025. California enacted legislation to restrict fee sharing with out-of-state ABS entities and to harden boundaries against indirect penetration of its market by Arizona-based structures. Sara Merken and Mike Scarcella, *California law sets up new contingency fee-sharing roadblock*, Reuters, October 16, 2025.

Texas issued Opinion No. 706 recognizing that lawyers may contract with non-lawyer-owned MSOs for administrative services if independence and fee-splitting prohibitions are respected, while emphasizing the lines that must not be crossed. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; *Litigation Funder's Plan to Invest in Law Firms Called 'Bad Policy,' With Big Impacts*, Insurance Journal (2025).

In the insurance arena, ISO approved a new endorsement in commercial liability policies conditioning coverage on mutual disclosure, upon demand, of third-party litigation funding agreements in coverage disputes. This development will spur discovery and privilege fights while adding transparency, at least in insurer–insured litigation. Michael S. Levine and Natalie Reed, Hunton Andrews Kurth, *ISO Approves Litigation Funding Disclosure Endorsement*, November 5, 2025.

Meanwhile, multiple states have enacted statutory disclosure or discovery regimes for third-party funding at the trial court level, and federal rulemakers and MDL judges have increased early vetting and transparency expectations in complex litigation. Matthew Bricker, *et al.*, *The Money Behind the Curtain: The Impact of Third Party Litigation Funding on Cyber Insurance*, CLM Magazine, May 28, 2025. The policy signal is clear: if capital is involved in the case, or behind the firm, courts, clients, and adversaries have a legitimate interest in knowing who holds the economic strings and on what terms.

Organizing for the New Reality: Formation of Organizations to Advocate for MSOs

As investment vehicles proliferate, market participants are mobilizing to professionalize and standardize MSO transactions. A first-of-its-kind consortium, the Private Equity Legal Alliance, launched to help founders and investors navigate this landscape with end-to-end support across preparation, valuation, investment, governance, and post-close integration, bringing together ethics counsel, bankers, accounting and tax advisors, insurance and benefits specialists, and interim finance ventures. *Private Equity Legal Alliance to Accelerate Law Firms' Access to Private Investment*, PR Newswire, November 6, 2025. Their stated aim is to expand access to capital in ways that preserve professional independence and client protection while enabling firms to finance AI adoption, data security, and national platforms. *Id.* Whether these efforts become a counterweight to skepticism or a blueprint for responsible deals will turn on their willingness to embrace transparency, enforce governance firewalls, and avoid fee sharing by another name. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025.

Accounting and Healthcare as Analogues: Promise, Limits, and Warnings

Accounting and healthcare are natural comparators. In both sectors, MSO or cognate structures unlocked capital and scale, and in both, quality and independence became contested. Emma Cueto, *Healthcare's Lessons for Law About Private Equity Unclear*, Law360, October 9, 2025. In healthcare, private equity's short investment horizons have been associated in some contexts with higher costs, increased turnover, and policies that clinicians argue affect care. Thoughtful investors have adapted with "don't break it" approaches that defer to professional culture and judgment, but the line between business and clinical decision making can blur in practice. *Id.* Law differs in meaningful ways. Noncompete limits give lawyers leverage to exit arrangements that strain professional judgment, and law's pricing responds more directly to quality and client satisfaction than healthcare's reimbursement models. *Id.*

Yet those protections are not panaceas. Economic dependence on a services platform can be real; standardized "metrics" can influence matter selection and staffing; and, once embedded, MSO control over systems and personnel can be hard to unwind. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025. The lesson is not to reject MSOs; it is to design them with an ethics-first architecture, patient capital, and credible exit and remediation rights when independence is imperiled. *Why Lawyers*

and Law Firms Should Pay Attention to MSO Partnerships, Holland & Knight, October 21, 2025.

Cautionary Example: Sterling Legal Shield and Lax Regulation of ABS in Arizona

A vivid illustration of risk at the seams of these models comes from Alabama. State authorities sued to dismantle an alleged web connecting clinics, out-of-state injury firms, case runners, and non-lawyer marketers that, according to the complaint, cold-called crash victims, posed as patient advocates, funneled them to a clinic with confusing branding, induced contingency retentions, and layered extraordinary medical liens designed to inflate settlement leverage. An Arizona ABS entity connected to some participants drew scrutiny for its role and for the interstate reach of operations using non-lawyer ownership to aggregate claims nationally; at one approval meeting, Arizona regulators themselves remarked on the "extraordinary" confluence of jurisdictions, registrations, and non-lawyer affiliations. Emily Siegel, *Heavyweight Investors Line Up for Law Firm Ownership Ventures*, Bloomberg Law, Oct. 15, 2025.

It would be unfair to tar all ABS or MSO entrants with the same brush. Yet the episode underscores real enforcement gaps. Where fee sharing is permitted and non-lawyers can own law practices, oversight must be equal to the complexity of structures and the incentives they create. Arizona's rapid approvals, significant private equity penetration, and concentration in heavy advertising fields like personal injury and mass torts call for sober, data-driven assessment, not celebratory rhetoric about access to justice Emily Siegel, *Heavyweight Investors Line Up for Law Firm Ownership Ventures*, Bloomberg Law, Oct. 15, 2025; Erin Mulvaney, *Smart Money in Bed With Lawyers: Why Wall Street Is Investing in Arizona Law Firms*, Wall Street Journal, March 20, 2025. The Alabama case, whatever its ultimate merits, shows how vulnerable consumers can be in the space where medical providers, marketers, funders, and law firms converge, and how quickly interstate models can use permissive jurisdictions to launder business practices into stricter states. Am. Tort Reform Ass'n, Sanctionable: The unsupported, exaggerated, and suspicious claims plaguing our nation's courts (October 2025).

Litigation Funding's Parallel Track—and Its Convergence With Ownership

Even apart from firm ownership, third-party litigation funding has reshaped litigation. Funders finance plaintiffs and portfolios in commercial disputes, mass torts, and IP; consumer lending at high effective rates is common in personal injury; dollars deployed have risen into the tens of billions globally; advertising expenditures to recruit claimants have exploded. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Matthew Bricker, *et al.*, *The Money Behind the Curtain: The Impact of Third Party Litigation Funding on Cyber Insurance*, CLM Magazine, May 28, 2025. Courts and legislatures have responded with disclosure rules and local orders; ISO's new endorsement foreshadows broader transparency in coverage disputes. Michael S. Levine and Natalie Reed, Hunton Andrews Kurth, *ISO Approves Litigation Funding Disclosure Endorsement*, November 5, 2025. As funders move from single-case investments to equity or quasi equity in firm operations via ABS or MSO structures, the convergence becomes clear.

Capital is no longer simply buying contingent returns on cases; it is buying platforms to originate claims, process volume, and monetize fee streams. That integration heightens the importance of independence and conflict controls and raises the regulatory stakes: the more layers of economic interest between lawyer and client, the more the profession must insist on transparency and enforceable boundaries. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Stephen Foley and Kaye Wiggins, *Burford Capital seeks to buy equity stakes in US law firms*, Financial Times, August 16, 2025.

What Comes Next: Practical Guardrails for Firms and Regulators

The momentum behind MSOs and ABS-like models is real, but so is the countermovement. Practical steps can reduce risk while allowing modernization. First, adopt clear written governance that codifies the firewall between legal judgment and business services, with explicit prohibitions on investor involvement in client selection, matter strategy, staffing, and settlement decisions. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025.

Second, use compensation models that reflect fair market value for services rendered, avoid revenue shares tied to legal outcomes, and periodically benchmark with independent advisors. Ryan

Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025.

Third, build confidentiality and privilege frameworks that restrict MSO and funder access to legal strategy and ensure any necessary sharing is protected, minimized, and auditable. Michael S. Levine and Natalie Reed, Hunton Andrews Kurth, *ISO Approves Litigation Funding Disclosure Endorsement*, November 5, 2025; Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025.

