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Justices Denied? Impact of the Judicial Districts Act on Incumbent Justices of the Illinois Supreme Court and Appellate Court

BY STEVEN F. PFLAUM & ANDREW T. HAMILTON

Introduction

The stated purpose of the Judicial Districts Act of 2021 "is to redraw the Judicial Districts to meet the requirements of the Illinois Constitution of 1970 by providing that outside of the First District the State 'shall be divided by law into four Judicial Districts of substantially equal population, each of which shall be compact

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Impact of *Daimler* on Creditor's Rights

BY MICHAEL CORTINA

This author has written a scholarly paper regarding the unintended consequences of the Supreme Court case of Daimler AG v. Bauman, particularly focusing its impact on the area of creditors' rights in Illinois. Due to the length of the paper, however, it cannot be published in this newsletter. Below is a summary, without citations, of the unintended consequences of Daimler that are noted therein. To read the entire paper, including the solutions proposed by the author, visit the website of SmithAmundsen.

In the creditors' rights area of the law, a commonly heard refrain is "getting a judgment is one thing, but collecting on it is an entirely different matter." One of the most utilized tools by creditors to collect on judgments in Illinois is the citation to discover assets ("CDA"). This statutory vehicle gives judgment creditors the ability to, *inter alia*, summon the judgment debtor to court to be deposed, freeze the debtor's bank accounts and seek a turnover of the funds contained therein, garnish wages, direct third parties holding property of the debtor to turn the property over to be sold, subpoena documents related to the debtor's assets, etc.

What is likely the most common use of a CDA is to attempt to freeze the judgment debtor's bank account in order to obtain the funds held by the bank that belong to the judgment debtor. Such a use of the CDA makes it the most efficient tool for collection since the creditor is legally owed the amount of the judgment by the debtor, and most people keep their money in a financial institution of one kind or another.

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Justices Denied? Impact of the Judicial Districts Act on Incumbent Justices of the Illinois Supreme Court and Appellate Court

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and composed of contiguous counties.'"[1] Several justices of the Illinois Supreme Court and Appellate Court do not reside in the judicial district, as redrawn by the JDA, to which they were elected or appointed (the "Affected Justices"). The first sentence in article VI, section 11 of the Illinois Constitution states in pertinent part that "[n]o person shall be eligible to be a Judge[2] … unless he is … a resident of the unit which selects him."[3] Viewed in isolation, this might raise questions regarding the ability of Affected Justices to serve out their terms of office or seek retention.

Fortunately, this situation was anticipated by both the framers of the Constitution and the drafters of the JDA. The second sentence in article VI, section 11 of the Constitution adds an important caveat to the residency requirement. It states that "[n]o change in the boundaries of a unit shall affect the tenure in office of a Judge or Associate Judge incumbent at the time of such change."[4] To that end, the JDA states that "[n]o Appellate or Supreme Court Judge serving on the effective date of this Act shall be required to change his or her residency in order to continue serving in office or to seek retention or reappointment in office."[5]

The JDA goes on to specify the manner in which Affected Judges may seek retention by purporting to confer them with the discretion to "seek retention in the district the Judge was elected from or seek retention in the district created by this Act."[6] As we will see, the JDA's retention provisions are ambiguous and raise potential constitutional issues.

This uncertainty places Affected Justices who wish to seek retention in a bind. Their exercise of the putative discretion conferred by the JDA could potentially subject them to challenges to their ability to seek retention, or possibly even to *quo warranto* actions challenging their entitlement to the office to which they were purportedly retained. Further complicating matters is a lack of case law or other authority addressing the relevant provisions of the Illinois Constitution.

With this conundrum in mind, this article seeks to ascertain the intended meaning of the retention provisions in the JDA and to analyze the constitutionality of those provisions, as so interpreted. The authors hope this analysis will help Affected Justices pursue retention in a manner that comports with both the JDA and the Illinois Constitution. We also hope to reduce the risk that Affected Justices and election officials will have different understandings of the retention options afforded by the JDA.

Three Key Issues Raised by the JDA

1. Does the JDA comply with the Illinois Constitution to the extent it allows Supreme Court or appellate court justices to serve the remainder of their terms even if, after the remapping, they no longer reside in the judicial district to which they were elected or appointed?

