DCBA Brief

The Journal of the DuPage County Bar Association

Volume 32, Issue 4 | December 2019

Morton Arboretum Illuminates the Holiday Season

DCBA Brief
The Journal of the DuPage County Bar Association
www.dcbabrief.org

Volume 32, Issue 4
December 2019

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Happy Holidays from the DCBA *Brief*

By Christopher Maurer

Christopher J. Maurer is a partner with the law firm of Anderson & Associates, P.C., and practices in the areas of divorce, domestic relations law, and probate litigation. Christopher is the Editor-in-Chief of the DCBA Brief, an active member of the DuPage County Bar Association, and a Director of the DuPage Bar Foundation. Christopher is Guardian *ad Litem* and certified Mediator for the 18th Judicial Circuit Court. He practices in DuPage, Cook, Kane, Will, Lake, McHenry, and Kendall County, and received his J.D. from Loyola University School of Law, Chicago, in 1997.

Welcome to the December issue of the DCBA *Brief.* Despite the ever-present omen of climate change, the cold, dog days of winter are upon us, and soon there will be a confusing sea of identical black overcoats in the cloakroom of the Attorney Resource Center. Feel free to take your pick.

As Old Father Time staggers toward the finish line of another year, many of us practitioners of the noble profession of law find ourselves scrambling around on several fronts that compete for our limited time, attention and sanity. First, we try to put our caseloads in order before the onslaught of the holidays, before judges, clients, and opposing counsels go MIA until January.

Second, we try to jam in as many holiday-themed bar functions and office parties as possible so we can schmooze with our colleagues of the bar and bench. For many, this is one of the few times of year that we get a chance to socialize with our fellow-practitioners. And no one wants to be labeled a "Scrooge" or a "Grinch" (or even a "Snow Miser" for the Rankin/Bass nerds out there). I highly recommend attending at least one of these events every year.

Third, and most important, we try to set aside time for family and friends with whom we share good cheer, maybe some burnt cookies, and sometimes even that viscous, yellow, artery coating beverage known as Egg-Nog (spiked or virgin, as you prefer).

Often the non-lawyer members of our extended families don't really understand the stresses and problems we face on a day-to-day basis in our practices. It is doubtful that they ever will, but to partially remedy this deficiency, I have come up with an attorney-themed variation on an old holiday classic. I give to you *The Twelve Days of Lawyering.*

The Twelve Days of Lawyering

On the twelfth day of [**Holiday or Non-Religious Event of Choice**], my practice gave to me:

Twelve crummy rulings,
Eleven clients griping,
Ten judges yawning,
Nine law clerks lounging,
Eight bailiffs barking,
Seven sheriffs tackling,
Six stricken pleadings,
Five phone call riiiiings;
Four contract bids;
Three broke pens;
Two bloody gloves;
And an heir missing from a family tree.

Feel free to add this little gem to your caroling set list. *(Continued on page 6)*

Join friends and colleagues from DAWL, DCBA and Justinians for a full evening of food and fun!

December 12, 2019 - 5:30 PM - 9:00 PM
Harry Caray's - Lombard, IL
Appetizers, Plated Dinner, Open Bar
Tickets availabe for purchase at www.dcba.org/Holiday19
$100 before December 2nd ($120 after)

Event Sponsorship or Raffle Basket Donations, contact rrupp@dcba.org

DuPage Bar Foundation

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Full Hot Breakfast with Your Contribution to the DBF Holiday Fund.

THURSDAY
The 19th
of December

8:30am
Until
10:30am

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DuPage Judicial Center

Raffle for a chance to win one of three gift card baskets. Purchase raffle tickets on site or see any member of the DBF Board to enter. Need not be present to win!

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Visit www.dcba.org/DBFHoliday to donate.

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The DCBA BRIEF is a publication of the
DuPage County Bar Association
126 South County Farm Road
Wheaton Illinois 60187
(630) 653-7779

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Please send any Letters to the Editor to the attention of Christopher Maurer, at email@dcbabrief.org

Happy Holidays from the DCBA *Brief*

(Continued from page 3)

With any luck, it'll be on the radio soon to the point that it will replace *Grandma Got Run Over By a Reindeer* as the world's most annoying holiday song.

I would like to thank **Azam Nizamuddin** for taking on the role of Articles Editor this month and for providing us with timely articles, one from **Danya Shakfeh** who explores implications of the Changing Landscape of Employment Rights; **Matt Caruso** with an overview of the new Illinois law regarding the Limitation on the Amount of Retainage that can be withheld from a Contractor in a Construction Contract; **Glenn Gaffney** and **Joseph Kwiatkowski** write about Employee Victims of ERISA and finally **Tony Mankus** gives us a look at the Strange World of Structured Transactions and Civil Forfeiture. Also, thanks to **Edward Sherman** for providing us with excellent Illinois law updates. ☐

Articles

Articles Editor

Azam Nizamuddin

Azam Nizamuddin is General Counsel with the American Trust Corporation and Chief Compliance Officer of Allied Asset Advisors in Oak Brook, Illinois. Previously, he practiced commercial litigation and family law with large firms, small firms, and as a solo practitioner. He is an active member of the DCBA and serves on the DCBA business Law Section. He previously served on the ISBA Corporate Law Section and on the ISBA ARDC Committee. He was appointed to the Illinois Supreme Court Access to Justice Commission, Language access Committee. He is also Adjunct Professor at Loyola University and frequently lectures on the intersection of law and religion.

New Employment Laws
for a New Generation?

By Danya Shakfeh

Technology has been disrupting employment law for decades leaving workers without rights, and employers in constant limbo about their duties. This disruption involves largely the blurring of employees and independent contractors and the rights and responsibilities that accompany each status. Given that employees' rights and designations are strictly derived from statute and that employment laws are strictly "positive laws" (i.e., they have no moral or "natural law" bases),[1] workers rely strictly on the government to discern and enforce their rights. Similarly, employers' duties and liabilities also derive strictly from the government.

Thankfully, recent Illinois legislation has expanded the rights of workers regardless of their employment classification. Specifically, the Illinois legislature enacted HB 262[2], an amendment to the Illinois Human Rights Act, which redefines "employer" as one that employs at least one person versus the previous definition of employing 15 or more people. The second pertinent legislation is the Workplace Transparency Act (WTA), which was passed in June 2019 and will become effective as of January 1, 2020.[3] What is most notable about the WTA is that it protects non-employees (i.e., independent contractors) from discrimination and harassment. Before the enactment of the WTA, the Illinois Human Rights Act (IHRA) only protected employees with certain civil rights protections, and independent contractors had no such rights, aside from basic tort liability protection.

As the "gig economy" is becoming more pervasive and replacing traditional employment relationships, it is time for legislation and employment laws to keep up with the change in the employer-employee relationship. A gig economy is defined as a labor market that is characterized by the prevalence of short-term contracts or freelance work as opposed to perma-

1. http://web.nmsu.edu/~dscoccia/376web/376lpaust.pdf
2. http://www.ilga.gov/legislation/101/HB/PDF/10100HB0252lv.pdf
3. http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=SB&DocNum=1829&GAID=15&LegID=119442&SpecSess=&Session=

nent jobs.[4] The gig economy also creates a situation whereby workers are heavily dependent on the employers but without receiving the rights that come with employment and without a remedy in the event of abuse. Being classified as an employee also comes with a host of other rights such as the right to unionize, wage rights, the right to file labor complaints, and freedom from discrimination. Further, as technology makes it is easier for businesses to secure remote workers, the prevalence of the gig economy also makes it more difficult for workers to secure full-time employment. This is where the WTA is extremely helpful because independent contractors will be protected in ways they previously were not.

One highly watched case of worker classification and rights in the gig economy involves Uber Technologies, Inc, commonly known as "Uber," a well-known ride-sharing service. In, *O'Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133 (2015), a nation-wide class action case filed in the Northern District of California, Uber drivers alleged that Uber violated various federal and state laws by misclassifying them as independent contractors as opposed to employees.[5] Although this litigation was filed in California, as will be explained below, Illinois attorneys should be keeping an eye on how this all plays out. At the heart of the *O'Connor* case was whether Uber has control over its drivers as control is one of the key elements in determining whether a worker is an employee or an independent contractor.[6] In their class action lawsuit against Uber, the plaintiff drivers argued that they are misclassified as independent contractors and should be classified instead as employees due to their dependence on Uber for their livelihood and Uber's control over them. The drivers alleged that Uber benefits from the independent contractor classification because as long as the drivers are classified as independent contractors, Uber is not legally required to compensate the drivers for their expenses, provide health insurance benefits, sick days, and other legally mandated employee benefits. Uber has 60,000 drivers and, in 2018, realized a revenue of $11.3 billion.[7] Based on Uber-reported number of employees, Uber seems much smaller than it really is. According to Uber's website, it has 22,000 employees,[8] but this does not include the 60,000 drivers deemed independent contractors by Uber.

In March 2015, using California's *Borello*[9] test of employment which was previously established by California's Supreme Court, the *O'Connor Court* denied the plaintiff class' motion for summary judgment because there were genuine issues of material fact as to the issue of control. The *Borello* test uses several factors to determine whether a worker is an employee or independent contractor with the principal test being whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result, in addition to the employer's control over employees.[10] In *O'Connor*, when considering whether Uber had control over its drivers, the Court considered whether Uber could fire a driver at-will. Uber argued that it could terminate drivers only if there was a material breach of the governing contracts. The drivers argued that the governing contracts allowed Uber to terminate its drivers at any time, similar to an at-will relationship. *O'Connor* at 1149-1150. This is where technology played an interesting role because Uber would often deactivate a driver's access to the Uber application if the drivers did not accept leads to Uber's satisfaction, which undermined Uber's argument that it only fired its drivers if there is a material breach of contract.[11] This deactivation process, the plaintiffs argued, was a form of control over the drivers and bolstered the drivers' claim that they should be classified as employees.[12] Ultimately, the Court ruled that this determination of control to determine the employment status is best left for the trier of fact. Subsequently,

About the Author

Danya Shakfeh is the managing member of Shakfeh Law LLC, based in Oak Brook, Illinois. Her firm's practice centers on business, contracts, non-compete agreements, and litigation. She has also been selected as a Rising Star by Illinois Super Lawyers for the years 2015-2020. She can be reached at www.ShakfehLaw.com.

4. https://hrdailyadvisor.blr.com/2018/10/31/understanding-the-gig-economy-and-how-it-impacts-your-company/
5. *Id.* at 1135
6. *Id.* at 1138
7. https://www.cnbc.com/2019/02/15/uber-2018-financial-results.html
8. https://www.uber.com/newsroom/company-info/
9. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (Borello)*, 48 Cal.3d 341, 355 (1989)
10. *Id.*
11. *Id.* at 1143
12. *Id.*

> **“ The gig economy also creates a situation whereby workers are heavily dependent on the employers but without receiving the rights that come with employment and without a remedy in the event of abuse.**

after the Court denied summary judgment, the parties entered into a settlement for $20 million in March 2019 and Judge Edward M. Chen, approved the settlement on August 29, 2019. The settlement terms include Uber modifying its driver deactivation process.

In a letter issued on April 29, 2019, the United States Department of Labor issued a letter stating that gig workers generally are independent contractors and not employees.[13] Although the controversy was centered around wage claims, the Uber case underscores how technology and the gig economy can blur the lines between employees and independent contractors when using the current tests of employment.

In 2018, California adopted the “ABC test” and abandoned the *Borello* test, for evaluating employment classification for the purpose of California’s Industrial Welfare Commission (IWC) Wage Order in its landmark decision *Dynamex Operations West, Inc. v. Superior Court,* 4 Cal.5th 903 (2018). The ABC test presumes that all workers are employees unless the employer can demonstrate all of the following:

(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both

13. https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf

under the contract for the performance of such work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity's business; and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[14] Summarily, the ABC test is stricter than the *Borello* test and renders more workers independent contractors.