Fourth, implement conflict management systems that identify and mitigate cross-portfolio exposures, including client disclosures where appropriate and structural remedies when conflicts cannot be managed. *Id*.

Fifth, establish independent ethics officers or committees with authority to police boundaries and to unwind or suspend directives that impinge on professional duties. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025.

Sixth, promote enforcement parity across jurisdictions: if one forum authorizes non-lawyer ownership, neighboring states should ensure cross-border operations do not circumvent their rules through staffing, co-counsel, or marketing arrangements. Sara Merken and Mike Scarcella, *California law sets up new contingency fee-sharing roadblock*, Reuters, October 16, 2025.

Seventh, require appropriate transparency around funding and ownership, by rule, endorsement, or order, so courts and adversaries can account for the influence and interests of non-parties in litigation. Am. Tort Reform Ass'n, Sanctionable: The unsupported, exaggerated, and suspicious claims plaguing our nation's courts (October 2025); Michael S. Levine and Natalie Reed, Hunton Andrews Kurth, *ISO Approves Litigation Funding Disclosure Endorsement*, November 5, 2025.

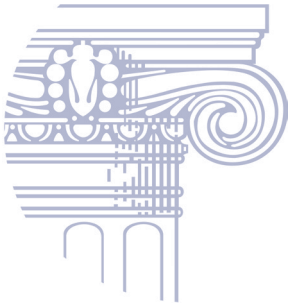
If investors and firms can operate within those guardrails, MSOs can fund modernization, broaden offerings, and professionalize operations without sacrificing the independence that Rule 5.4 sought to protect. If they cannot, or will not, then regulators should not hesitate to follow California's lead in retrenching around fee sharing and policing indirect evasions. Sara Merken and Mike Scarcella, *California law sets up new contingency fee-sharing roadblock*, Reuters, October 16, 2025.

Conclusion: Modernization Without Commodification

The legal profession is not immune to economic gravity. Firms need capital to invest in AI, cybersecurity, analytics, and national platforms; clients expect integrated service; and the partnership model is strained by succession and competition. *Why Lawyers and Law Firms Should Pay Attention to MSO Partnerships*, Holland & Knight, October 21, 2025; Cecy Graf, *Burford's MSO Play: Law Firms Are Out of Excuses*, The American Lawyer, Sept. 29, 2025. Carefully structured MSOs offer real benefits: they let lawyers practice law while professionals run the business, and they create recurring economics that can attract patient capital. Ryan Baysen and Emma Cueto, *PE Firms Leap Into MSO 'Frontier' For Slice of Legal Industry*, Law360 Pulse, September 9, 2025; Jacob Shamsian, *It's illegal in most states for private equity to buy a law firm. Lawyers have figured out a workaround*, Business Insider, July 6, 2025.

But the profession's core should not be for sale. Independence, loyalty, and confidentiality are not artifacts of a bygone era; they are the foundations of public trust. If non-lawyer involvement is to endure, whether through ABS licensing, MSO contracting, or portfolio funding, it must serve, not supplant, those commitments. That means firm leaders must build and enforce ethical architecture equal to the moment. Regulators must demand transparency and outcome data, calibrating reforms to evidence rather than aspiration. And where experiments yield the kind of conduct alleged in Alabama, or reveal regulatory laxity, the response must be swift and unmistakable. Am. Tort Reform Ass'n, Sanctionable: The unsupported, exaggerated, and suspicious claims plaguing our nation's courts (October 2025); Emily Siegel, *Heavyweight Investors Line Up for Law Firm Ownership Ventures*, Bloomberg Law, Oct. 15, 2025.

The fence around the profession was built for reasons that remain sound. Where gates are opened, they should be narrow, closely watched, and constructed so that what comes in strengthens the profession's capacity without weakening its purpose.



Catherine Geisler
Constangy, Brooks, Smith & Prophete, LLP, Chicago

Risks in Adopting Bring Your Own Device Policies

Although it may be convenient and cheap for business to adopt a Bring Your Own Device ("BYOD") policy, there are several risks that they should consider before implementing one. A BYOD policy is a policy that allows employees to use their personal devices, such as a laptop or phone, for work. *Pable v. Chicago Transit Authority*, 145 F.4th 712 (7th Cir. 2025), is a prime example of the dangers of allowing employees to use their personal device for work.

What Happened?

In *Pable*, a former software engineer for the Chicago Transit Authority ("CTA") discovered a security vulnerability within BusTime System, a real-time transit tracking application used by transit authorities such as CTA and developed by CTA's third-party vendor, Clever Devices. *Pable*, 145 F.4th at 716. The vulnerability granted unauthorized access to the application and allowed users to enable public alerts postings. The employee notified his supervisor and created a test application to see if they could post a service alert to the Dayton, Ohio BusTime system. The alert created a real bridge closure notice and automatically posted to the Dayton Regional Transit Authority's ("Dayton RTA") Twitter feed. Following the successful test, the supervisor notified the Dayton RTA and Clever Devices of the test alert. The Dayton RTA took no legal action but Clever Devices was critical of exploiting the vulnerability and notified the CTA.

The CTA placed the employee and supervisor on administrative leave and informed them that an interview would be conducted but made no mention of the Dayton test. The CTA later terminated both the employee and supervisor's employment with the CTA. Thereafter, the former employee filed a whistleblower retaliation lawsuit against the CTA and Clever Devices alleging that he was terminated for reporting a security vulnerability. The district court ruled that the former employee intentionally destroyed evidence on his personal device and dismissed his complaint with prejudice as a sanction and imposed monetary sanctions against not only the former employee but also his attorney. *Id*. at 719. The Seventh Circuit affirmed the trial court's judgment. *Id*. at 726.

Dangers of Data Deletion

A primary risk that a business should recognize when adopting a BYOD policy is that data can be easily deleted from a personal device. As a result, a BYOD policy should expressly lay out the parameters of what applications can be used, how it should be used, and how long data should be retained for work purposes. However, this may not be enough to prevent data deletion.

In *Pable*, prior to his employment termination, the former supervisor deleted his entire conversation with the former employee on Signal (a free, open-source encrypted messaging application) regarding the Dayton test, because he believed the messages were personal in nature and the CTA did not instruct him to preserve such messages. *Id*. at 717. The court noted that the record was silent as to whether the CTA was aware that the former employee and supervisor used Signal for work purposes or whether the CTA approved the use of Signal. *Id*. at 718. During discovery, the CTA learned that the messages with the

About the Author

Catherine Geisler is an associate of *Constangy, Brooks, Smith & Prophete, LLP* and is based in Chicago. She assists clients in responding to various data security incidents such as ransomware, business email compromises, and other types of cyberattacks. Through her daily work helping to manage responses to data security incidents, she stays abreast of the evolving legal landscape regarding privacy and cybersecurity issues to better serve clients. She also has substantial experience providing clients with advice on the development of policies and procedures for data privacy and security to ensure compliance with all U.S. laws, such as the California Consumer Privacy Act (CCPA) and Health Insurance Portability and Accountability Act (HIPAA), and international privacy laws, such as the General Data Protection Regulation (GDPR).

Ms. Geisler worked as an associate in an insurance practice group prior to joining Constangy, where she represented insurance carriers in a variety of insurance coverage disputes. Her experience included analyzing insurance coverage issues, assessing insurance carriers' risks, preparing coverage opinions and position letters, and handling all aspects of insurance coverage litigation in state and federal courts. Ms. Geisler has written extensively on data privacy and security matters, and she serves as the technology columnist for Illinois Defense Counsel. She also holds the Certified Information Privacy Professional/United States (CIPP/US) credential from the International Association of Privacy Professionals (IAPP).

supervisor were deleted from the former employee's personal device because the supervisor deleted the message thread and the former employee enabled a configuration feature on Signal to delete threads when another user deletes the entire thread. However, the CTA disputed the employee's explanation by providing Signal's Chief Operating Officer affidavit stating that at that time, deleting a message thread did not remove the same message from another user's device. The CTA also learned that additional messages with the supervisor were automatically deleted twenty-four hours after the recipient reads the message.