Section 35 of the JDA allows Affected Justices to serve the balance of the term to which they were elected or appointed by declaring that "[n]o Appellate or Supreme Court Judge serving on the effective date of this Act shall be required to change his or her residency in order to continue serving in office…."[7] This provision is clearly constitutional. It implements article VI, section 11 of the Constitution, which states that "[n]o change in the boundaries of a unit shall affect the tenure in office of a Judge or Associate Judge incumbent at the time of such change."[8]

2. Does the JDA comply with the Illinois Constitution to the extent it allows someone who was previously elected to the Supreme Court or the Appellate Court to run for retention even if, after the remapping, that Justice does not live in the judicial district to which they were elected?

Section 35 of the JDA also allows Affected Justices who were previously elected to office to run for retention. That section provides in pertinent part that "[n]

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o Appellate or Supreme Court Judge serving on the effective date of this Act shall be required to change his or her residency in order to … seek retention … in office."[9]

This provision is constitutional. Justices' "tenure in office" protected by article VI, section 11 of the Constitution is broader than the ten-year "terms of office" for supreme court and appellate court justices provided by article VI, section 10.[10] Section 11 is the only provision in the Constitution that uses the word "tenure." Under basic principles of constitutional interpretation, that word should be given a different meaning than "term."[11] "Term" means the length of service authorized by a single election or appointment to office.[12] We believe that "tenure" should be construed to embrace the entire duration of a justice's service in office, which can potentially aggregate periods associated with an initial appointment, subsequent election, and later retention.

In addition, allowing Affected Justices to run for retention is consistent with other provisions in the Constitution that protect judges against legislative interference. Foremost among those are provisions allowing incumbent judges to seek retention even if the number of Appellate or Circuit Judges is reduced,[13] and preventing judges' salaries from being diminished during their terms of office.[14]

3. *What options does the JDA give Affected Justices with respect to the judicial district in which they may run for retention, and are those options constitutional?*

Section 35 of the JDA gives an Affected Justice "the right to seek retention in the district the Judge was elected from or seek retention in the district created by this Act."[15] Each of the two options contained in this provision is susceptible to different meanings, as follows:

"[T]he judicial district the judge was elected from" could mean either (1) the same judicial district to which the judge was previously elected, but as reconfigured by the JDA, or (2) the same judicial district to which the judge was previously elected, as it was configured at the time of the judge's election. (We will call these Options 1 and 2, respectively.)

"[T]he district created by this Act" could mean either (3) the same judicial district to which the judge was previously elected, but as reconfigured by the JDA, or (4) the judicial district in which the judge resides after the reconfiguration by the JDA. (We will call these Options 3 and 4, respectively, although Options 1 and 3 are the same.)

The one thing that we can conclude with a high degree of confidence is that the two options—"the district the Judge was elected from" and "the district created by this Act"—must mean different things. Basic principles of statutory interpretation disfavor a construction that would render either provision superfluous.[16] Because Options 1 and 3 are the same, we can rule out that possible combination. That means the correct interpretation must be either (i) Options 1 and 4, (ii) Options 2 and 3, or (iii) Options 2 and 4.

Guidance is provided by Section 5 of the JDA, which is entitled "Legislative intent." Section 5 states in pertinent part that "[i] ncumbent judges have the right to run for retention in the counties comprising the District that elected the judge, or in the counties comprising the new District where the judge resides, as the judge may elect."[17] This provision is also ambiguous. Are "the counties comprising the District that elected the judge" the counties that comprised that district when the judge was elected, or the counties that comprise that district as it was reconfigured by the JDA?

The description of the second retention alternative contained in Section 5—"the new District where the judge resides"—is more straightforward.[18] It purports to allow an Affected Justice who was elected to one judicial district to seek retention by voters in another judicial district, *i.e.*, the district, as reconfigured by the JDA, in which the Affected Justice resides (*i.e.*, Option 4).

The use of the term "new District" in this alternative also implies that the first alternative, which does not use that term, refers to the district at the time the Affected Justice was elected. In other words, this suggests that "the counties comprising the District that elected the judge" means the counties that comprised that district when the judge was elected (*i.e.*, Option 2).

The conclusion that the retention provision in Section 35 was intended to refer to what we have termed Options 2 and 4 is problematic, however, because Option 4 may be of questionable constitutionality as applied to Affected Justices. There are two possible interpretations of Option 4. The first is that it purports to allow an Affected Justice to run for retention *to* a judicial district to which the Justice was not elected, *i.e.,* the new, post-redistricting judicial district in which the Justice resides. Under this interpretation, an Affected Justice who was previously elected to office and served in one judicial district would be retained by the voters, and would serve, in a different, new judicial district. (We will call this interpretation "Option 4a.")