The ABC test is not unique to California and is commonly used all over the country, including in Illinois, which codifies the ABC test for the purposes of unemployment benefits. Under Illinois' Unemployment Insurance Act, a worker is also presumed to be an employee unless an employer can demonstrate that the employee meets the requirements of the ABC test. Ill. Admin. Code tit. 56, § 2732.200 (2008).

Although the *O'Connor* case and passage of other legislation affecting the rights of independent contractors are taking place in California, Illinois employers should take notice of the changing landscape as Illinois may follow suit in amending laws in light of the controversies surrounding the gig economy.

As previously noted, Illinois passed two laws that also altered the rights of independent contractors and employees. To reiterate, they are HB 262, which now defines an employer as a person employing one or more persons for the purposes of claims involving rights under the Illinois Human Rights Act.[15] This means businesses of all sizes are now subject to laws regarding discrimination of employees, not just those that have 15 or more employees. This change in employee minimum requirements is likely due to the fact that with technology and automation, businesses are now outsourcing various tasks and can effectively run large enterprises with relatively few employees. One reason why revenue matters in cases of discrimination is that it may have been previously presumed that smaller businesses did not have as much market power as larger companies. However, as technology allows companies to bring in revenue without being a "large" company, businesses can now generate 6-figure revenues without a large employee base since these businesses are making more use of independent contractors. This trend of high-earning businesses with few to no employees is reflected in many publications such as *The Million-Dollar One-Person Business* by Elaine Pofeldt.[16] Although the title signals that these businesses consist of only one person, Pofeldt explains in her book that these business structures generate lots of funds by outsourcing tasks to other companies or to freelancers. At some point, many of these businesses do take on employees but gone are the days that a business needs to employ a dozen people before generating significant revenue or having an influence on the market.

The second law, as noted above, is the Workplace Transparency Act (WTA), which was passed in June and will become effective as of January 1, 2020.[17] What is most notable about the WTA is that it protects non-employees (i.e., independent contractors) from discrimination and harassment. Before the enactment of the WTA, under the Illinois Human Right Act (IHRA), only employees had certain rights and independent contractors had no such rights. With the increasing reliance on independent contractors, this is a big win for social justice advocates. Violating the WTA could result in an award for a plaintiff that includes attorney's fees. See Section 3-25 of the WTA This expansion of protection of independent contractors is also a nod to the fact that businesses are developing without traditional employees and the growing gig economy. Combining the terms of the IHRA and the WTA means that

14. *Id* at 916-917
15. http://www.ilga.gov/legislation/101/HB/PDF/10100HB0252lv.pdf
16. https://themilliondollaronepersonbusiness.com
17. http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=SB&DocNum=1829&GAID=15&LegID=119442&SpecSess=&Session=

all employers are subject to regulations involving harassment and discrimination and all workers, regardless of their formal employment status, receive these same rights.

Illinois employers and attorneys who advise business clients should take notice of the changing laws in California and the impact the gig economy is having on the law in general. Illinois standards for determining employment classification are similar to California, specifically as found in the ABC test. However, unlike California, Illinois has thus far only passed legislation that gives independent contractors more rights, without reclassifying them as employees. On the other hand, giving independent contractor rights versus requiring employers to reclassify them will likely save businesses a great deal of litigation as it will not allow employers to challenge classification of their workers.

As technology changes, the employment landscape through automation and remote workers and the gig economy continues to be more prevalent, lawmakers should reconsider the utility of distinguishing between employees and independent contractors. In other words, do the reasons for creating these employment classifications still exist? Or are these classifications being abused by some employers resulting in a disproportionate benefit to the employer? Lastly, as the newly passed Illinois laws cited above demonstrate, lawmakers may continue to reconsider whether employee rights should be dependent on a worker's employment classification. ☐

New Law in Illinois Regarding the Limitation

on the Amount of Retainage that can be Withheld from a Contractor in a Construction Contract

By Matthew Caruso

Everyone in the construction business needs to know about a new law in Illinois that limits the amount of retainage[1] that can be withheld from a contractor who has entered into a private contract for the construction of a private commercial structure or single-family housing of more than twelve units. The law does not apply to public contracts.

This law is intended by the Illinois General Assembly to favor contractors and subcontractors as the latest salvo in the unending evolutionary war of survival between owners and contractors. The Illinois Mechanics' Lien Act[2], whose definitions are incorporated in the Contractors Prompt Payment Act[3], moved the pendulum to the advantage of contractors and particularly subcontractors when it gave subcontractors the ability to lien a job even if they did not have a contract with the owner.[4] After the passage of the Mechanics' Lien Act, it was no longer a defense to a subcontractor's payment claim for an owner to say that he had no knowledge of the subcontractor and that the owner had no enforceable contract with the subcontractor.

However, as many subcontractors know, the ability to file a lien claim can sometimes have limited success as a tactic for obtaining payment, because it can take years to litigate a mechanics' lien claim, and the owner can starve out a small subcontractor by withholding payments for work performed. Owners also had an advantage in a "take it or leave it" negotiating position in awarding contracts. The recent law passed in Illinois, part of a relatively recent statute known as the "Contractors Prompt Payment Act,"[5] is intended to shift the balance back towards contractors and subcontractors and away from the owner, the party who controls the purse strings. The Contractors Prompt Payment Act provides some relief to contractors from their

1. Retainage refers to an amount of money held back from a contractor or subcontractor during the term of a construction project. According to 2004 research on retainage practices in the United States, 85% of all commercial construction contracts in the United States require at least 5% retainage. Dennis Bausman, Ph. D., *Retainage Practice in the Construction Industry*, pg. 12 (2004).
2. 770 ILCS 60/1
3. 815 ILCS 603/1
4. 815 ILCS 603/10
5. 815 ILCS 603/1

inherent disadvantage under the Golden Rule: "He who has the gold, makes the rules."

In 2017, 815 ILCS 603/10 was added to the Contractors Prompt Payment Act. As of August 18, 2017, this new section required that all construction contracts in Illinois include a provision, whether written into the contract or not, that all contractors whose work is approved by the owner, and that all subcontractors whose work is approved by the owner or contractor, shall be paid within 15 days. This section strengthened section 603/15, passed by the Illinois General Assembly in 2007, which required payment of 10% interest on payments not made in a "timely manner." The 2017 law answered the obvious question: What does "in a timely manner" mean? As of 2017, it means "within 15 days."

Section 603/20 of the Illinois Contractors Prompt Payment Act, which became effective on August 20, 2019, is intended to help contractors and subcontractors by limiting the amount of retainage that can be withheld to no more than 10%, and requiring that once a job has been 50% completed based solely on the cost of the contract, the retainage must be reduced to 5%. This requirement of reducing a contract's retainage to 5% means that at the 50% cost point of the contract, the owner must be prepared at the next pay request to pay out additional funds to reduce the retainage going back from the beginning of the job to 5%. Thus, on a two million dollar job with 10% retainage, at the 50% completion of the job – when the contractor has completed one million dollars' worth of work - the 10% retainage withheld so far would equal $100,000 (10% of one million). At the next pay period after 50% completion of the contract, the owner will have to pay the contractor an additional $50,000 to bring the retainage on the first half of the job down from 10% to 5%, in this example, from $100,000 to $50,000.

While this new law lowering the allowable retainage on construction contracts is certainly helpful to subcontractors, there is a potentially unintended negative consequence for contractors on large projects, because Section 603/20 requires the retainage to be reduced to 5% at the 50% level of completion of **each separate subcontract.**[6] That means that the contractor may be at less than 50% completion under its contract with the owner, but some of his subcontractors are beyond 50% completion under their contracts with the contractor, and those subcontractors must be paid for 95% of their work at a point in the project when the contractor is only being paid for 90% of the contractor's work. Thus, a contractor must be careful in negotiating his contract with the owner to make sure that the owner pays enough funds to the contractor to cover the decrease in retainage of the earliest subcontractors such as the excavator who are the first ones to complete the work in their subcontracts; otherwise, the contractor will face possible liability for payments to subcontractors out of his own pocket instead of from funds paid by the owner.

For example, if the contractor hired an excavating subcontractor whose subcontract was worth $2 million like the example in the previous paragraph, the contractor would be required to pay the excavator an extra $50,000 to lower the retainage from 10% to 5% after the excavator had performed 50%

About the Author

Matthew T. Caruso is a partner at the law firm of Roberts & Caruso practicing out of the firm's Wheaton office. He concentrates his practice on business litigation, contested probate, construction law, guardianships and criminal law. Matt is a two-time Chair of the DCBA's Business Law Committee. He has acted as lead counsel in over 25 jury trials and numerous bench trials.

6. 815 ILCS 603/20

DCBA Members in the Spotlight

Do you know someone extraordinary?

The *DCBA Brief* wants to spotlight members who have exhibited extraordinary acts of kindness, service, or have improved the quality of our legal system in a meaningful way. Please tell us if you know someone who deserves the spotlight.

Nominations are easy and the profile interview and Brief article itself will be handled by Editorial Board members. We do all the leg work!

Send your nomination to Jolianne Alexander at jolianne@mkfmlaw.com**.** Nominees will be contacted by a member of the Editorial Board to be interviewed.

“…a contractor must be careful in negotiating his contract with the owner to make sure that the owner pays enough funds to the contractor to cover the decrease in retainage of the earliest subcontractors… otherwise, the contractor will face possible liability for payments to subcontractors out of his own pocket…

of the subcontract, but the owner would be still holding back 10% retainage from the contractor if the contractor's overall contract for the entire project has not been 50% completed. In that case, if the contractor does not have the correct wording in his contract with the owner to cover the decrease in retainage for early-finishing subcontractors, then the contractor would have the burden of paying the extra $50,000 to the excavating subcontractor when the excavator's work becomes 50% completed.

> Section 603/20 of the Illinois Contractors Prompt Payment Act reads as follows:
>
> (815 ILCS 603/20)
> Sec. 20. Retainage. No construction contract may permit the withholding of retainage from any payment in excess of the amounts permitted in this Section. A construction contract may provide for the withholding of retainage of up to 10% of any payment made prior to the completion of 50% of the contract. When a contract is 50% complete, retainage withheld shall be reduced so that no more than 5% is held. After the contract is 50% complete, no more than 5% of the amount of any subsequent payments made under the contract may be held as retainage.
> (Source: P.A. 101-432, eff. 8-20-19.)
> (815 ILCS 603/99)
> Sec. 99. Effective date. This Act shall take effect upon becoming law.
> (Source: P.A. 95-567, eff. 8-31-07.)