Another issue that arose in *Pable* was that the CTA exerted a great deal of time and effort obtain a forensic image of the employee's personal device. *Id*. at 718-19. The first forensic image that the CTA received from the former employee was limited and lacked key information. It was later discovered that the former employee's attorney instructed a forensic vendor to only search for data based on key terms and date ranges rather than a full forensic image. As a result, the CTA retained a different forensic vendor to obtain a forensic image. The second forensic image revealed details about the vulnerability and discussions about the litigation but did not contain all the conversations between the former employee and supervisor.

Although the district court in *Pable* dismissed the former employee's complaint with prejudice and Seventh Circuit affirmed the judgment, the CTA underwent a costly and lengthy discovery proceeding that resulted in limited evidence. Even if the CTA allowed the use of Signal for work, *Pable* reveals the dangers of allowing employees to use their personal devices for work purposes. The CTA was unable to recover valuable evidence as the former employee deleted data.

Risks of Unauthorized Access

Although it did not occur in *Pable*, another risk of a BYOD policy is unauthorized access of sensitive information. In *Pable*, the supervisor used Signal because it was more secure than text messaging. *Pable*, 145 F.4th at at 718. Even though Signal encrypts messages, there are other means to gain unauthorized access to those messages. For example, an employee may inadvertently add a non-employee to a message thread where sensitive business operations are being discussed. In March 2025, National Security Advisor Mike Waltz inadvertently invited Atlantic editor-in-chief Jeffrey Goldberg to a Signal chat that included several top government officials discussing a U.S. attack in Yemen. Meredith Deliso and Fritz Farrow, *The Atlantic editor details moment he realized he was included in Yemen group chat,* ABC News, (Mar. 24, 2025), https://abcnews.go.com/Politics/atlantic-editor-details-moment-realized-included-yemen-group/story?id=120117135. Goldberg had access to highly sensitive information, including weapons systems, specific timing of the attack, weather in Yemen, and sequence of events. *Id*. Alternatively, if the device is stolen along with the means to unlock the device, an unauthorized actor can easily open the Signal application and read the messages. Ivan Pereira and Lucien Bruggeman, *What to know about Signal, which the Pentagon previously discouraged workers from using*, ABC News, (Mar. 25, 2025), https://abcnews.go.com/Business/what-is-signal-messaging-encryption/story?id=120129513. Additionally, applications are susceptible to malware and spyware. In February 2025, Google Threat Intelligence Group observed that several Russia state-aligned hackers have increased their efforts to target and compromise Signal accounts by launching phishing campaigns. Dan Black, *Signals of Trouble: Multiple Russia-Aligned Threat Actors Actively Targeting Signal Messenger*, Google Cloud, (Feb. 19, 2025), https://cloud.google.com/blog/topics/threat-intelligence/russia-targeting-signal-messenger/. For *Pable*, if a hacker gained access to the former employee and supervisor's messages about the vulnerability, they could have done serious damage to and severely disrupted a number of transit authorities' operations. For these reasons, businesses should carefully consider the risks involved with implementing a BYOD policy, especially if employees handle sensitive information.

Key Takeaways

A BYOD policy offers convenient and affordable option for businesses as they do not need to provide devices to their employees. However, if a business deals with highly sensitive information, it should weigh the risks and benefits of implementing such a policy. Information residing on an employee's personal device could get easily deleted with no way of recovering that data or an unauthorized party may gain access to sensitive information that may cause detrimental harm to the business. A business should evaluate such risks before moving forward with implementing a BYOD policy.

Index of IDC Monograph and Feature Articles Volume 35

The *IDC Quarterly* continues its long-standing tradition of delivering timely, practical, and thought-provoking content to the Illinois defense bar. As a respected legal journal with statewide and national reach, it is widely recognized for its excellence and influence. That reputation is built on the exceptional scholarship and insight contributed by IDC members.

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We are fortunate to have had the opportunity to present these pieces, and many others, to you over the years. We offer our sincere thanks to the many editors and authors who have made this journal what it is today.

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Recent Developments in Pollution Coverage Under Illinois Law | Written by: **C. William Busse**, *Busse & Busse, P.C.*, Chicago, **James L. Craney**, *Craney Winters Law Group, LLC*, Edwardsville, **Amy E. Frantz**, **Michael D. Sanders**, and **Donald Patrick Eckler**, *Freeman, Mathis & Gary, LLP*, Chicago (35.1.M1)

The Evolution of Secondary Exposure Claims in Toxic Tort Cases: The Genesis of Secondary Exposure Claims | Written by: **Kelly M. Libbra**, *HeplerBroom LLC*, Edwardsville, **Kasia Nowak**, *Foley Mansfield*, Chicago, and **Jordan T. Panger**, *Brown & James, P.C.*, Belleville (35.2.M1)

Amendments to Illinois Wrongful Death Act to Include Exemplary Damages: Are You Ready for the Change? | Written by: **LaDonna L. Boeckman**, *HeplerBroom LLC*, Chicago, **Sagar P. Thakkar**, *Rock Fusco & Connelly, LLC*, Chicago and **Whitney L. Burkett**, *Segal McCambridge*, Chicago (35.3.M1)

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Must We All Become RICO Attorneys? | Written by: **Donald Patrick Eckler** and **Charlotte J. Meltzer**, *Freeman, Mathis & Gary LLP*, Chicago (35.3.26)

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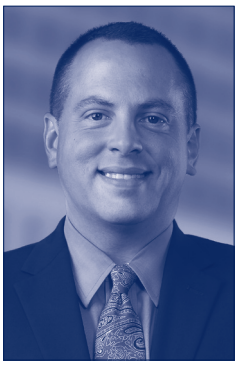
Identifying Solid Medical Foundation for the Life Care Plan | Written by: **Betsy Keesler, BSN, RN, CLCP**, *InQuis Global* (35.4.33)

Association News



Gregory W. Odom Appointed Secretary/Treasurer

Gregory W. Odom of *Baker Sterchi Cowden & Rice LLC* in Belleville, was appointed IDC Secretary/Treasurer in December. Greg will advance through the executive committee's officer positions, culminating in his term as president in June 2029.

Greg focuses his practice on defending clients in mass toxic tort, class action, commercial and product liability litigation, including biometric privacy class actions, and advises businesses on cybersecurity and biometric privacy law compliance. An experienced trial attorney, he represents clients in state and federal courts across Illinois and Missouri, with an emphasis on southern Illinois, the St. Louis metropolitan area and Cook County.

Greg has been recognized by The Best Lawyers in America, Illinois Super Lawyers Rising Stars and Illinois Law Bulletin Media. He has also been awarded the IDC Rising Star Award in 2015 and the IDC President's Award in 2018. He serves on the board of directors of the Autism Society of Southern Illinois and is a member of the Jefferson County chapter of the Illinois Chamber of Commerce.

Greg has been an active IDC member since 2013, has served as chair of several committees, and was elected to the board of directors in 2017.