The second possibility is that Option 4 purports to allow an Affected Justice to run for retention *in* a judicial district to which the Justice was not elected (*i.e.,* the Justice's retention would be decided by voters in the new, post-redistricting judicial district in which the Justice resides), but would continue to serve in the judicial district to which they were previously elected. (We will call this interpretation "Option 4b.") As we will see, Option 4b is more likely to be constitutional than Option 4a. This favors interpreting the JDA to include Option 4b, as courts prefer reasonable interpretations of statutory language that would result in a statute being constitutional.[19]

Article VI, section 12(d) of the Constitution allows "a Supreme, Appellate or Circuit Judge *who has been elected to that office* [to] file in the office of the Secretary of State a declaration of candidacy to *succeed himself*."[20] The threshold question is the nature of the "office" to which a supreme court or appellate court justice is elected. Is their office simply "supreme court justice" or "appellate court justice," or is it supreme court justice or appellate court justice "for the [Ordinal Number] Judicial District?"

As with most of the issues discussed in this article, case law and other authorities provide little guidance. But we believe the Constitution's provision for three supreme court justices from the first district and one Justice from each of the other four judicial districts suggests that the judicial office held by a member of the Supreme Court pertains to a specific judicial district.[21] The same constitutional provision requires appellate

court justices to be elected to specific judicial districts. Moreover, an appellate justice elected to serve in a particular judicial district would be required to serve in that district unless they were reassigned by the Supreme Court pursuant to its plenary authority over the operation of the courts.[22] Finally, we give some weight to the fact that the oath of office administered to judges, as well as the certificates issued by the Secretary of State to elected judges, identify the particular judicial district or judicial circuit in which the judge serves.[23]

Because (1) judicial retention involves a judge succeeding themself to the same office to which they were previously elected, (2) Supreme Court and Appellate Court Justices hold offices pertaining to a specific judicial district, and (3) Option 4a would purport to allow a Justice who was elected to one judicial district to be retained as a Justice in another judicial district—in other words, the Justice would be retained to a different office than that to which they were elected—we believe Option 4a would violate the Illinois Constitution as applied to Affected Justices.[24]

Option 4b stands a better chance of being constitutional. Under that interpretation of the JDA, Affected Justices could run for retention *in* the new judicial district in which they reside post-redistricting, but they would be retained *to* the judicial district that previously elected them, thereby succeeding themselves in office.[25] In other words, a Justice could run for retention to district X, but the voters of district Y (which is where the Justice now lives) would decide whether to retain the Justice. Although this interpretation is consistent with the understanding of retention as involving a judge succeeding himself or herself in office, it entails voters from one judicial district deciding whether to retain a Justice who serves in another judicial district. While unusual, this interpretation does not appear to conflict with any provision in either the Illinois Constitution or the United States Constitution.

There is historical evidence suggesting that the Illinois Constitution does not flatly prohibit a Justice from holding an office in a judicial district in which the Justice does not reside following redistricting. Article VI of the 1970 Constitution was based on the Judicial Article to the 1870 Constitution that was adopted in 1964.[26] The 1964 Judicial Article had transition provisions that allowed the incumbent supreme court justices to remain in office.[27] Justice Walter V. Schaefer was designated a Justice from the newly created First Judicial District, which was limited to Cook County, even though he resided in Lake County.[28] Justice Schaefer had previously been elected to a judicial district that included Cook and Lake Counties. He subsequently ran for retention to his office under the 1964 Judicial Article—*i.e.*, supreme court justice for the First Judicial District—even though he continued to reside in Lake County.[29] This history involving Justice Schaefer suggests that in a transition situation following judicial redistricting, the 1970 Constitution likewise permits an incumbent Justice to seek retention to an office pertaining to a judicial district in which the Justice no longer resides.[30]

This conclusion is bolstered by our previously discussed conclusions that a Justice's "office" includes the judicial district to which they were elected, and that the provision in article VI, section 11 of the Illinois Constitution protecting judges' "tenure in office" applies to judges' retention, and not just to their ability to serve out their current term.[31] The tenure provision carves out an exception to that section's general rule that a judge must be "a resident of the unit which selects him."[32] The tenure provision must have been intended to apply to Affected Justices. It would be superfluous if it only applied to judges who, post-redistricting, continue to reside in the judicial district or judicial circuit to which they had previously been elected, as those judges would satisfy the normal residency requirement.[33]