This new section of the Contractors Prompt Payment Act 815 ILCS 603/20 limiting retainage in construction contracts to 10% and reducing retainage to 5% when the contract is 50% completed is now the law in Illinois. Whether this provision is written in a construction contract or not, this law says that the retainage limitations are in the contract whether you see them or not. It would be wise for contractors to inform their estimators of this new law, and for owners to be aware of this law when budgeting their projects. ☐

Employee Victims of ERISA § 510 Violators Deserve Full Make Whole Remedies of Back Pay, Front Pay and Other Equitable Relief

By Joseph Kwiatkowski and Glenn Gaffney

The *Employee Retirement Income Security Act* (*ERISA*) is a Federal Act which controls health, welfare and benefit plans created by employers. *ERISA* governs health insurance, disability insurance, defined contribution and defined benefit plans, some severance plans, life insurance, disability plans, incentive and stock option plans. It applies to not only large company welfare benefit plans, but also plans created by mid-size and small corporations and LLCs. Many small companies and professional practices offer Simple SEP and IRA plans and health insurance. *ERISA* was intended to make sure employees receive benefits they were promised, "but Congress did not require employers to establish benefit plans in the first place."[1] Therefore, courts have held that *ERISA* represents "a careful balancing" between the rights of plan participants while still encouraging companies to create and maintain those plans even in an unfavorable and highly competitive economic environment.[2] *ERISA's* goal is to induce employers to offer benefits and yet ensure a predictable set of liabilities under uniform standards with remedial but not punitive liability awards when a violation occurs.[3] U.S. Supreme Court Chief Justice Roberts has said, "People make mistakes. Even administrators of *ERISA* plans."[4] However, these "mistakes" can have a major financial impact on individual Plan Participants. ERISA evolved from the law of trusts so there is a legal fiction that all relief must be equitable in nature regardless of the underlying harm caused by the Plan Administrator or even the employer itself. When an employee is affected by a Plan Administrator's "mistake", the ERISA claim needs to be presented within either the express statutory language of *ERISA* or using acceptable equitable concepts within an evolving Federal common law under the statutory guidance of "other appropriate equitable relief."[5]

An aggrieved individual can usually obtain "benefits due him under the terms of the plan" with little problem or complication since such relief is expressly authorized by statute.[6] However, when an individual seeks other "make-whole" relief such as money damages for unpaid medical bills or similar monetary relief, there are significant challenges. While ERISA is guided by principles of trust law (which for example preclude emotional distress or punitive damages as a form of relief),[7] "trust law does not tell the entire story."[8] Recently, courts across the nation have begun to re-interpret equitable remedies to now include previously unavailable "legal damages."[9] The purpose of this article is to provide an understanding of the recent transformation and evolution of equitable terms and concepts relating to individuals seeking "make whole relief" for money damages under *ERISA,* in particular when the employee is a victim of discrimination or benefit interference by the Administrator or employer which clearly results in actual harm such as the loss of a job.

1. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).
2. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004).
3. *Rush Prudential HMO, Inc. v. Moran*, 530 U.S. 355, 379 (2002).
4. *Conkright v. Frommert*, 559 U.S. 506, 130 S.Ct. 1640, 1644 (2010) (The fact that plan administrators make mistakes should come as no surprise, given the *Employee Retirement Income Security Act* of 1974 is "an enormously complex and detailed statute," *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993), and the plan that administrators must construe can be lengthy and complicated.)
5. 29 U.S.C. § 1132(a)(3); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209-210 (2002).
6. 29 U.S.C. § 1132 (a)(1)(B).
7. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985); *Mertens v. Hewitt Associates*, 508 U.S. 262.
8. *Varsity Corp. v. Howe*, 516 U.S. 489, 497 (1996).
9. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 142 (U.S. Supreme Court concluded that § 1132(a)(2) did not authorize plaintiff to sue for compensatory and punitive damages for employer's alleged breach of fiduciary duty).

Back Pay and Front Pay as Remedies for ERISA § 510 Violations – ***Overview***

ERISA contains provisions designed to protect individuals from retaliation for asserting their rights under ERISA. Specifically, § 510 of ERISA states, "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan…or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan". [10] In order to establish a *prima facie* case under § 510 of ERISA, a plaintiff must demonstrate the following: "(1) [he] belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate was present".[11]

Additionally, § 510 of ERISA provides, "It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."[12] If an individual files or participates in a grievance under § 510 of ERISA, the grievance does not need to be correct, only plausible.[13] This provision of ERISA protects not only individuals who report an actual violation of ERISA, but also those who had a reasonable belief that an ERISA violation was occurring.

The provisions of § 510 of ERISA are two pronged. They protect individuals from being deprived enjoyment of their ERISA rights and individuals who report ERISA violations. While determining if an ERISA violation occurred is one issue, another matter is determining the type of relief to award an aggrieved party when a violation occurs. A plaintiff's remedies for ERISA § 510 violations are limited to the provisions under § 502(a)(3) of ERISA.[14] "(a) A civil action may be brought… (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan".[15] What constitutes "other appropriate equitable relief" has been a highly contested issue in the courts. Despite the contentious nature of this issue, courts have found, more often than not, that back pay and front pay are available remedies for violations of § 510 of ERISA.

Back Pay as an Available Remedy

The remedy of back pay is a payment for work done in the past and withheld unlawfully. Courts have taken a more liberal approach in defining back pay as "other appropriate equitable relief". Monetary relief does not disqualify it from being equitable in nature.[16] Monetary damages can be categorized as equitable when they are restitutionary.[17] The Seventh Circuit has stated that restitution may be a monetary equitable remedy under ERISA.[18] "Remedies for ERISA violations may include

10. 29 U.S.C. § 1140.
11. *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996).
12. 29 U.S.C. § 1140.
13. *George v. Junior Achievement of Cent. Indiana, Inc.*, 694 F.3d 812, 817 (7th Cir. 2012).
14. *Teumer v. General Motors Corp.*, 34 F.3d 542, 544 (7th Cir.1994).
15. 29 U.S.C. § 1132(a)(3).
16. *Warner v. Buck Creek Nursery, Inc.*, 149 F.Supp.2d 246, 255 (W.D. Va. 2001).
17. *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995).
18. *Anglin v. Sears, Roebuck and Co.*, 139 F.Supp.2d 914, 919 (N.D. Ill. 2001).

About the Authors

Joseph Kwiatkowski received his Bachelor's Degree from the University of Illinois at Urbana-Champaign and J.D. from the Chicago-Kent College of Law. He is an Associate at the Law Offices of Michael Lee Tinaglia, Ltd. He has experience representing plaintiffs and defendants in employment, commercial and real estate law matters.

Glenn Gaffney is a graduate of the University of Illinois with a B. S. in Business Administration and received his J.D. from Southern Illinois University School of Law. He has been Chair of both the DCBA Labor and Employment Section and the ISBA Labor and Employment Section Council. Mr. Gaffney was President of the DCBA for the term 2006-2007.

'awarding the employee back pay, reinstatement, restitution of his forfeited employee benefits, and any other relief necessary to make him whole'".[19]

This open and liberal definition of "other appropriate equitable relief" should include back pay as an equitable remedy. Looking at the plain language of § 502(a)(3) of ERISA, it is evident that there is no preclusion of back pay as appropriate equitable relief.[20] In general, back pay qualifies as an equitable remedy when it is intertwined with injunctive relief or is an integral part of an overall equitable remedy.[21] It is established in the law that back pay is an equitable remedy when it is requested with reinstatement.[22] Back pay and reinstatement are monetary equitable remedies that may be recovered under ERISA, as these remedies are relief necessary to make plaintiff whole.[23]

This line of reasoning has been applied in Seventh Circuit decisions. In *Cabin*, plaintiffs Howard Cabin and Cecilia Cabin, his wife, filed a claim for ERISA retaliation.[24] They alleged that defendant terminated Howard Cabin in retaliation for his and his wife's use, or to prevent the plaintiffs from continuing their use, of defendant's employee benefit plans.[25] The court held that plaintiffs were entitled to seek equitable monetary relief for the alleged ERISA violations.[26] Likewise, in *Anglin*, plaintiff sued defendant for an alleged wrongful termination violating § 510 of ERISA.[27] Plaintiff claimed that defendant terminated him so it would not have to pay him any further employee benefits.[28] The court held that plaintiff was entitled to back pay, reinstatement and other various remedies if he was successful on his claim.[29]

Front Pay as an Available Remedy

Not only can victims of ERISA violations recover wages owed to them in the past, but they may also recover wages that would have been owed to them in the future. Money damages can be categorized as equitable relief under ERISA when they are restitutionary.[30] Restitution is a remedy available in equity and falls within § 502(a)(3)'s category of "appropriate equitable relief".[31] Courts have expanded their understanding to include front pay as an equitable remedy.[32]

Although courts award front pay as an equitable remedy, it is only granted in certain circumstances. Front pay is an available equitable remedy under ERISA § 502(a)(3) when sought as a substitution for reinstatement.[33] "Front pay is awarded only when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible".[34] Reinstatement is inappropriate when excessive hostility or antagonism exists between parties.[35] Front pay can be available when "reinstatement is inappropriate, such as where no position is available or the employer-employee relationship has been so damaged by animosity that reinstatement is impracticable".[36]

Courts have gone on further to distinguish front pay from compensatory damages. Despite being very similar, compensatory damages and front pay are different remedies.[37] Front pay awards a plaintiff a monetary amount as if he had been reinstated in his old job.[38] Compensatory damages are not as limited as front pay and provide relief for reputational harm, loss of experience, employment mobility, lost earning capacity and the ability to obtain a job in adverse economic situations.[39] Likewise, a compensatory damages award that only provides a plaintiff with the cash value of reasonably-certain future earnings might leave the plaintiff still suffering harms that could be remedied by reinstatement such as a restored job track record and job history.[40] At a minimum, front pay should be awarded as an equitable remedy even when compensatory damages are legal in nature.

The Equitable Remedy of Surcharge

Surcharge is an "amount that a court may charge a fiduciary that has breached its duty."[41] It has been a historic equitable remedy evolved from the law of trusts used to "charge"

19. *Cabin v. Plastofilm Industries, Inc.*, 1996 WL 496604 at *2 (N.D. Ill. 1996) (citing, *Bittner v. Sadoff & Rudoy Inds.,* 490 F.Supp. 534, 536 (E.D. Wis. 1980).
20. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1263 (10th Cir. 2004) (Lucero, J., dissent).
21. *Id.* at 1265.
22. *Cabin v. Plastofilm Industries, Inc.*, 1996 WL 496604 at *2.
23. *Anglin v. Sears, Roebuck and Co.*, 139 F.Supp.2d 920.
24. *Cabin v. Plastofilm Industries, Inc.*, 1996 WL 496604 at *1.
25. *Id.*
26. *Id.* at *2.
27. *Anglin v. Sears, Roebuck and Co.*, 139 F.Supp.2d 916.
28. *Id.* at 916.
29. *Id.* at 920.
30. *Schwartz v. Gregori,* 45 F.3d 1022.
31. *Id.*
32. *Id.*
33. *Warner v. Buck Creek Nursery, Inc.*, 149 F.Supp.2d 257.
34. *Schwartz v. Gregori*, 45 F.3d 1023.
35. *Teutscher v. Woodson*, 835 F.3d 936, 946 (9th Cir. 2016).
36. *Id.* at 947 (citing, *Traxler v. Multnomah County*, 596 F.3d 1007, 1011-12 (9th Cir. 2010).
37. *Id.* at 959 (Smith, J., concurring opinion).
38. *Williams v. Pharmacia*, 137 F.3d 944, 953 (7th Cir. 1998).
39. *Id.*
40. *Teutscher v. Woodson*, 835 F.3d 959 (Smith, J., concurring opinion).
41. *Black's Law Dictionary*, 1579 (9th Ed. 2009).