2026 Defense Practice Series

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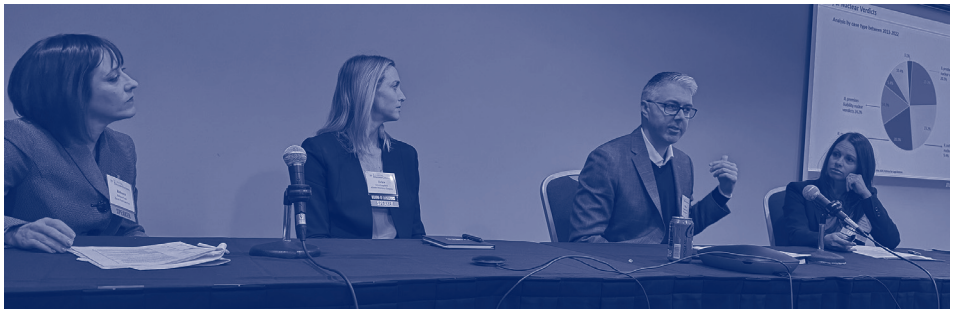
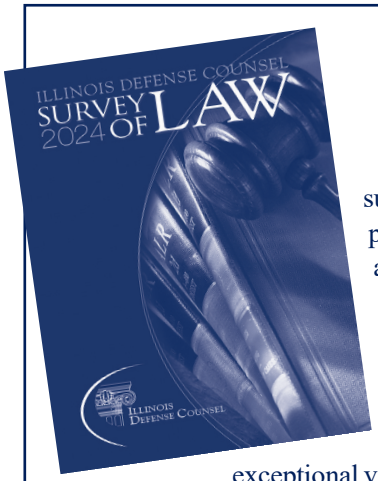
We had a wonderful time gathering in Chicago for The Modern Defense of Damages conference and Annual Holiday Party in December. To every attendee, speaker, sponsor, and supporter—thank you! The Damages Conference sparked ideas, the Holiday Party brought us together, and the Spirit of the Season Fundraiser reminded us what this season is all about: showing up for each other!

Thank you to all donated to the Spirit of the Season Fundraiser for the Illinois Chapter of the American Foundation for Suicide Prevention. We are pleased to announce that we raised over $1,200 for the Foundation. Learn more about the American Foundation for Suicide Prevention at www.afsp.org.





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THE IDC MONOGRAPH:

Current Issues with Removal to Federal Court

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Current Issues with Removal to Federal Court

Introduction

Although removal to federal court appears to be a relatively simple process, the analysis of when removal is available and when it is advantageous to your client can be quite complex. Removal jurisdiction allows defendants to take a case out of state court and place the case in the federal court that has jurisdiction. The right to remove is governed by 28 U.S.C. § 1441 *et seq*. As is discussed below, a party may remove where there is diversity of citizenship and the amount in controversy meets the statutory requirement of $75,000 or the case concerns a federal question. This process raises numerous issues for the defense practitioner. This article aims to clarify and discuss those issues.

Pros and Cons of Removal to Federal District Court

There are positives and negatives associated with the removal of a circuit court case to federal district court. Assuming defense counsel is well-apprised of the unique rules and litigation style of federal practice, the pros often outweigh the cons. On the other hand, removal is not a decision to be taken lightly. It should not be considered a "free" or low-risk option in light of various potential pitfalls, including the risk of remand and the potential for higher litigation costs. A candid goals and cost-benefit discussion with the client should be viewed as a prerequisite before filing a notice of removal.

Pros of Removal

A major motivation for removal to federal court is the perception that the county of filing is not a neutral forum. There can be numerous reasons for this belief, both personal to the practitioner and as more publicly acknowledged by the defense bar. For example, counsel may have experienced unfavorable rulings from a particular judge. More broadly, certain venues have the reputation of being consistently plaintiff-friendly (such as Cook, St. Clair, and Madison Counties). Federal district courts, on the other hand, are frequently perceived by defense counsel as more even-handed. Studies agree that this understanding is a strong one among the defense bar.[1] Whether it truly matches reality—at least generally—is far from clear.[2] More

About the Authors

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*.

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tangibly, the rules-based approach to case scheduling in federal court is often viewed as advantageous from a defense perspective. The strict requirements of the Federal Rules of Civil Procedure, particularly as to scheduling, typically results in an orderly and predictable litigation process. As mandated by the Federal Rules, district courts (with input from the parties) establish a case-wide schedule once a suit exits the pleading stage.[3] All parties thus have in hand an ironclad listing of all case deadlines, through trial, at a very early time. This is far different from many Illinois circuit courts, where the absence of strong scheduling rules frequently allows parties themselves to dictate the pace of litigation. If the plaintiff and defendant are comfortable with moving at a snail's pace, many courts will allow it. Not so in federal court. Although scheduling orders may be modified, it is a more difficult process than in most Illinois state courts.[4] Although the firmer deadlines and active case management put pressure on all parties, the party with the burden of proof must necessarily move quickly to establish its case prior to the dispositive motion deadline. That deadline—and federal courts' demonstrated willingness to grant summary judgment for the defense—is another potential pro to litigating in the district court.

The vast jury pools in the divisions of Illinois' three federal judicial districts are far more diverse than in any individual county. For example, the eight counties comprising the Eastern Division of the Northern District of Illinois draws from urban, suburban, and rural areas stretching from Lake County to the northeast all the way to La Salle County to the southwest.[5] For defendants concerned with the perceived pro-plaintiff reputation of Cook County, removal to federal court offers a greater variety of prospective jurors. A more heterogenous jury pool, by itself, may compel corporate defendants to seek removal.

Removal from Cook County, in particular, also allows the defense to escape one of the nation's busiest civil dockets. As many readers will understand, trial dates for civil cases filed in Cook County can be set far out, shifted repeatedly, or stacked with multiple other trials. Although trials are not guaranteed to be faster in federal court, the aforementioned active schedule supervision by the district court judge and magistrate judge provides far more certainty than at the Daley Center.

Another advantage of removal is the potential for mediation services offered by the federal court. Without needing to find and pay for a private mediator, parties in district court litigation can simply request to participate in a judicial settlement conference. Such conferences are typically conducted by the assigned magistrate judge. This service is, in the view of the authors, worth its weight in gold. For all parties, the participation of a sitting judge in negotiations can add urgency and seriousness to the process. And, no matter the result, settlement conferences with the magistrate judge are entirely free.

Finally, it is clear that most Illinois attorneys never step foot into federal court. Federal practice is a different experience governed by a different set of procedural rules. For these and other reasons, most plaintiffs' attorneys would prefer not to litigate in federal district court. Some admittedly fear trying their hand in district court. This can serve as a motivator for defense counsel to consider removal in appropriate circumstances. As perhaps the ultimate "pro" favoring removal, the authors have seen cases voluntarily dismissed by plaintiffs' counsel following their successful removal. At the very least, fear of federal court can provide valuable leverage for defense counsel.

Cons of Removal

The above pros presuppose that defense counsel is in a good position—through knowledge and experience with the Federal Rules of Civil Procedure, the local rules, and any applicable standing orders—to capitalize on a move to the district court. Without such knowledge, less-experienced defense counsel may inadvertently disadvantage their clients through removal.

One initial danger is the ineffective removal. As discussed above, removal requires a showing that the federal court possesses original subject matter jurisdiction (*e.g.*, diversity under 28 U.S.C. § 1332 or federal question under § 1331) over the action and compliance with the procedural removal requirements outlined in 28 U.S.C. § 1441. The jurisdictional showing is the defendant's burden, and missteps are not uncommon.[6] Even if federal jurisdiction is proper, procedural perils could still be lurking. For example, the filing of a notice of removal after the 30-day deadline (absent special circumstances) will result in remand to state court unless the plaintiff waives a challenge.[7] The "forum-defendant rule" (discussed below) could also invalidate a removal based on diversity of citizenship on procedural grounds.[8] Because the unanimous consent of the defendants is another removal requirement, inadequate or misinterpreted communications among defense counsel can jeopardize unanimity. If not all of the served defendants agree to removal—and provide

written confirmation of their agreement to the court within 30 days—the plaintiff will almost certainly succeed in its inevitable motion for remand.[9] Defense counsel should understand that, with a few exceptions, the federal court's order remanding a case back to state court may not be challenged through an appeal. It is a nonreviewable decision pursuant to 28 U.S.C. § 1447(d) and long-established judicial interpretation.[10]

Another potential disadvantage is that federal litigation can involve higher costs than in state court. Discovery is generally more immediately intensive in light of the disclosures mandated by Federal Rule of Civil Procedure 26(a)(1). Rule 26(a)(1) mandates that all parties provide each other with "initial disclosures" without the need for discovery requests. This is typically the first deadline facing the parties. Defendants must provide the names and contact information of individuals with discoverable information, a description of documents that may support their claims or defenses, details as to any applicable insurance, and should a counterclaim be filed, a computation of any damages claimed.[11]

Motion practice in federal court can also be more expensive than in state court. A motion for summary judgment, for example, must include a detailed "statement of undisputed material facts" and comply with the district-specific rules for dispositive motions. Compliance with the rules can be complicated and time-consuming, particularly to the uninitiated. Adjudication of motions can also take longer in federal court. This is necessarily a function of one of the key distinctions between Illinois' larger circuit courts and federal district court: federal judges handle both criminal and civil cases. The speedy trial requirements of federal criminal prosecutions means that criminal cases are, by rule, given scheduling preference when practicable.[12] It is not unheard-of to wait for nine to 12 months for a ruling on a non-dispositive motion to dismiss a complaint. Once a scheduling order is entered, however, federal courts are much more likely to enforce them than in state court.

Further expense, of the unexpected variety, can occur if plaintiff's counsel attempts to join a non-diverse defendant to a suit removed based on diversity jurisdiction. This strategy should be opposed, but the results can be unpredictable. If successful, joinder of the new defendant would destroy the federal district court's subject matter jurisdiction over the action.[13] The defendant would in such an instance find itself back in state court.

Other case-specific advantages and disadvantages may affect the decision whether to seek removal. Some factors may fit into either category. For example, would the expert standard under amended Federal Rule 702 or Illinois' *Frye* standard for expert witness testimony best benefit your client's case? Jury pool considerations can also be important. A defendant may have a case pending in a relatively conservative forum, and removal may result in the case being in a federal jurisdiction that would include a less desirable jury pool. These and other questions should be explored as fully as possible during the brief 30-day window for removal.

Recent Removal Case Law

Although many of the rules for removal to federal court are well established, there are still important changes occurring with new case law. In this section we discuss some of the recent federal appellate court opinions discussing removal.

In *Royal Canin U.S.A., Inc. v. Wullschleger*, the United States Supreme Court sought to resolve a Circuit split on the issue of whether an amended complaint omitting a federal claim destroys supplemental jurisdiction over a state law claim that was originally paired with it.[14] In Royal Canin, Wullschleger filed her original complaint in Missouri state court under the Missouri Merchandising Practices Act, state antitrust law, and the Federal Food, Drug, and Cosmetic Act (FDCA).[15] Royal Canin then properly removed the case to federal court, until Wullschleger amended her complaint to delete its every mention of the FDCA, leaving her state claims to stand on their own.[16] She then petitioned to the District Court to remand the case to state court.[17]

The Court held that when the plaintiff in an original case amends her complaint to withdraw the federal claims, leaving only state claims behind, she divests the federal court of adjudicatory power.[18] The Court explained that there is no discretion to decline supplemental jurisdiction here because there is not supplemental jurisdiction at all.[19] Once the plaintiff has ditched all claims involving federal questions, the leftover state claims are supplemental to nothing – and §1367(a) does not authorize a federal court to resolve them.[20]

In *Roberts v. Smith & Wesson Brands, Inc*., multiple plaintiffs sought to recover damages under Illinois law against Smith & Wesson, a gun manufacturer whose product was used in a mass shooting in Highland Park, Illinois, in 2022.[21] The complaints also asserted that Smith & Wesson should not have offered the type of gun the shooter used because it was of a type reserved for police and military use under federal law.[22] The

complaints included the shooter, the shooter's father, and the gun shop where the gun was purchased.[23]

Smith & Wesson filed notices of removal to federal court, asserting that the victims' claims arose under federal law.[24] The gun shop consented, but the shooter and shooter's father did not, which led the plaintiffs to move for remand on the basis that removal requires consent of all the defendants, and that the suits arose exclusively under state law because Illinois law created the claim for relief.[25] Smith & Wesson argued that its removal rested on its status as an entity "acting under" a federal officer for purposes of 28 U.S.C. § 1442(a)(1), which allows removal whether or not other defendants elect to be in federal court.[26] Additionally, it argued that removal is authorized by § 1441(c) rather than § 1441(a), and § 1441(c) is exempt from the all-defendant consent requirement.[27]

The Court of Appeals for the Seventh Circuit held that the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail does not mean that it is acting under a federal agent for purposes of § 1442(a)(1).[28] The court explained that this situation was no different than tobacco producers or drug manufacturers working under the supervision of their respective agencies.[29] Additionally, the court held that the state suits do not present multiple claims against Smith & Wesson.[30] The court explained that a claim is the set of operative facts that produce an assertable right in court and create an entitlement to a remedy.[31] Here, the core claim is for the shooter killing and injuring multiple persons, which the other defendants may bear liability for.[32] But the complaint does not state separate "claims," such as one for selling a machine gun.[33] That is a separate legal theory, which does not multiply the number of claims.[34] Lawyers set out each legal theory in a separate "count" of a complaint, but that does not multiply the number of claims.[35]

In *Ray v. Tabriz*, plaintiffs settled a lawsuit with their medical providers for injuries as a result of medical malpractice while they were under a federal health benefits plan (Blue Cross Blue Shield).[36] The plan's terms, as well as Office of Personnel Management regulations, provide that a Federal Employees Health Benefits carrier is entitled to full reimbursement for benefits paid to an enrollee to treat an injury or illness if the enrollee makes a monetary recovery from a third party in connection with the same injury or illness.[37] After plaintiffs settled, Blue Cross Blue Shield asserted a reimbursement lien on the settlement for the benefits it paid in connection with the medical malpractice injuries.[38] Plaintiffs subsequently filed a motion for lien adjudication under Illinois common fund doctrine, which Blue Cross Blue Shield filed notice to remove to federal court under 28 U.S.C. §§1441 and 1442, arguing that the court had federal question jurisdiction and that the motion was removable on federal officer grounds.[39]

On appeal, the Court of Appeals for the Seventh Circuit held that the reimbursement dispute implicates distinctly federal interests and that a reimbursement right predicated on a Federal Employees Health Benefits Act contract is not a prescription of federal law.[40] These claims that seek recovery from the proceeds of state-court litigation are the sort ordinarily resolved in state court.[41] Therefore, removal under §1441 was not available.[42]

However, the court held that the case was removable under §1442 because Blue Cross Blue Shield satisfies the four requirements for federal officer removal.[43] Blue Cross Blue Shield is (1) a "person" under the statute, (2) was "acting under" a federal agency, (3) the action is for or relating to Blue Cross Blue Shield's acts under the Office of Personnel Management's authority, and (4) Blue Cross Blue Shield has a colorable defense.[44]

Grounds for Removal to Federal Court

Diversity Jurisdiction

Diversity jurisdiction exists in a civil matter where (1) the dispute is between citizens of different states and (2) the amount in controversy exceeds $75,000 exclusive of interests and costs.[45] A corporation is a citizen of every state in which it is incorporated and where it has its principal place of business.[46]

Determining the citizenship of an individual is generally pretty simple. An individual's residence determines his citizenship. For corporations the analysis can be more complex. The first part of the analysis looks at where the corporation incorporated. A limited liability company is a resident of each state in which one of its members is a citizen.

The phrase principal place of business refers to the place where the corporation's high-level officers direct, control, and coordinate the corporations' activities.[47] In *Hertz*, the United States Supreme Court adopted the "nerve center" approach to determining principal place of business for purposes of removal.[48] The *Hertz* court explained that the nerve center is essentially the "corporate brain."[49] The Seventh Circuit has long utilized the nerve center test for principal place of business and has stated, "we look for the corporation's brain and

ordinarily find where the corporation has its headquarters."[50] A subsidiary corporation which is incorporated as a separate entity from its parent corporation is considered to have its own principal place of business.[51]

The nerve center test is important because a corporation could have significant operations in the state where suit is filed, and still not be a citizen of that state for purposes of removal jurisdiction.