> **“…this article… provide(s) an understanding of the recent transformation and evolution of equitable terms and concepts relating to individuals seeking “make whole relief” for money damages under ERISA…**

a trustee with a loss or depreciation to the trust estate resulting from a breach of trust.[42]

In the 2011 Supreme Court decision of *Cigna v. Amara*, a beneficiary sued the plan fiduciary for breach and sought a monetary remedy. The Supreme Court described the claim as the type of action that could only be brought in a court of equity prior to the merger of law and equity.[43] Nevertheless, the beneficiary was awarded a money judgment which traditionally was considered a “legal remedy” and outside *ERISA*’s purview. The Supreme Court said, “but the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief.” Equity courts possess the power to provide relief in the form of monetary compensation for a loss resulting from the trustee’s breach of duties, or to prevent the trustee’s unjust enrichment. The Court said, “Indeed, prior to the merger of law and equity this kind of monetary relief against the trustee, sometimes called a ‘surcharge’ was exclusively equitable.”[44] Previously, the Supreme Court had ruled that an *ERISA* action could only restore the plaintiff with particular funds or property held by the defendant, and not punish the defendant with personal liability.[45] The Roberts Supreme Court concluded that contrary to the lower court’s “fears” that “surcharge” violated the *ERISA* rule prohibiting legal judgments, surcharge was available as “appropriate equitable relief” pursuant to *ERISA* § 502(a)(3) so long as the plan participant makes a proper showing of “actual harm.”[46] In addition to surcharge, the Supreme Court also upheld the District Court’s award of an affirmative and negative injunction as a measure of equitable relief, stating “Indeed, a maxim of equity states that ‘equity suffers not a right to be without a remedy.’ “[47]

Not long after *Cigna,* the 7th Circuit also expanded *ERISA* relief in *Kenseth v. Dean Health Plans*. There, the Plaintiff was mistakenly led to believe that her surgery would be a covered expense by the Plan administrator.[48] Yet, the $77,974 surgery claim was denied and as a result, plaintiff sued the insurance plan for make whole relief.[49] In the spirit of *Cigna*, the Seventh Circuit held that if the plaintiff proves a breach of fiduciary duty proximately causing her damages, then plaintiff may seek an appropriate equitable remedy including make-whole relief in the form of money damages.[50]

In this post-*Cigna* world, the 7th Circuit has not been alone in changing the method in which ERISA relief is understood. The 5th Circuit ruled that a plaintiff was eligible for make-whole relief money damages for medical benefits due to a fiduciary breach.[51] The 4th Circuit held that life insurance benefits, and

42. Restatement of Trusts § 205.
43. *Cigna Corp. v. Amara,* 131 S.Ct. 1866, 1879 (2011).
44. *Cigna Corp. v. Amara*, 131 S.Ct. 1879.
45. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 214; *Mertens v. Hewitt Associates*, 508 U.S. 256.
46. *Cigna Corp. v. Amara*, 131 S.Ct. 1881.
47. *Cigna Corp. v. Amara*, 131 S.Ct. 1879.
48. *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 872 (7th Cir. 2013).
49. *Id.*
50. *Id.* at 883.
51. *Gearlds v. Entergy Services, Inc.*, 709 F.3d 448 (5th Cir. 2013).

not just wrongfully paid premiums, were monetary damages available to Plaintiff.[52] In *McCravy*, the court stated that "the portion of *Amara* in which the Supreme Court addressed Section 1132(a)(3) stands for the proposition that remedies traditionally available in courts of equity, expressly including estoppel and surcharge, are indeed available to plaintiffs suing fiduciaries under Section 1132(a)(3)".[53] Likewise, the 2nd, 8th and 9th Circuits have held that plaintiffs seeking monetary damages is an equitable remedy known as "surcharge" and is available relief under ERISA for fiduciary breaches.[54]

Equitable Estoppel

Equitable estoppel prevents a party from asserting rights he otherwise would have against another when his own conduct renders assertion of those rights contrary to equity. In ERISA claims, courts have utilized equitable estoppel when a beneficiary detrimentally relies on some misrepresentation of coverage. For estoppel to apply, the Seventh Circuit stated that "a plaintiff demonstrating extreme circumstances must also show (1) a knowing misrepresentation; (2) made in writing; (3) reasonable reliance on that misrepresentation by the plaintiff; and (4) that the reliance was to the plaintiff's detriment reliance."[55]

Estoppel can be beneficial when a beneficiary suffers harm due to his reliance on misrepresentation made by a plan administrator. The Supreme Court confirmed the availability of this remedy upon a proper showing of detrimental reliance that "in truth, influences the conduct of the plaintiff, causing prejudice."[56] Frequently, courts utilize estoppel in combination with other equitable remedies. For instance, the Supreme Court upheld the remedy of reformation of an *ERISA* plan and enforced upon the employer what had been promised to its employees stating, "This aspect of the remedy resembles estoppel, a traditional equitable remedy."[57] Likewise, a District Court in Wisconsin ruled in favor of the beneficiary for her claims of estoppel and surcharge for breach of fiduciary duty against the employer and the plan.[58] While the beneficiary could not recover twice, she was allowed to recover in the alternative if one of her claims were to fail.[59]

Disgorgement

When a plaintiff attempts to obtain money damages, in general, then courts typically define disgorgement as a legal remedy. However, courts will label a disgorgement as an equitable remedy if plaintiffs seeks a constructive trust upon an identifiable *res* within defendant's possession.[60] This type of disgorgement is an equitable form of restitution "not to impose personal liability on the defendant, but to

52. *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012).
53. *Id.* at 181.
54. *Gabriel v. Alaska Elec. Pension Fund,* 773 F.3d 945, 963 (9th Cir.2014); *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 724–25 (8th Cir.2014); *New York State Psychiatric Ass'n, Inc. v. UnitedHealth Group*, 798 F.3d 125, 134-135 (2nd Cir. 2015).
55. *Pearson v. Voith Paper Rolls, Inc.*, 656 F.3d 504, 509 (7th Cir. 2011).
56. *Cigna Corp v. Amara*, 131 S.Ct. 1881.
57. *Cigna Corp. v. Amara*, 131 S.Ct. 1880.
58. *Winkelspecht v. Gustave A. Larson Co.*, 2012 WL 1995103.
59. *Id.*
60. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 213.

restore the plaintiff's particular funds or property in the defendant's possession."[61] It is absolutely critical that a plaintiff seeks specifically identified funds held in possession by the defendant or traceable items that the defendant purchased with the funds.[62] An equitable lien is destroyed if the defendant spends the entire identifiable fund on nontraceable items.[63] Successful plaintiffs can additionally obtain interest or lost earnings on a delayed benefit payment as a form of "other appropriate equitable relief."[64]

Restitution

Restitution can be legal or equitable in nature.[65] In *Mondry v. American Family Mut. Ins. Co.*, the court used the "equitable branch" of restitution to not only reverse an insurance company's wrongful denial of a benefit claim, but also ordered the insurance company to disgorge the profit it received from the delay and use of money created by the breach.[66] In another case, a plan administrator breached its fiduciary duty and the Court allowed the plan participant the opportunity to make a missed *COBRA* payment, then ordering the plan to "pay the maternity-related medical expenses it had refused to pay in reliance on the pre-existing conditions limitations."[67]

When benefits are withheld, plans can gain interest at the expense of the beneficiary.

While interest alone is not a plan benefit, it can be the basis for imposing an equitable remedy due to the plan unjustly enriching itself.[68] While restitution can be considered a legal remedy, like in breach of contract cases, it is classified an equitable remedy when there is a breach of trust.[69]

Accumulated Earnings, Pre-Judgment Interest and the Clean-Up Doctrine

Beneficiaries can obtain more than a constructive trust or something similar in nature when benefits have wrongfully been withheld. The Seventh Circuit has stated, "This is not to say that money can never be recovered in a suit in equity, apart from the equity clean-up document, which allows an equitable suitor to obtain incidental damages relief in his equity suit so as to spare himself, the defendant and the judiciary the burden of two suits on the same claim."[70]

Back in 2011, the Second Circuit heard a case in which the plan participant sued the plan not only seeking funds wrongfully removed from his account and credited towards his ex-wife's account, pursuant to a Qualified Domestic Relations Order (QDRO), but also the economic equivalent of the accumulations after the improper credit. The Court held that despite *ERISA's* anti- alienation rule, plan assets can be used to satisfy a judicial judgment entered against the plan itself, including an award of accumulated earnings and pre-judgment interest on the money improperly segregated pursuant to the invalid QDRO.[71] There, the Court held that plaintiff was entitled to be compensated for the time value of the "mis-directed funds" dictated by the Federal common law of "natural justice, and the law of every civilized country."[72] Now, there's a concept and a quote any imaginative plaintiff's lawyer can use seeking what essentially is a money remedy for a violation of ERISA.

Conclusion

It is apparent that the availability of remedies under ERISA is continually changing and evolving. Although ERISA evolved from the law of trusts, courts should continue to use equitable terms to provide an aggrieved victim full relief, including monetary awards as needed to make a victim whole. ERISA remedies should be based on what is reasonable, just, and fair as opposed to being self-limited to unreasonable and antiquated concepts of law and equity. ☐

61. *Knudson*, 534 U.S. at 214.
62. *Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 136 S.Ct. 651, 659 (2016).
63. *Id.*
64. *Fotta v. Trustees of United Mine Workers of America, Health & Retirement Fund of 1974*, 165 F.3d 209, 214 (3rd Cir. 1998).
65. *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 482 (7th Cir. 2010).
66. *Mondry v. American Family Mut. Ins. Co.*, 557 F.3d 781, 807 (7th Cir. 2009) (*American Family's* plan was self-funded and it arguably benefited from the delay that *Mondry* experienced in obtaining documents which should have been produced by the plan administrator and reversing an erroneous denial of a claim for benefits).
67. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000).
68. *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597, 603 (7th Cir. 2002).
69. *Mondry*, 557 F.3d at 806 (citing *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 498 (7th Cir. 1999).
70. *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 603 (Wrongful withholding of benefits due can entitle the beneficiary to impose a constructive trust on interest from the withheld benefits which results in a monetary judgment for plaintiff).
71. *Milgram v. Orthopedic Associates Defined Contribution Pension Plan*, 666 F.3d 68, 79-80 (2nd Cir. 2011).
72. *Id.* at 79 (First finding that implied agreements to pay interest on delayed disbursements of owed money fits squarely within the tradition of common law contract interpretation and then relying upon turn-of-the-century U.S. Supreme Court decision of *Spalding v. Motion*, 161 U.S. 375, 396 (1896).

The Strange World
of Structured Transactions and Civil Forfeiture

By Tony Mankus

On November 14, 2011, a small businessman, a third-generation wholesale meat supplier, was approached by a Special Agent of the IRS and served with a *Subpoena Duces Tecum*. It commanded him to appear before a Federal Grand Jury on November 23, 2011 at the Dirksen Federal Building in Chicago. In lieu of his personal appearance, the subpoena gave him the option of providing voluminous amounts of accounting and bank records to the Special Agent.

The next day, November 15, 2011, the small businessman (we'll call him Mr. Smith), received another unpleasant surprise. His bank informed him that the $127,000.00 he had in his operating account had been seized and was frozen pursuant to a Seizure Warrant issued by a Magistrate Judge of the U. S. District Court, Northern District of Illinois.

Besides the shock of what had just happened, Mr. Smith was faced with an immediate emergency. Since he could not access his funds in the checking account, he could not buy the necessary products to service his customers (such as restaurants) which had placed orders with him. He faced an imminent threat of going out of business.

He was hurriedly referred to our office by another law firm and we scrambled to find out what was going on. After making some inquiries, we discovered that Mr. Smith's bank account was seized pursuant to the federal forfeiture statutes [31 U.S.C. § 5317(c)(2) and 18 U.S.C. § 981(a)(1)(A)]. The allegation was that Mr. Smith engaged in "structured transactions" in violation of 31 U.S.C. §§ 5313(a) and 5324(a)(1) and (3).

We did some research on the related statutes and found the following:

31 U.S.C. § 5317(c)(2) states the following:

(2) Civil forfeiture.— *Any property involved in a violation of section 5313, 5316, or 5324 of this title, or any conspiracy to commit any such violation, and any property traceable to any such violation or conspiracy, may be* ***seized and forfeited*** *to the United States in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to section 981 (a)(1)(A) of title 18, United States Code.*

31 U.S.C. § 5313 requires domestic currency transactions over $10,000.00 to be reported to the IRS on Form 8300. 31 U.S.C. § 5324 prohibits structuring the cash transactions in such a way as to evade the reporting requirements under Sec. 5313. 18 U.S.C. § 981(a)(1)(A) authorizes the federal government to seize (forfeit) "property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property."

18 U.S.C. § 1956 prohibits money laundering, 18 U.S.C. § 1957 prohibits engaging in monetary transactions in property derived from certain specified unlawful activity, and so on.

The reference to these federal statutes certainly seemed onerous. It was evident from the related case law and the legislative history of these statutes that they were enacted to catch the "bad guys," such as drug dealers, money launderers, etc. Our in-depth discussions with Mr. Smith, however, as well as his accountant, revealed that our client was neither a drug dealer, nor a money launderer; nor did he seem to be engaged in some nefarious criminal activity of the type envisioned by Congress. His recordkeeping, accounting, and tax filing were in good order and carefully managed by a reputable CPA.