When assessing whether a case can be removed to federal court on the basis of diversity, the practitioner must keep in mind the resident defendant rule.

28 U.S.C. § 1441(b)(2) provides:

> A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

The forum defendant rule is "designed to preserve the plaintiff's choice of forum, under circumstances where it is arguably less urgent to provide a federal forum to prevent prejudice against an out-of-state party."[52] The *Morris* court explained that the "forum defendant rule disallows federal removal premised on diversity in cases where the primary rationale for diversity jurisdiction—to protect defendants against presumed bias of local courts—is not a concern because at least one defendant is a citizen of the forum state."[53]

Amount in Controversy

As noted above when claiming diversity jurisdiction, the amount in controversy must meet the statutory minimum of $75,000.[54] Courts have held that "when plaintiffs allege serious, permanent injuries and significant medical expenses, it is obvious from the face of the complaint that plaintiffs' damage exceed the jurisdictional amount."[55] When a specific damages figure is not pled, a defendant may still remove a case to federal court if it has a plausible good faith belief estimate that the stakes meet the $75,000 threshold.[56] A removing defendant does not confess liability in order to show that the controversy in question exceeds the jurisdictional threshold.[57] Defense counsel should point out in the Notice of Removal that they are only arguing the amount in controversy, not consenting that plaintiff is entitled to the damages alleged.

The amount in controversy issue can put defense counsel in an awkward position. Counsel may be arguing that amount in controversy exceeds the jurisdictional amount to keep the case in federal court while still contesting the amount of damages. Even if plaintiff does not raise the issue on a motion to remand, the court may raise the motion on its own in a show cause order. Counsel need not look only to the allegations in the complaint to establish the amount in controversy, but also may look to the statements in the initial Rule 26 disclosures. If the issue arises after discovery has started, the answers to interrogators and responses to requests for production may also be used to support defendant's position. In response to a motion to remand or to court's order to show cause, a defendant may also request for leave to conduct discovery to ascertain the jurisdictional amount. Counsel may also want to use requests to admit to establish the amount in controversy meets the jurisdictional requirements.

> A case generally may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Federal Question Jurisdiction

The other basis for removal besides diversity jurisdiction is federal question jurisdiction. By statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."[58] One category of cases over which the district courts have original jurisdiction are "federal question" cases; that is, those cases "arising under the Constitution, laws, or treaties of the United States."[59] The presence or absence of federal question jurisdiction is governed by the

"well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.[60] The rule makes the plaintiff the master of the claim; and the plaintiff may avoid federal jurisdiction by exclusive reliance on state law.

A case generally may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.[61]

Third party practice raises additional issues with federal question removal. The case law indicates that a third-party cause of action does not make all claims removeable.[62] As discussed above, federal officers cases are removeable under this process. For example, in the *Adkins* case a party sued National Railroad Passenger Corporation (Amtrak) in a third party action. Because Amtrak is a federal entity, a lawsuit involving Amtrak is a federal question case. There is some case law that indicates the federal court could exercise supplemental jurisdiction over the cause of action, but nothing to indicate the federal court would be required to exercise supplemental jurisdiction.[63] If you proceed to file a third-party action based on a federal question, you could face a situation where the underlying claim proceeds in state court and the third-party claim proceeds in federal court.

Remand

Once a matter has been removed from state court to federal court, plaintiffs will generally search for any procedural means available to have the case remanded to state court. Remand proceedings are generally initiated by plaintiffs to return to a venue where a plaintiff will enjoy a more favorable Code Civil Procedure, a more favorable set of Supreme Court Rules and a more generous jury pool.

It is important to note that a motion to remand due to procedural defects must be filed within 30 days of the notice of removal. However, a motion to remand for subject matter jurisdiction can be made at any time before the final judgment is entered.

The process of remanding a case from federal court to state court is governed by 28 USC § 1447 (c), which states:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Bases for Remand

A common tactic plaintiffs use as a basis for remand in a case involving diversity jurisdiction is to seek to add new parties to the litigation so as to destroy complete diversity. This is controlled by 28 USC § 1447(e), which states: "(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder or permit joinder and remand the action to the State court."

Since leave to add additional parties is generally liberally given, once granted, defense counsel must be prepared to challenge the propriety of the addition of the diversity destroying party or parties. The argument generally raised to prevent remand in cases involving diversity is fraudulent joinder. "In order for a defendant to remove a case to federal court pursuant to 28 U.S.C. § 1441 (a), complete diversity is required; the citizenship of each plaintiff must be different from the citizenship of each defendant."[64]

Diversity jurisdiction, however, cannot be destroyed by the fraudulent joinder of additional parties that are nondiverse. "Diversity jurisdiction cannot be destroyed by joinder of nondiverse parties if such joinder is fraudulent."[65] "Fraudulent joinder occurs either when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or where there has been outright fraud in plaintiff's pleading of jurisdictional facts."[66]

While "outright fraud in plaintiff's pleading of jurisdictional facts" is fairly self-explanatory, the ability to "state a cause of action against nondiverse defendants" often results in some confusion on the part of defense counsel. It is important to note that the plaintiff's motives in adding diversity destroying parties (even if painfully obvious) are not relevant. All that is relevant is whether there is a possibility that a plaintiff can successfully state a cause of action against nondiverse defendants in state court.

A recent Northern District of Illinois case is illustrative of how this plays out. In *Guillermina Florez v. Costco Wholesale Corp., et al.*,[67] the plaintiff was injured when she tripped over a pallet of flowers at a Costco store. The plaintiff was an employee of Native's Wholesale Nursery, a company that

It is important at this juncture to note two guiding principles of removal. First, the court will resolve any doubts regarding removal in favor of the plaintiff's choice of forum in the state court. Second, the party seeking removal bears the burden of establishing federal jurisdiction.

delivered flowers to Costco stores on pallets. Costco employees were responsible for removing the pallets from Native's delivery trucks and placing them in the store via forklift. The plaintiff's foot became caught on one of the pallets after it was lifted into the store, causing her to fall and sustain injuries.

The plaintiff originally filed suit in the Circuit Court of Cook County, naming Costco as the sole defendant. Costco removed the case to federal court on the grounds of diversity, as the plaintiff was a citizen of Illinois and Costco was a citizen of the State of Washington. After removal, the plaintiff filed an amended complaint adding the three forklift drivers that were employed by Costco: Lasecki, Sandoval, and Kardach.[68] The plaintiff alleged that the three additional Costco employee-defendants negligently placed the pallets of flowers, which was the proximate cause of her injuries.[69] It was undisputed that the three newly added defendants were residents of Illinois.[70]

The individual employees moved to dismiss the count against them and the plaintiff moved to remand based on a lack of complete diversity between the parties.[71] The court declined to dismiss the three newly added defendants, holding that at the pleading stage, the amended complaint provided sufficient detail to plausibly allege that the additional defendants could be held liable under Illinois negligence principles.[72]

It is important at this juncture to note two guiding principles of removal. First, the court will resolve any doubts regarding removal in favor of the plaintiff's choice of forum in the state court.[73] Second, the party seeking removal bears the burden of establishing federal jurisdiction.[74]

Costco nevertheless argued that the joinder was fraudulent and that the employees were added for the sole purpose of destroying complete diversity. The court noted that fraudulent joinder requires a defendant to demonstrate that, "after resolving all issues of fact and law in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant."[75] The court also noted that:

> Despite the doctrine's name, whether a party is considered fraudulently joined depends on the chance of success on the merits, not a plaintiff's motives…Indeed, some courts suggest that the burden is even more favorable to a plaintiff than the standard for a motion to dismiss.[76]

In *Hunter Valles v. David Pleasant and Cleveland Cliffs Steel, LLC.*[77], the plaintiff, a machine operator and employee of Metal Services LLC, d/b/a Phoenix Services (Phoenix) was injured in an explosion at the Cleveland-Cliffs steel production plant in East Chicago, Indiana. The plaintiff filed suit in the Circuit Court of Cook County against Cleveland-Cliffs and David Pleasant, the Safety Director at the Cleveland-Cliffs plant. Cleveland removed the case to the United States District Court for the Northern District of Illinois based on diversity of citizenship.[78] The plaintiff moved to remand the case to the Circuit Court of Cook County due to lack of complete diversity.[79] In his motion to remand, the plaintiff argued that the court lacked diversity jurisdiction because defendant Pleasant was domiciled in Illinois.[80]

As an initial matter, the court undertook an analysis of the citizenship of Cleveland-Cliffs. The court noted that Cleveland-Cliffs is a limited liability corporation. Consequently, for diversity purposes, the citizenship of a limited liability company is "based on the citizenship of its members. If any of the LLC's members are citizens of the same state as the opposing party, then there is no complete diversity." The court went on to state that determining the citizenship of an LLC poses a unique problem because unlike corporations which may have citizenship in one or two states, LLCs can have multiple citizenships among its members and some of its members may also be LLCs.[81] The court relied on Cleveland-Cliffs' affidavit in support of its notice of removal. That affidavit

averred that the LLC had only one member: Cleveland-Cliffs Steel, which was incorporated in Ohio. Although the court ultimately concluded that there was diversity between Cleveland-Cliffs and the plaintiff, it next undertook an analysis of whether the allegations against Pleasant raised the possibility of an independent duty Pleasant may have owed to the plaintiff. The court reasoned that the allegations pled against Pleasant were sufficient to create a reasonable possibility that an Illinois court could find that Pleasant had an independent duty to the plaintiff. As such, the court found that Pleasant was not fraudulently joined and granted the motion to remand.

In rendering its opinion, the court turned to the well-established guidelines as to what a defendant arguing fraudulent joinder must establish. "Joinder is fraudulent when "the out-of-state defendant can show there exists no reasonable probability that a state court would rule against the [in-state] defendant."[82] Courts look "only to determine whether the claims against the nondiverse defendant are wholly insubstantial and frivolous. The question is whether defendants have shown that plaintiff could not state a claim against nondiverse defendants, not whether plaintiff has stated a claim against them."[83] Because the court found that a legitimate claim could be pled in state court against Pleasant, the court ruled that the joinder of Pleasant was not fraudulent.

Awards of Costs and Fees

In removing a case to federal court, defense counsel must take great care in assuring that the removal is appropriate. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. This is governed by 28 U.S.C. § 1447 (c), which states in pertinent part: "An order remanding the case may require payment of just costs and any actual expenses including attorney fees, incurred as a result of the removal." An order remanding the case requiring the payment of the plaintiff"s fees and costs can be an expensive order indeed. Once a claim of improper removal is made by a plaintiff, what follows becomes somewhat labor intensive. The process involves the motion to remand filed by the plaintiff, a rebuttal brief prepared by the plaintiff supporting the remand, the task of preparing supporting affidavits, multiple court appearances and the potential of limited discovery regarding the propriety of federal jurisdiction.

Some courts have struggled with the showing a party must make to be awarded fees and costs for improper removal. In *Moore v. Permanente Med. Group, Inc.*,[84] the plaintiff filed a wrongful death action in the Superior Court of California and a breach of contract and bad faith action arising out of an arbitration and other tortious conduct related to the arbitration. Defendants removed the case to federal court and the plaintiff filed a motion to remand that was granted. The plaintiff then moved for an award of attorney's fees pursuant to 28 U.S.C. § 1447(c). The motion was granted and fees were awarded to the plaintiff. On appeal, the defendants argued that the district court applied an incorrect legal standard in awarding attorney's fees to the plaintiff.

The appellate court reviewed a prior version of section 1447(c) before it was amended in 1998, The appellate court found that the prior statute required a showing that the removal was "improvident" in order to award attorney's fees.[85] However, the amended section 1447(c) does not contain the "improvident removal" language and merely provides for "just costs and any actual expenses, including attorney fees, incurred as a result of the removal."[86] As such, the appellate court found that the district court properly held that a finding of bad faith was not required for an award of attorney's fees. The court also noted that the Second Circuit also concluded that bad faith is not necessary for an award of attorney›s fees after the 1988 amendment.[87]

Once remanded, a district court retains jurisdiction after remand to entertain a motion for costs and actual expenses, including attorney fees.[88]

Procedure

Counsel would be well advised to review the procedural rules each time a case is removed from state court to federal court. A notice of removal is signed pursuant to Rule 11 of the Federal Rules of Civil Procedure.[89] Thus, counsel must keep in mind the requirements of Rule 11 with respect to statements in the notice of removal. Also, counsel is not obligated to support each assertion with evidentiary support. Counsel may still choose to add an affidavit if counsel thinks the addition will reduce the chances of the plaintiff opposing the removal. Venue of the court to which the case is removed is proper if the district contains the state circuit court where the case is filed.[90] The case must be removed within 30 days of receipt of service by defendant.[91] Failure to comply with this deadline will most likely prevent a removal to federal court.

When the civil action is removed pursuant to diversity of citizenship, all defendants who have been properly joined and served must consent to the

removal.[92] If defendants are served at different times, and the later served defendant moves to remove within 30 days, the earlier served defendants may consent to the removal.[93]

Counsel must also remember that filing in state in court is required as well as filing the notice of removal. A notice of notice of removal must be promptly filed in the state court where the case had been pending.[94] Failure to file in state court will prevent the removal from being completed and will allow the state court to take action on the case after defendant may think they have removed the case.[95] Defendant has 21 days to answer the complaint or seven days from the time of filing of notice of removal, whichever is longer.[96]

Conclusion

This article provides an overview of some of the considerations counsel should give to a removal to federal court. As noted in the article and the case law discussed, removal presents numerous practical and legal challenges. Although this article does not address every possible issue connected to removal, we hope the article does provide insight and analysis that can be used when next considering removal to federal court.

Endnotes

[1] *See, e.g.,* Thomas E. Willging & Shannon R. Wheatman, *Attorney Reports on the Impact of Amchem and Ortiz on Choice of a Fed. or State Forum in Class Action Litigation: A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attorneys* (updated), 7-8, 18-20, 28-33 (Fed. Jud. Ctr. May 2004) (discussing perceptions of fairness as rationale for filing and removal of class actions); Adam B. Sopko, *Swift Removal*, 13 The Fed. Cts. Law Rev. 42-44 (2021) (discussing snap removals to federal court).

[2] Willging & Wheatman, *Attorney Reports on the Impact of Amchem and Ortiz*, at 8-9, 33-46.

[3] Fed. R. Civ. P. 16(b); Fed. R. Civ. P. 26(f).

[4] *See* Fed. R. Civ. P. 16(b)(4) (a scheduling order may only be modified for good cause and with the judge's consent).

[5] 28 U.S.C. § 93; Divisional County Map of the U.S. Dist. Ct. for the N.D. Ill., https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/GeneralInfo/Districtmap.aspx (last visited Nov. 21, 2025).

[6] *Thompson v. Army and Air Force Exchange Serv.*, 125 F.4th 831, 837 (7th Cir. 2025) (district court required to remand removed case for which it lacked subject matter jurisdiction); *Morrow v. DaimlerChrysler Corp.*, 451 F. Supp. 2d 965, 967 (N.D. Ill. 2006) (defendants failed to satisfy the 30-day deadline to file a notice of removal).

[7] *See, e.g., DC Liquidators, LLC v. Warehouse Equip. Specialists, LLC*, 66 F. Supp. 3d 1138, 1140-41 (N.D. Ill. 2014).