The one troubling problem, though, was the allegation of "structured transactions." We did additional research and found the following:

31 U.S.C. § 5324 states, in relevant part, the following:

(a) ***Domestic Coin and Currency Transactions Involving Financial Institutions.***— *No person shall, for the purpose of evading the reporting requirements of section 5313 (a) or 5325 or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508—*

(1) *cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313 (a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by an order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508;*

(2) *cause or attempt to cause a domestic financial institution to file a report required under section 5313 (a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by any order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508, that contains a material omission or misstatement of fact; or*

(3) *structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.*

When we contacted the U.S. Attorney's office to obtain more information about the allegations, we discovered that IRS Special Agents had tracked Mr. Smith's deposits to his business operating account for almost two years. Their records showed that Mr. Smith made regular bank deposits during this period, at least three or four times a week, sometimes twice in the same day, and that all the cash deposits, except one, were under $10,000.00. The total amount deposited into the operating account during this period was in excess of $931,000.00.

We asked Mr. Smith to explain his operating procedures, especially as to how he handled the payments he received from his clients. Mr. Smith replied that his clients paid him

About the Author

Tony Mankus, graduate of the John Marshall Law School, is President and partner of Mankus & Marchan, Ltd., with offices in Lisle and Aurora, IL. His primary focus is on tax controversies and bankruptcies, representing clients before the IRS, IDOR, IDES, the U.S. Tax Court, the U.S. District Court, the U.S. Bankruptcy Court, as well as various Illinois State courts.

> **“It was evident from the related case law and the legislative history of these statutes that they were enacted to catch the “bad guys,” such as drug dealers, money launderers, etc.**

either in cash or with checks, sometimes a combination of the two. As to the cash he received, he said he usually deposited less than $10,000.00 in order to avoid having to fill out the burdensome IRS Form 8300. He said he worked 12 to 14 hours a day in his business and was too busy to be bothered with this paperwork. Mr. Smith went on to explain that whenever he had more than $10,000.00 in receipts for the day, he simply kept the excess in his safe. He then deposited the excess money into the bank account when the receipts for the day were smaller. Mr. Smith assured us, however, that he kept good records of his cash receipts and always reported ALL of his income on his tax returns.

Regarding the issue of “structured transactions,” Mr. Smith said he had never heard of the term, nor was he aware of the fact that he could have requested his bank to exempt him from the reporting requirements whenever he had cash in excess of $10,000.00 (FinCEN Form 110). When asked if he had ever discussed his depositing procedures with his bank, or with his CPA, Mr. Smith recollected that several such meetings or discussions were held with both, but his recollections were fuzzy. He could not recall precisely the details of what was discussed, or the outcome of such meetings or discussions. He had the impression, however, that he did not have to worry about any such issue, since he thought that the bank would “take care of it.”

We explained the above to the Assistant U. S. Attorney handling the case and asked him to release the funds. We argued that Mr. Smith made some technical mistakes, but that he was neither a criminal nor a tax evader, as contemplated by the federal statutes relevant to this case. We assured him that Mr. Smith’s accounting records were in good order and that the CPA would provide him with complete copies of everything required by the subpoena.

The Assistant U. S. Attorney refused to release the funds and asked us to bring Mr. Smith to his office for an interview. We agreed to the interview in hopes that they would see that, while the client made some technical mistakes, he was not a criminal, or drug dealer, or money launderer.

The interview did not go as we had hoped. The focus was more on getting Mr. Smith to admit that he had structured the cash deposits to avoid the reporting requirement rather than on the larger context of his legitimate business. It appears, however, that we were able to convince the Assistant U.S. Attorney that there was no larger criminal scheme involved in Mr. Smith’s business operation.

Following procedures under 18 U.S.C. § 983(a)(2), and IRM 9.7.2.8.7, we filed a Seized Asset Claim Form, as well as a request for the immediate release of the seized bank account, based on hardship, pursuant to 18 U.S.C. § 983(f) and IRM 9.7.7.3.

The claim for immediate release of the seizure was denied. Per 18 U.S.C. § 983(a)(3)(A), the Government then had 90 days after our property claim was filed to either return the property to us, or file a civil complaint for forfeiture. Alternatively, the Government could seek to obtain a criminal indictment under 18 U.S.C. § 983(a)(3)(B)(I) within the 90 day period.

During this 90 day interim period, we tried to convince the Assistant U.S. Attorney to release the seized bank account. He again refused stating that we were lucky he did not seek a criminal indictment against Mr. Smith. We then proposed to settle the matter for a nominal fine, a slap on the wrist, so to speak, in order to punish Mr. Smith for his technical transgression. Our suggested fine of $10,000.00 was rejected out of hand. He stated, finally, that the Government would seek the forfeiture of the entire $127,000.00. He felt that this was a concession since he could have sought recovery of $931,000.00, the amount that was structured during the two year period monitored by the IRS.

This was not pleasant news to Mr. Smith. After the Government filed the civil forfeiture complaint, we did some additional research to see what our client's chances were of recovering at least some of the seized funds. While there was some forfeiture case law against our client's position [*United States of America v. Jadwiga Malewicka, U.S. Court of Appeals, Seventh Circuit, No. 10-3967 (2011)*], a U.S. Supreme Court decision [*United States v. Bajakajian, No. 96-1487 (1998)*] held that a forfeiture fine must be commensurate with the transgression pursuant to the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution.

We encouraged Mr. Smith to file a response to the forfeiture complaint, but he decided against it. Besides the cost of litigation, his main concern was losing his clients. His business depended on the relationships he had developed over the years with his major clients. If they found out that he was involved in litigation with the U.S. Government, he feared that they would drop him because of the negative publicity. He decided to accept the loss of the entire amount of seized funds. Fortunately, he was able to salvage his business by mortgaging some real estate he owned.

We felt terrible about what happened to Mr. Smith, but took a philosophical approach. On the one hand, we understood that, after 9/11, the Government was particularly aggressive, as it should be, in pursuing individuals and/or business entities that fall within the parameters of the Bank Secrecy Act, 31 USC 1051, *et sec.*, and that clients should be well advised to be cautious in their financial transactions and should not be cavalier about following regulations. On the other hand, it was also unfortunate that the Government could be so inflexible, as it was in this case. The Government has enormous resources and should use discretion in choosing to use them against "mom and pop" businesses. Even when it is technically in the right, it should take into account the larger context of the situation and be sensitive to the potential of unintended consequences.

Ironically, that was not the end of the story. In 2014 we spotted a case in North Carolina with many similarities to Mr. Smith's (*USA v. $107,702.66, Case No. 7:14-CV295-F*). Lyndon McLellan, the owner and President of L&M Convenient Mart, Inc., allegedly structured about $2,000,000.00 in bank cash deposits between 2011 and 2014 in order to avoid having to file the required bank reports. The IRS sought and obtained a warrant to seize the business bank account with $108,000.00 and refused to release it, even though Mr. McLellan was able to demonstrate that none of the funds were illegally obtained. Unlike Mr. Smith, however, Mr. McLellan filed a claim for the money in the U.S. District Court of North Carolina, Southern Division.

Fortunately for Mr. McLellan, there was another twist to the story. Due, in part, to the negative publicity surrounding this case, as well as many other similar ones across the country, IRS' Criminal Investigation Division issued new guidance on October 17, 2014 regarding structured transaction cases. It instructed its agents not to conduct seizures and forfeitures in what it called "legal source" structuring cases. The U.S. Department of Justice followed suit and issued Policy Directive 15-3 on March 31, 2015 with similar changes to its prosecutorial procedures. On May 31, 2015, the USDOJ filed a voluntary motion to dismiss the McLellan case without prejudice and returned the seized money to Mr. McLellan.

We contacted Mr. Smith with this positive development and informed him that there was a chance now to recover his money. We thought Mr. Smith would be very happy and encouraged to hear that.

We were wrong.

Mr. Smith thought about going forward with our suggestion, but ultimately declined. Maybe he was too busy with his business and didn't want to take on another problem. Maybe he still felt there was a risk that he would lose his big clients due to the negative publicity. Maybe he had simply reconciled to the loss of his money and didn't want to revisit a very painful chapter of his life. We didn't ask. We respected his decision.

Ultimately, the moral of this unfortunate story may be FinCEN Form 110. In March of 2015, the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury released a booklet explaining the electronic filing requirements for the designation of exempt persons through the BSA (Bank Secrecy Act) E-Filing System. The filing web site is located at: https://www.fincen.gov/resources/filing-information" For information about the E-Filing system check the website at: https://bsaefiling.fincen.treas.gov/main.html. Business owners who deal in cash, their accountants, and/or their bankers, who want to avoid the hassle of multiple IRS Forms 8300, or getting caught up in the strange world of structured transactions, would be well-advised to review this site. ☐

Illinois Law Update

Editor Edward R. Sherman

Defendant's counterclaim is not actually a counterclaim.

In an interesting procedural case, the Illinois Supreme Court in *Carmichael v. Union Pacific Railroad*, 2019 IL 123853, held that a defendant cannot disguise an affirmative defense as a counterclaim.

In *Carmichael*, the plaintiff was injured in a motor vehicle accident and subsequently filed a declaratory judgment action seeking a declaration that defendant, a transportation company involved in her incident, was legally responsible for her damages due to a failure to comply with the minimum insurance coverage requirements under the Illinois Vehicle Code. The plaintiff also sought damages to the maximum amount of coverage required by the Illinois Vehicle Code. The defendant filed affirmative defenses and a counterclaims against the plaintiff, as well as the Secretary of State, asserting that the statutory provision was unconstitutional and that the statute did not provide for a private remedy. The defendant did not notify the Attorney General as required by Supreme Court Rule 19 for matters involving questions of constitutionality so that the Attorney General could intervene.

The trial court dismissed the counterclaim determining that the constitutional claims lacked merit, but did not address the failure of the defendant to notify the Attorney General as required by Rule 19 or whether the Illinois Vehicle Code provided for a private right of action. Upon reconsideration the trial court subsequently held that the statute provided an implied private right of action.

The plaintiff subsequently dismissed her declaratory judgment action leaving only the defendant's dismissed counterclaim remaining, which the defendant appealed.

The appellate court affirmed the trial court's dismissal of the counterclaim, but on different grounds. The appellate court found that the constitutional claims did not need to be reached because the statute did not provide for a private right of action.

The plaintiff petitioned the Supreme Court and the defendant filed a cross-petition. The court granted both petitions, but focused its opinion on the procedural irregularities in the case relating to the counterclaims filed and not the constitutional or other substantive issues.

With respect to the counterclaim against the plaintiff, the court noted that a counterclaim "must stand or fall on its own merits, regardless of the disposition of the complaint" and that "a counterclaim that requests no affirmative relief and only seeks to defeat the plaintiff's claim is really an affirmative defense, not a counterclaim." The court then noted that the counterclaim against the plaintiff was not a counterclaim because it merely requested a declaratory judgment on the identical legal grounds as its affirmative defense and its prayer for relief was to declare the statute unconstitutional and dismiss the plaintiff's complaint.

With respect to the Secretary of State, the court noted that a counterclaim was improper because "[a] counterclaim is an action brought by a named party against another *existing* party to the action", which the Secretary of State was not. The court stated that the defendant should have followed Rule 19 and notified the Illinois Attorney General instead so the Attorney General could have intervened in the case, if desired. Finally, the court emphasized the importance of following proper procedure by noting that the defendant effectively attained appellate review of an order that was not final nor appealable.

Failure to properly serve amended complaint against party in default renders amended judgment void.
In *LaMarca v. Che Ce Ce Corporation, et al.*, 2019 IL App (1st) 182718, the Illinois Court of Appeals (First District) held that an amended judgment obtained by a plaintiff for money damages on a forcible entry and detainer action against a party in default without following the service requirements for an amended complaint under Supreme Court Rule 105 was void.

In *LaMarca*, the plaintiff filed a forcible entry and detainer action seeking possession with the Cook County Circuit Court. The defendant did not respond or appear because only possession was sought and judgment for possession was entered. Subsequently, the plaintiff orally moved the trial court to amend the judgment and seek $10,000 in monetary damages, which was granted by the trial court. The defendant sought relief from the money judgment by filing a 2-1401 petition. The trial court denied the petition and review was sought with the appellate court.

The appellate court reversed the trial court and found the amended money judgment to be void for lack of personal jurisdiction over the defendant. Specifically, the appellate court noted that the plaintiff failed to follow Rule 105, which sets forth the requirements for new or additional relief against parties in default and requires service of the amendment by service of process, certified mail or publication. As a result, the trial court did not have personal jurisdiction over the defendant for the additional relief sought by the plaintiff and the judgment was, therefore, void.

About the Editor

Edward R. Sherman is an attorney with Lillig & Thorsness, Ltd and practices primarily in civil litigation and appeals. He has argued appeals before the Illinois Appellate Court, the Illinois Supreme Court and the 7th Circuit Court of Appeals. He is a member of the DuPage County Bar Association, Illinois Association of Defense Trial Counsel, and the Defense Research Institute.

Welcome

Welcome to the new DCBA members.

New Attorney Members:
Ellen K. Samuel; **Candice Adams**, Ankin Law Office; **Shannan Younger**; **Sonia A. Desai**, AMITA Health (Presence Health); **Jordan R. Byhring**, Mirabella, Kincaid, Frederick & Mirabella, LLC; **Jennifer Eseed**, Perkins & Zayed, PC; **Natalie M. Watkins**, Calabrese Associates, P.C.; **Katherine J Cozzani**.

Affiliate Members:
Brenda K. Roe-Weaver, LEXISNEXIS**; Stephanie Lennon,** LEXISNEXIS**.**

Legal Community Members:
Elizabeth Fraley, LeBac Law, P.C.**; Patricia Hays Brooks,** PHB Divorce Support Services, Inc.**; Sarah K. Mondello,** Davi Law Group, LLC**.**

Student Member:
Krystsina Kananchuk.

Merger doctrine applies when judgment creditor's judgment is later acquired by entity whose sole shareholder owes a debt to judgment debtor.

In *Access Realty Group, Inc. v. Kane*, 2019 IL App (1st) 180173, the Illinois Court of Appeals (First District) held that a judgment assigned by a judgment creditor to an entity whose only shareholder owed a debt to the judgment debtor resulted in a merger and satisfaction of the outstanding judgment owed by the judgment debtor.

In *Access Realty Group, Inc.*, the original judgment creditor obtained a judgment for $783,000 against the judgment debtor. The judgment creditor obtained a turnover order of a promissory note owed by a third party to the judgment creditor that exceeded the total judgment amount owed with the caveat that any excess amounts obtained by the judgment creditor were to revert back to the judgment creditor. Subsequent to the turnover order, Access obtained the judgment by assignment from the judgment creditor. Ironically (or maybe not so ironically), Access' sole shareholder was the obligor on the note that was turned over as part of post judgment supplementary proceedings. The judgment debtor argued that as the obligor on the promissory note has sole control over Access and that the merger doctrine extinguished the judgment debtor's debt. The trial court agreed and found the judgment to be extinguished and satisfied.

The appellate court, with dissent, affirmed the trial court's order. The majority's opinion first cited the merger doctrine as providing that "when one person, who is bound to pay an obligation, also becomes entitled to receive the same obligation, there is an extinguishment of rights." The majority found that although Access was a legally distinct entity from the obligor on the assigned note that the corporate entity could be disregarded where the corporation is merely the alter ego or business conduit of another person. The majority found this to be the case and, therefore, found that the obligor on the note had the qualities of both a creditor and debtor such that the doctrine of merger applies and the judgment was satisfied.

The dissent disagreed and argued that the corporate formalities should not be so easily disregarded. The dissent also challenged the majority that the merger doctrine has traditionally been applied when a judgment is satisfied with payment, not an obligation such as a note that could potentially be worthless. □

News & Events

Save the date now for Judges' Nite 2020

Welcome to Wellness!

By Lisa M. Giese

When we think of wellness, often physical fitness and nutrition come to the forefront of our minds. However, for attorneys, and most people in general, overall health and wellness is much more dimensional than just physical wellness. With difficult and stressful careers, mental health and emotional wellbeing are just as important, if not more important, than our physical fitness.

Wellness can mean many things to different people. The University of California (Riverside) breaks wellness down into seven categories.[1]

1. Physical wellness: Fitness, exercise, diet, nutrition, sexual health and sleep.
2. Emotional wellness: The ability to understand ourselves and cope with the challenges life can bring.
3. Social wellness: The ability to relate to and connect with other people in our world.
4. Spiritual wellness: The ability to establish peace and harmony in our lives.
5. Environmental wellness: The ability to recognize our own responsibility for the quality of the air, the water and the land that surrounds us.

1. http://wellness.ucr.edu

6. Occupational wellness: The ability to get personal fulfillment from our jobs or our chosen career fields while still maintaining balance in our lives.
7. Intellectual wellness: The ability to open our minds to new ideas and experiences that can be applied to personal decisions, group interaction and community betterment.
8. Finding wellness in each of these areas is an important part of finding overall wellness and balance in our lives.

In 2016, the American Bar Association, in conjunction with the Hazelden Betty Ford Foundation, released the first national study on attorney wellness (or lack thereof).[2] The statistics were shocking and showed that attorneys were substantially more likely to experience problematic drinking, anxiety, depression, and even suicidal thoughts than professionals in other fields, even with similar educational backgrounds. Some of the suspected reasons that attorneys are more susceptible to these life struggles include:

1. Difficulty juggling family and professional responsibilities.
2. Overworking - long hours, carrying work home.
3. Pressure from partners, clients, and self.
4. Nature of attorneys to prioritize success and accomplishment over personal well-being.

Financial pressures, including rising student loan debt.

Attorney wellness is important not only for one's own self and well-being, but also because attorneys have a professional responsibility to represent their clients free of mental health limitations. In fact, Rule 1.16 of the Illinois Rules of Professional Conduct specifically states an attorney shall not represent a client or shall withdraw if the attorney's physical or mental condition materially impairs the attorney's ability to represent the client. As many as 25-30% of attorneys facing formal disciplinary charges before the Attorney Registration and Disciplinary Committee suffer from addiction or mental illness.[3]

Attorneys often report feeling highly stressed because of deadlines or the content of their daily work. Deepak Chopra, alternative medicine doctor and meditation advocate extraordinaire, says that stress is defined as the perception of physical or psychological threat - it is never actually in the environment, it exists only within yourself and is a reflection of how you interact with the environment. When stress becomes chronic or normalized in daily life, three stages of damage begin to appear: psychological and neural damage (feeling mentally tired or lacking energy), behavioral damage (negative changes in behavior such as drinking more), and physical damage (stomachaches, headaches, poor digestion, or even heart attack or stroke).[4] Therefore, coping with the perceived stress is a critical component of attorney wellness to prevent its manifestation into a bigger problem.

One of the most beneficial practices for physical and emotional wellness is the practice of meditation. Studies have shown that meditation provides greater mental and physical resilience, better impulse control, and healthier aging.[5] A San Francisco attorney, Jeena Cho, partnered with the National Association of Women Lawyers and Seyfarth Shaw in 2018 to create an 8-week mindfulness training program in which 968 attorneys participated.[6] The program resulted in a 22.73% reduction in perceived stress, 6.15% increase in job effectiveness, 28.84% decrease in depression, and 30.29% decrease in anxiety.[7]

About the Author

Lisa M. Giese is a partner in the law firm of Kollias & Giese, P.C. in Wheaton, Illinois practicing in the area of domestic relations. She received her undergraduate degree from Michigan State University and her J.D. from Loyola University Chicago, with a certificate in Child and Family Law. She currently serves on the Child Law Section Council of the ISBA.

2. Krill, Patrick R., JD LLM; Johnson, Ryan MA; Albert, Linda MSSW. "The Prevalence of Substance Use and other Mental Health Concerns Among American Attorneys," *Journal of Addiction Medicine*: January/February 2016.
3. Bass, Debra M., "CLE Program Highlighted Mental Health Issues and Legal Professionalism," *Illinois State Bar Association, Mental Health Matters Newsletter*, October 2018.
4. Chopra, Deepak MD and Tanzi, Rudolph MD, "A Better Answer to Chronic Stress," The Chopra Center.
5. Skinner, Quinton "Beyond Meditation," *Experience Life Magazine*, July/August 2019.
6. Cho, Jeena, "Starting Small: It's time to make an achievable lawyer well-being resolution," *American Bar Association Journal*, January 2018.
7. *Id.*

For someone that has never meditated or who generally finds the practice of sitting still difficult, meditation can be extremely intimidating. For attorneys, Cho suggests starting with just six minutes per day, a time increment attorneys are familiar with from their billing practices.[8] She suggests finding a time when you can consistently practice your meditation (for example, in the morning before your coffee) and setting a timer for the length of time so as not to be distracted by anticipating when the session will conclude.[9]

Start by simply finding a comfortable seated position where you do not need to fidget. Begin playing relaxing music (try music with no words), closing your eyes, and taking deep breaths in through your nose and out through your nose. Ensure that the breaths are felt in the belly and not the chest, causing your stomach to rise with your inhales and fall with your exhales. Consider counting to four on your inhales and four on your exhales, matching their length. Try establishing a mantra (positive word or statement) for your meditation that you can repeat throughout your practice if you feel your mind wandering. Some sample mantras for stress management include[10]:

1. With every breath, I feel myself relaxing.
2. I have control over how I feel, and I choose to feel at peace.
3. All experiences are helping me grow.
4. I give myself permission to let go of what no longer serves me.

Those who are unfamiliar with how to meditate may turn to YouTube or free applications that are available on your phone for meditation videos and guidance.

If meditation still feels daunting, there are plenty of other options for wellness available. Mindful movement can help achieve a state of well-being and can be found through yoga or tai chi (a movement practice derived from Chinese martial arts). Moving within these practices has been shown to have a calming and de-stressing effect on the body. You can find yoga or tai chi practices that are suitable for any age and body type, including those for seniors and those with physical disabilities or obesity.

For those who are not interested in an organized class, there are plenty of things that you can do, even while you are at the office. Try taking a few minutes and putting your phone on "do not disturb," step away from your computer, shut off your cell phone. Just sit there breathing and counting your breaths for a set period of time. Alternatively, try clearing your mind by going on a short walk outside. Notice how you feel and whether you can stop your mind from wandering or thinking about what you have to do next. Be present in that moment.

In order for our brains to work at optimal capacity, we need to essentially allow them to do nothing for least 30-60 minutes per day.[11] So next time you feel too busy or stressed to partake in meditation (or another mindful practice), remind yourself that you will actually be more productive and a better attorney by giving your mind that short break from the stressors of life.

Besides finding mindfulness, being aware of your nutrition and eating habits is another important step that attorneys can take to reduce stress and increase overall wellness. Miami Holistic Nutritionist, Kristina Gineris, of Modern Organic Life[12] advises that there are certain foods that are known to have major healing properties and health benefits, including those that can combat stress levels, ease depression and increase good heart health.

Stress negatively affects blood pressure and blood flow. Nutrients from healthy foods can help regulate blood flow in the body.[13]

The goal of Modern Organic Life is to make cooking a time of release, creativity, silence, invigorating the sensing, and ultimately bringing a sense of calm and peace, rather than being seen as a chore or responsibility. "In our current day, we are living fast-paced, and we rarely leave ourselves enough time for a proper wind down at the end of the day. A healthy balanced diet (not based around the outdated food pyramid we learned about growing up) is essential in terms of true health," says Gineris.