[8] 28 U.S.C. § 1441(b)(2); *Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2013); *Norwegian Air Shuttle ASA v. Boeing Co.*, 530 F. Supp. 3d 764, 770 (N.D. Ill. 2021).

[9] *See, e.g., Theis v. Flowers Baking Co. of Lenexa, L.L.C.*, 3:25-cv-697-NJR, 2025 WL 1805296 at *2 (S.D. Ill. July 1, 2025).

[10] 28 U.S.C. § 1447(d) states: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." *See also Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995); *Foster v. Hill*, 497 F.3d 695, 697 (7th Cir. 2007); *Rubel v. Pfizer Inc.*, 361 F.3d 1016, 1018-20 (7th Cir. 2004).

[11] Fed. R. Civ. P. 26(a)(1).

[12] Fed. R. Crim. P. 50 ("Scheduling preference must be given to criminal proceedings as far as practicable.").

[13] *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 768 (7th Cir. 2009).

[14] *Royal Canin U. S. A., Inc. v. Wullschleger*, 604 U.S. 22 (2025).

[15] *Royal Canin*, 604 U.S. at 28.

[16] *Id.* at 29.

[17] *Id.*

[18] *Id.* at 30.

[19] *Id.* at 31.

[20] *Id.* at 31-32.

[21] *Roberts v. Smith & Wesson Brands, Inc.,* 98 F.4th 810, 812 (7th Cir. 2024)

[22] *Roberts,* 98 F.4th at 812

[23] *Id.*

[24] *Id.*

[25] *Id.* at 813.

[26] *Id.*

[27] *Id.*

[28] *Roberts,* 98 F.4th at 813.

[29] *Id.*

[30] *Id.* at 815

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Roberts,* 98 F.4th at 815.

[35] *Id.*

[36] *Ray v. Tabriz*, 110 F.4th 949, 952 (7th Cir. 2024)

[37] *Ray*, 110 F.4th at 952.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 954.

[41] *Id.*

[42] *Id.*

[43] *Ray*, 110 F.4th at 955.

[44] *Id.* at 956-57.

[45] 28 U.S.C. § 1332(a)(1).

[46] 28 U.S.C. § 1332 (c).

[47] *Hertz Corporation v. Friend,* 559 U.S. 77 (2010).

[48] *Hertz*, 559 U.S. at 95.

[49] *Id*.

[50] *Wisconsin Knife Works v. National Metal Crafters,* 781 F.2d 1280 (7th Cir. 1986).

[51] *Beightol v. Capital Bankers Life Ins. Co.,* 730 F. Supp. 190 (E.D. Wisc. 1990); *See Huggins v. YCI Methanol One, LLC,* 477 F.Supp.3d 590 (S.D. Texas 2000); *Merrimack Mutual Fire Insurance v. Omega Flex, Inc.,* 569 F.Supp.3d 68 (Mass. 2021) (discussing nerve center test).

[52] *Morris v. Nuzzo,* 718 F.3d 660 (7th Cir. 2013) (citing *Hurley,* 222 F.3d at 380).

[53] *Id. at* 665. *See Dresser Indus., Inc. v. Underwriters at Lloyd's of London,* 106 F.3d 494, 499 (3d Cir.1997) ("If diversity jurisdiction exists because of a fear that the state tribunal would be prejudiced towards the out-of-state plaintiff or defendant, that concern is understandably allayed when the party is joined with a citizen from the forum state."); *Lively v. Wild Oats Mkts., Inc.,* 456 F.3d 933, 940 (9th Cir.2006).

[54] 28 U.S.C. § 1332

[55] *McCoy by Webb v. General Motors, 226* F. Supp.2d 939 (N.D. Ill. 2002).

[56] *Bloomberg v. Serv. Corp. Int'l,* 639 F.3d 761 (7th Cir. 2011).

[57] *Sabrina Roppo v. Travelers Commercial Insurance Co.,* 869 F.3d 568 (7th Cir. 2017).

[58] 28 U.S.C. § 1441(a).

[59] 28 U.S.C. § 1331.

[60] See *Gully v. First National Bank,* 299 U.S. 109, 112–113, 57 S.Ct. 96, 97–98, 81 L.Ed. 70 (1936).

[61] *Franchise Tax Board,* 463 U.S., 1, 12, 103 S.Ct. 2841, 2847–2848.

[62] *Adkins v. Illinois Central Railroad Co.*, 326 F.3d 828 (7th Cir. 2003); *Lewis v Union Pacific*, 2010 WL 2278653 (W.D. Ark. 2010)

[63] *See Adkins*, 326 F.3d, at 836

[64] *Ronald D. Lance and Joyce G. Lance v. Employers Fire Insurance Company, Commercial Union Insurance Companies, and Stivers & Powers, Inc.,* 66 F.Supp.2d 921,922. (C.D. Ill. 1999).

[65] *Hoosier Energy Rural Elec. Co-op., Inc. v. Amoco Tax Leasing IV Corp*., 34 F.3d 1310, 1315 (7th Cir. 1994)*, (*quoting *Gottlieb v. Westin Hotel Co*., 990 F.2d 323, 327 (7th Cir.1993)).

[66] *Hoosier Energy*, 990 F.2d at 327.

[67] *Guillermina Flores v. Costco Wholesale Corp.,* 1:25-cv-03656 (C.D. Ill), Order of Oct. 28, 2025 (Doc. 43) at 1.

[68] *Id.* at 1-2.

[69] *Id.*

[70] *Id.* at 2.

[71] *Id.* at 3.

[72] *Id.* at 2 (citing *Morris v. Nunzo,* 718 F. 3d 660, 668 (7th Cir. 2014)).

[73] *Flores,* Order of Oct. 28, 2025 at 2 (citing *Morris v. Nuzzo,* 718 F3d at 668).

[74] *Flores,* Order of Oct. 28, 2025 at 2 (citing *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 352 (7th Cir. 2017).

[75] *Flores,* Order of Oct. 28, 2025 at 5 (citing *Schur v. L.A. Weight Loss Ctrs. Inc.,* 577 F.3d 752, 764 (7th Cir. 2009)).

[76] *Flores,* Order of Oct. 28, 2025 at 5 (citing *Mayes v. Rapoport,* 198 F .2d 457, 464 (4th Cir. 1999) and *Battof v. State Farm Ins. Co*., 977 F. 2d 848, 852 (3d Cir. 1992) (noting that a 12(b)(6) inquiry "is more searching than that permissible when a party makes a claim of fraudulent joinder").

[77] *Hunter Valles v. David Pleasant and Cleveland Cliffs Steel, LLC*, 2023 U.S. Dist. LEXIS 135761, *1 (N.D. Ill. Aug. 4, 2023).

[78] *Valles*, 2023 U.S. Dist. LEXIS 135761, *3.

[79] *Id.* at *4

[80] *Id.*

[81] *Id.* at *7 (quoting *J.P. Morgan Sec. LLC v. Cresset Asset Mgmt., LLC*, 2021 U.S. Dist. LEXIS 239457, *3 (N.D. Ill. Dec. 15, 2021)

[82] *Id.* at *17 (quoting *Calchi v. TopCo Assocs., LLC*, 2023 U.S. Dist. LEXIS 99074, *4 (N.D. Ill. June 7, 2023).

[83] *Id.* at *10-11.

[84] *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443 (9th Cir. 1992).

[85] *Moore*, 981 F.2d at 446.

[86] *Id.*

[87] *Id.* at 446.

[88] *Id.* at 445.

[89] 28 U.S.C. §1446(a).

[90] 28 U.S.C. § 1441(a).

[91] 28 U.S.C. § 1446(b)(1).

[92] 28 U.S.C. § 1446(b)(2)(A).

[93] 28 U.S.C. § 1446 (b)(2)(C).

[94] 28 U.S.C. § 1446(d).

[95] *Id.*

[96] FRCP 81(c).