To help make healthy choices more accessible to you, the Wellness Committee will be sharing some of its favorite healthy and stress-reducing recipes to DCBA members thanks to Modern Organic Life. Watch for more recipes in upcoming Wellness Committee communications. ☐

8. *Id.*
9. *Id.*
10. www.happify.com/hd/4-mantras-for-instant-stress-relief
11. *Skinner, Quinton "Beyond Meditation,"* Experience Life Magazine, July/August 2019.
12. www.modernorganiclife.com
13. theactivetimes.com

Why this recipe?

As stress wears you down, it opens the gate for sickness. This dish includes one of the best kinds of nuts, cashews, which provide a creamy texture to your sauce and boost the immune system with vitamins and zinc. They reduce blood pressure and fight heart disease. Spinach, a favorite superfood, among other dark leafy green plant foods, contains folate; a vitamin that helps produce the feel-good brain boosting chemicals serotonin and dopamine. It also combats the stress hormone cortisol. No dairy here, we are using healthy substitutes to avoid inflammation in the body and skin or gut sensitivities. Jalapeños which most people don't know are a great source of vitamin c, which reduces stress and lends antioxidant properties to the dish.

Vegan Enchiladas Verdes

Ingredients + directions:

Preheat your oven to 375'

Verde sauce:
1/2 cup raw cashews (to begin, soak these in hot water for twenty minutes, then drain)
1 1/2 cups organic salsa verde
1/2 fresh lime squeezed
1/4 cup organic cilantro
Add all ingredients to small or high-powered blender, process on high and set aside

Enchiladas:
4 tablespoons organic avocado oil (or oil of choice, choose a high heat oil)
1/2 of a white onion, chopped
1/2 teaspoon chipotle chili powder
1/2 teaspoon Chile powder
2 organic garlic cloves, chopped
Good pinch Himalayan Pink salt or Sea Salt, small pinch black pepper
1 cup organic corn (can be frozen and thawed, canned or freshly cooked)
4 cups organic spinach
1 can rinsed and drained great northern white beans, or navy beans
1 1/2 cups vegan coconut milk-based mozzarella or cheddar (Violife or SoDelicious are the brands I prefer, easily found at Whole Foods and some other grocers)
1 jalapeño sliced (I keep seeds in for extra heat, you are welcome to deseed)
Organic Corn tortillas

Heat a non-toxic skillet over medium with 1-2 tablespoons oil of your choice. Sauté the onion and garlic until just softened, that should only take a few minutes. Add in the chipotle powder, pink salt and pepper, and cook for another minute. Add the corn, cook through and then add either kale or spinach, and sauté until the leafy greens are just wilted but still a nice bright green. * do not overcook spinach. Stir in the beans and one cup of your choice of coconut milk-based cheese. Stir and cook for another few minutes until the cheese is melted. Remove from the pan to a bowl and set to the side.

Warm another non-toxic skillet and coat with a tablespoon of the remaining oil and heat tortillas on each side. Set aside.

Lightly oil baking dish and pour a small amount of your salsa verde in the bottom of dish to just slightly coat. Fill each of your tortillas with your enchilada mixture. Roll tight and place fold side down into oiled and salsa'd baking dish. Place so that tortillas cover the entire baking dish. Pour the remaining salsa verde to cover our enchiladas. Top with remaining cheese, jalapeños and bake for approximately 20 minutes.

Remove from oven and top with fresh cilantro, fresh organic sliced green onions (use green and white parts), fresh lime, and more salsa verde if desired!!

ISBA Update

ISBA Needs Your Input

By Kent Gaertner

The ISBA Board of Governors held its fall meeting on October 18th, 2019 at the Chicago Regional Office. As in most meetings, the Board reviewed the current financials of the ISBA, pending legislation of interest to the ISBA and various Section Councils and discussed several new ethics opinions that may be of interest to our members. There were several other items that our DuPage ISBA members should be aware of.

ISBA is working with a vendor to gauge interest in bringing back an ISBA health insurance program for its members. Older members may remember that ISBA did have such a program a number of years ago. That program was ultimately dropped because premiums became prohibitively expensive. Attorneys apparently are not the healthiest of people. It now appears several large health insurance companies are willing to revisit health coverage for attorney groups around the country. State bar associations in several states now have such health insurance programs. On the ISBA website cover page, there is a link to take a health insurance survey. Completing the survey will help ISBA determine the interest in the program and what the program should offer. It will also allow ISBA to determine whether the average firm age can be used to determine premium rates. We would be very grateful if you would take a couple of minutes to fill it out and submit it electronically. There is no particular target date yet for launching the program, but hopefully it would be fully operational by January 1st, 2021. This has the potential to save ISBA members and their firms significant costs so I hope you will help us get this off the ground.

ISBA is continuing to work with ARDC, at the request of the Supreme Court, to reach a compromise on the issue of non-lawyer fee sharing. Our General Counsel reports that excellent progress has been made and there may be a draft of a new Rule coming down, perhaps by the Mid-year meeting in early December. ISBA remains committed to protecting the professionalism of the legal profession. Our leadership, who attended the ABA convention in San Francisco recently, reports that many of the western states are totally caving in to fee sharing with non-lawyers. Oregon, for example, is even considering not only fee sharing with non-lawyers but also allowing non law school graduates to take the bar exam. All this is being done in the name of increasing access to justice. It is the ISBA's position that there has been no evidence whatsoever that fee sharing with non-lawyers increases access to justice for poorer people.

The work of the ISBA Special Committee on Governance, chaired by **Matt Pfeiffer**, is ongoing since kicking off in July. The purpose of the committee is to investigate interest in changing the size of the ISBA Assembly and possibly the scope of its duties and obligations. As I have previously reported, the last several Assembly meetings have not been attended by nearly forty per cent of the Assembly members. Since each Assembly meeting costs the ISBA more than $50,000, the Board feels this justifies looking at changes that can be made to make the Assembly more dynamic and functional. I would invite all DuPage ISBA members to contact Matt or myself if you have an opinion on how the assembly should be changed or if it needs to be changed at all. We can be reached at matt@pfeifferlawoffices.com or kent@pfeifferlawoffices.com.

(Continued on page 42)

About the Author

Kent is the Eighteenth Judicial Circuit's representative on the ISBA Board of Governors. He is the principal of Kent A. Gaertner P.C. and "Of Counsel" to Pfeiffer Law Offices, PC where he concentrates his practice in bankruptcy and workouts. He was president of the DCBA in 2009/2010

Levin Schreder & Carey is pleased to welcome

Elizabeth A. McKillip

As a partner at its new DuPage County office

Elizabeth is a partner with Levin Schreder & Carey's five lawyer litigation team that devotes all of its efforts to representing fiduciaries and family members in resolving controversies related to probate, trusts and family business disputes.

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December Bar Notes

DCBA Update

By Robert Rupp

Welcome New Lawyers
On November 6th, representatives from the New Lawyers Division joined the Membership Committee in attending the 2nd District Admission Ceremony in Elgin. 1459 new names statewide joined your ranks as Illinois Lawyers, 151 in District Two and we were pleased to welcome 24 as new members of the DCBA. The DCBA waives dues for the first year of a new attorney's career. When they take part in association activities by attending monthly CLE programs or social events, they earn a 50% reduction on dues in their second and third year. This formula has historically worked very well for our association as we retain well over 50% of the new lawyers who join each year. It is incumbent on all of us to reach out to them with a welcome hand as this is what truly binds the new lawyer to our community. If you see a new face at a CLE, please introduce yourself. Consider becoming a mentor or participating in the Ask a Senior Lawyer program to be an even bigger part of developing this next generation of lawyers.

Claim Your Sustaining Membership
The January *DCBA Brief* will feature our annual roster of Sustaining Members. Don't miss your chance to be on the list! Sustaining membership is only $100 and is a great way to support the work of the DCBA. In addition to the reward of giving, you also receive recognition at social events throughout the year and a $40 coupon to use on any DCBA social event, including the 2019 DAWL/DCBA/Justinian Inaugural Holiday Gala coming up on December 12th. Call the DCBA office or go to www.dcba.org/sustaining to download an application to add your name as a DCBA Sustaining Member.

Home for the Holidays
Although it's been said many times and many ways, we truly hope to see you at the Inaugural Grand Holiday Gala on December 12th at Harry Caray's in Lombard (visit www.dcba.org/Holiday19 for details) and at the DuPage Bar Foundation Holiday Breakfast in the Attorney Resource Center December 19th (www.dcba.org/DBFHoliday to donate to the DBF Holiday Fund). Great food, great friends and great raffles will punctuate both events, so make them a part of your holiday planning.

Be a Part of the Judges' Nite Tradition
It is so difficult to believe that it has been a year since we "Cut the Cord" with the 2019 edition of Judges' Nite. Be a part of the 2020 show, taking place February 28th at the College of DuPage, as cast, crew, sponsor or attendee! The cast and crew kickoff will take place at the Bar Center at noon on Saturday, January 4th. Sponsorships and program book advertisement placements are available now at www.dcba.org/JN2020. Tickets will go on sale January 15th with limited VIP seating available.

Treat Your Colleagues with ARC Hospitality
The calendar for Attorney Resource Center Coffee and Donut Sponsorship for January – April will open December 16th. Weeks fill fast and new sponsors are always welcome. Contact Jenn Webber at the Bar Office, jwebber@dcba.org or 630-653-7779 to claim your week early as a bonus for reading this column. Coffee is $125 for the week and donuts are $135 or you can supply your own specialty for your Thursday. Sponsors are welcome to display brochures or other collateral during their week as well. ☐

About the Author

Robert Rupp is the Executive Director of the DuPage County Bar Association. He has worked in professional association management since 1994, serving a variety of national and international medical and legal associations, including the American Bar Association.

Legal Aid Update

Happy Holidays

By Cecilia Najera

Just like that, 2019 is coming to an end. DLA bid farewell to some staff members earlier in the year, and recently welcomed a new Office Administrator, **Nicole Janssen**. Nicole began working as our part-time Office Administrator in November. She earned her B.A. in English from the University of Iowa. She previously worked as a realtor and paralegal in Chicago. DLA also welcomed a new full-time Staff Attorney, **Jennifer Nunez**. Jennifer earned her B.A. in Political Science from Northeastern Illinois University and graduated from Valparaiso University Law School where she was a participant in International Moot Court. She was just recently sworn in to the Illinois Bar, although she is also licensed to practice in Iowa. Please help me welcome Jennifer when you meet her in the courthouse. We are so excited to have both of these amazing ladies join our staff.

The holidays are now upon us along with the giving spirit and good cheer. I wanted to take the time to recognize the giving spirit of another organization, the Wheaton Franciscan Sisters ("WFS"). Based less than a mile away from our office, WFS is committed to service and, "striving together to be instruments of peace, hope, and justice in our world today." Their campus is home to Marianjoy Rehabilitation Hospital and Canticle Place, a 12-unit apartment complex providing affordable housing to persons living with AIDS. We were elated to receive a new grant from the WFS at the end of October. This grant is allowing us to expand our staff, and we are very grateful for all the ways that the WFS has served our community.

During this holiday season, please remember that charitable giving is very important to the survival of many not-for-profit organizations. Giving is not just beneficial to those who receive your gift, but it is also good for the soul. Helping those in need helps us to recognize that despite all our individual differences, we are all in this together. Lead and teach by example. Make our community stronger. There are so many ways you can help encourage those around you:

1) Visit those who may be lonely or struggling with a health issue.
2) Volunteer. Give of your time at a local food pantry, soup kitchen or homeless shelter. People's Resource Center, Loaves and Fishes, and PADS are all great local organizations at which to volunteer.
3) Adopt a family or gather necessary items to give to a local shelter. Family Shelter Service often needs help, especially during the holidays.
4) Make a New Year's Resolution to help someone learn or improve their English literacy skills. Literacy DuPage is always looking for volunteers.
5) Just Shop. Remember that through AmazonSmile, you can shop smile.amazon.com in the comfort of your own home. A portion of your purchase will be donated to a charity of your choice. *(Continued on page 42)*

About the Author

A Wheaton native, Cecilia "Cee-Cee" Najera is a graduate of the University of Iowa and received her J.D. from Southern Illinois University. She served as the DCBA New Lawyer Director from 2004 to 2009 and is currently the Director of DuPage Bar Legal Aid Service.

PRACTICE MANAGEMENT
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DCBA
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Date: Monday, January 20, 2020
Time: Registration: 8:00am
Program: 8:30am to 4:45pm

Location: DuPage Bar Center Classroom (Lower Level)
126 S. County Farm Road, Wheaton, IL 60187

8:30 AM - 9:30 AM

Understanding Your Malpractice Policy

1 Credit PRMCLE

9:45 AM - 10:45 AM

Road Warriors Panel - Practicing Across Multiple Circuits

1 Credit PRMCLE

11:00 AM - 12:00 PM

Business Basics of Law Firm Management

1 Credit PRMCLE

1:15 PM - 2:15 PM

Your Professional Reputation and Civility

1 Credit PRMCLE

2:30 PM - 3:30 PM

Building and Promoting Your Professional Brand

1 Credit PRMCLE

3:45 PM - 4:45 PM

Rules and Regulations Governing Referral and Business Development

1 Credit PRMCLE

Join the DCBA for the 2020 Practice Management Basic Skills Seminar. This Professional Responsibility Seminar will focus on practice management and is open to **ALL ATTORNEYS** to provide insight from judges, experienced attorneys, business consultants and the ARDC regarding issues faced in day to day practice. In addition to PRMCLE credit, this seminar will satisfy the Illinois Supreme Court Newly Admitted Attorney requirement (Rule 793) for newly admitted attorneys. You can register for one session, multiple sessions, or the entire day.

The full program is pending approval by the Illinois MCLE Board for 6 hours of Professional Responsibility (PRMCLE) credit by the Illinois Supreme Court Commission on Professionalism.

Registration opens on the DCBA Website on December 1st at www.dcba.org/BasicSkills2020.

DuPage Bar Foundation
Supporting Justice in Our Community

DCBA Memorial Service and DBF Memorial Plaque

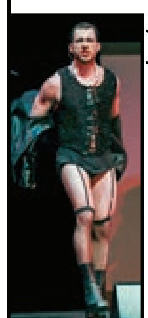
On Friday, January 24, 2020, at 11:30 a.m., the DuPage County Bar Association will sponsor a Memorial Service at the Attorney Resource Center on the third floor of the DuPage Judicial Center, 505 N. County Farm Road, Wheaton, Illinois. The purpose of the event is to remember and honor DuPage attorneys who passed away since 2016, and to reflect on their legal careers and contributions to the community.

The DuPage Bar Foundation has created a Memorial Plaque which hangs at the Courthouse on the third floor across from the entrance to the Attorney Resource Center. The plaque honors those members of the Bar Association who have passed. If you are interested in having a memorial plate created to be added to the Plaque for a deceased loved one who was part of the legal community, please contact the Chair of the Memorial Committee of the DCBA, **Jay Laraia** (james@laraiawhitty.com), or the President of DuPage Bar Foundation, **Robert McDonough** (rmcdonough330@gmail.com). Individual plates may be purchased through the dcba.org/donations page of the DCBA website. Select the "Memorial Fund". Each memorial plate costs $250 and constitutes a tax deductible donation to DBF, a 501(c)(3) charity. Proceeds will be donated to the DuPage Bar Foundation, which supports justice in the DuPage community by maintaining the integrity of the legal profession, contributing to the education of future lawyers through scholarships, and improving the facilitation of justice through charitable acts.

If you plan to attend the Memorial service, please RSVP the number attending and the name of your loved one to **Robert Rupp** at rrupp@dcba.org or call (630) 653-7779. ☐

Are you longing for the Roar of the Grease Paint and the Smell of the Crowd?

Be part of this year's cast and crew of the 2020 Judges' Nite show.



Join your colleagues for the Judges' Nite kickoff event on Saturday, January 4th at noon for this year's "auditions"**

The Judges' Nite show is a primary fundraiser for the DuPage Legal Aid Foundation and is a great way to lend your time and talent to a very worthy cause.

We are seeking performers, stage crew, prop and makeup volunteers.

The kickoff will take place in the Bar Center Board Room at 126 S. County Farm Rd, Wheaton.

**"Auditions" = meeting some fun colleagues and sharing a good time. The show will take place on Friday, February 28, 2020 at the MAC.

ISBA Needs Your Input

(Continued from page 36)

The Special Committee will make an informational presentation at the next Assembly meeting on December 7, 2019 in conjunction with the Mid-Year meeting being held December 5th through 7th. Ultimately, any changes to the Assembly will need to be approved by the Assembly itself. It is hoped that the Special Committee will conclude its work prior to the May Board of Governors meeting so that the Board can approve a proposal or proposals to be voted upon by the Assembly at the annual meeting in St. Louis in June.

Lastly, as of this writing, three members of the Board have expressed intent to run for the office of Third Vice President in the 2020 election. They are **Nora Devine** from Chicago. Nora does real estate tax appeals and other sophisticated real estate matters involving taxes. Next is **Shawn Kasserman** from Chicago. Shawn does all manor of civil litigation. Finally, is **Ava George Stewart** from Chicago. Ava does criminal law with a concentration in DUI defense. More candidates may enter the fray before time for filing petitions expires on January 31, 2020. ☐

Legal Aid Update

(Continued from page 39)

DuPage Legal Aid (Tax EIN No: 51-0189412) is just one of many to which you can donate.

Judges' Nite is Legal Aid's largest fundraiser of the year. Reserve the date! JN 2020 will be held on February 28, 2020 at COD's MAC. Love to Sing and Dance or be creative with makeup or staging? Give of your talents and join in the fun! The JN Kickoff will be held on January 4th, at noon, at the DCBA Bar Center. Planning is already under way and we have already acquired one Live Auction item, and I'll give you a hint as to what it is…ever wanted to run for the roses or see the most exciting two minutes in sports? Attend JN 2020 for your chance to bid on two hotel rooms to stay within 3 miles of Churchill Downs the weekend of the Kentucky Derby and four tickets to attend the Kentucky Derby! If you have a fabulous item you would like to donate to the auctions, please contact CeeCee at clnajera@sbcglobal.net or (630) 653-6212.

Happy holidays to all! May 2020 be the best year yet. ☐

LRS Stats

9/1/2019 to 9/30/2019

The Lawyer Referral & Mediation Service received a total of **1024 referrals, including 19 in Spanish** (927 by telephone, 64 online referrals and 33 walk-ins) for the month of September.

We receive calls in the following areas but currently have no attorneys in these areas: Civil Rights, Health Care Law and Mental Health. If you practice in these areas and would like to join LRS or add them to your existing LRS profile, please call Tim Doyle at (630) 653-7779 or email tdoyle@dcba.org.

If you have questions regarding the service, attorneys please call or email Tim. Please refer clients to call (630) 653-9109 or request a referral through the website at www.dcba.org.

Administrative Law	1
Animal Law	1
Appeals	3
Bankruptcy/Credit Law	22
Business	29
Collection	65
Consumer Protection	12
Contract Law	3
Criminal Law	282
Elder Care	12
Employment Law	85
Estate, Trusts and Wills	67
Family Law	193
Government Benefits	4
Immigration Law	6
Insurance Law	21
Intellectual Property Law	2
Mediation	3
Military Law	2
Modest Means	1
Personal Injury	75
Real Estate Law	133
School Law	1
Tax Law	1

Classifieds

Used Office Furniture

Solid wood executive desk, credenza, leather executive chair, 2 side upholstered chairs and matching wood bookcase. Pictures available. $550 or best offer. **Call John Sheahin at 630-653-0078 or jsheahin@comcast.net.**

Oak Brook

Office Space for Rent (or Virtual Office Use)

120 West 22nd Street, Oak Brook, IL; 1-4 fully furnished office spaces available at law office, turn-key offices, easy access to expressways; two conference rooms, full kitchen, phones, high speed internet, personal phone answering (9am – 5pm M-F); heat/air conditioning, water, electricity included; separate men's/women's washrooms; and large, private parking lot; from $1500/month. **Call Linda at 630-573-5021 or lindamarr@shlawfirm.com.**

Glen Ellyn

Unique Office Suite on Main Street in Downtown Glen Ellyn. 3 or 4 Offices, plus Reception Area. Hardwood Floors, 12' High Pressed Tin Ceilings. **Call Mr. Gilbert (630) 469-4200.**

Wheaton-Danada Area

Office (14' 2" x 10"6") in prestigious Danada area of Wheaton; Office suite has 4 offices, 3 of which are occupied by other lawyers; conference room, kitchen, reception area; **Available Immediately. $675.00. Furnished or unfurnished. Call (630) 260-9647.**

Glen Ellyn

Two prime office spaces in downtown Glen Ellyn in a lawyer suite. Each space excellent for multiple solos, a small firm with 2-3 attorneys/staff, or combined for a small firm of 4-6 attorneys/staff. 15 minutes from DuPage Courthouse and 30 min. from Kane. Within walking distance of Glen Ellyn Metra station, as well as multiple banks, realtor offices, and restaurants. Street advertising available. Exceptional opportunity for Business Law, Estate Planning, Probate, Real Estate and Tax. Includes shared reception area and access to conference room. Referrals possible. **Contact Charles at (630) 469-7100 or cwentworth@elrlaw.com.**

Where to Be
with DCBA

Judges' Nite 2020: Participants, Sponsors, and Donors Wanted

It's the time of year again when **Nicolas Nelson**, like the great grizzly bear, starts to hibernate and spend hours upon hours sequestered away writing another Judges' Nite masterpiece. This year, Judges' Nite falls on Friday, February 28, 2020, but the fun starts much sooner than that. The cast and crew kickoff event will take place on Saturday, January 4, 2020 at noon at the DuPage County Bar Center where novice and veteran performers, crew, makeup artists, and costume and prop developers alike should come and get involved. All are welcome and encouraged to participate.

In Judges' Nite 2019, more than 45 members of the DuPage County Bar Association participated in the show, "Cutting the Cord." Judges' Nite is an annual tradition in DuPage County and has been an ongoing source of laughs since its inception in 1976. Over the years, Judges' Nite has raised funds for Legal Aid and is its biggest fundraising event of the year. In 2019, Judges' Nite raised more than $37,000 for Legal Aid. Funds raised during this event help provide DuPage County residents with free legal assistance to obtain orders of protection, financial support for single parents, support for the disabled and parenting time. In 2018, Legal Aid provided over 10,000 hours of pro bono legal assistance to the community.

"With the contested judicial election closely following the show, it's sure to be an entertaining night poking fun at the candidates while raising money for a great cause," says **Lisa Giese**, DuPage Legal Aid Board Member and partner at Kollias & Giese, P.C. Lisa, chair of the Events Committee, along with **Christina Morrison** Judges' Nite Producer, **Cecilia Najera**, Legal Aid Director, and other volunteers help organize and facilitate fundraising activities the night of the show including live and silent auctions, cash call, and raffle.

For Judges' Nite 2020, sponsorship opportunities include pre-show cocktails, pre-show hors d'oeuvres, intermission cocktails, beer and wine bar, intermission snacks, and post-show desserts. If you would like to be a sponsor or place an advertisement in the Judges' Nite playbill, please contact **Robert Rupp** at rrupp@dcba.org. If you have items you would like to donate for the auctions, please contact Legal Aid Director, Cecilia Najera at clnajera@sbcglobal.net. Tickets and playbill ads may be purchased through the dcba.org website. Watch for more details in the DCBA Docket each Thursday.☐

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