The primary federal constitutional challenge to Option 4b would rely on the disconnect between the people voting for the Justice's retention and the people whom the Justice would be "representing." However, judges are not representatives of constituents in the same way as members of the legislative or executive branches.[34] Moreover, some voters in the judicial district in which the Affected Justice would continue to serve post-retention did have an opportunity to vote for or against the Justice when he or she was elected. Finally, the one-person, one-vote principle applicable to legislative and executive offices does not apply to the election of judges.[35] For each of these reasons, we do not believe that Option 4b violates the United States Constitution.

Conclusions & Recommendations

The JDA is constitutional to the extent it allows supreme or appellate court justices who were elected or appointed to their positions to serve the balance of their term of office. It is also constitutional to the extent it allows an elected Justice to run for retention even after being mapped out of their district.

The most problematic aspects of the JDA concern the judicial districts in which an Affected Justice can seek retention. We believe it would normally be prudent for an Affected Justice to choose to run in the same judicial district to which they were elected, as that district was configured when the Justice was elected. Choosing to run in the new judicial district in which they reside, but to which they were not previously elected, would run the risk of inviting a legal challenge. Any such challenge would probably fail, at least as long as the election officials interpret that aspect of the JDA to involve what we have called "Option 4b," which entails an Affected Justice running for retention to the same judicial district in which they were previously elected, but with the Justice's retention being decided by voters in the new judicial district, following redistricting, in which the Justice resides. But unless there is a compelling political reason to choose Option 4b, an Affected Justice would be well advised to avoid the heightened legal risk associated with that option.

Although we have devoted most of this article to untangling the options available to Affected Justices who wish to seek retention, incumbent Justices who continue to reside in the judicial district to which they were previously elected also have a choice: they can either run in the judicial district as it was configured when they were elected or as it exists after redistricting. While we believe

both options are constitutional, absent political considerations we would counsel incumbents to choose to run in the new judicial district. That avoids any potential issue concerning a discrepancy between the geographic area served by the Justice and the area from which voters can cast ballots regarding the Justice's retention.■

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1. P.A. 102-11 (the "JDA"), § 5, quoting Ill. Const. art. VI, § 2.
2. Although it is customary to refer to members of the Illinois Supreme Court and Illinois Appellate Court as "justices," the Illinois Constitution refers to them as "judges." Ill. Const. art. VI, §§ 3, 5. The Constitution's only use of "justice" as a title is contained in two provisions that refer to a "Chief Justice." Ill. Const. art. VI, §§ 3, 16. (Unless otherwise indicated, all references in this article to the "Constitution" refer to the 1970 Illinois Constitution.)
3. Ill. Const. art. VI, § 11.
4. *Id*.
5. JDA, § 35.
6. *Id*.
7. JDA, § 35.
8. Ill. Const. art. VI, § 11.
9. JDA, § 35.
10. Ill. Const. art. VI, §§ 10, 11.
11. *Cf. In re Marriage of Paris*, 2020 IL App (1st) 181116, ¶ 38 ("An elementary rule of construction is that when the legislature uses certain words in one instance and different words in another, it intends a different meaning."); *Gregg v. Rauner*, 2018 IL 122802, ¶ 23 ("The same general principles that govern the construction of statutes also govern our construction of constitutional provisions.").
12. *See* Ill. Const. art. VI, § 10 ("The terms of office of Supreme and Appellate Court Judges shall be ten years.").
13. Ill. Const. art. VI, § 11(e).
14. Ill. Const. art. VI, § 14.
15. JDA, § 35.
16. *See, e.g., People v. Jones,* 223 Ill. 2d 569, 581 (2006) ("We construe statutes as a whole, so that no part is rendered meaningless or superfluous.").
17. JDA, § 5.
18. *Id*.
19. *See, e.g.*, *In re Marriage of Eltrevoog*, 92 Ill.2d 66, 70-71 (1982) ("If a reasonable construction will uphold the constitutionality and validity of a statute, that is the interpretation this court will give the statutory language."); *Oswald v. Hamer*, 2018 IL 122203, ¶ 29 ("It is a court's duty to construe a statute so as to uphold its constitutionality if reasonably possible.").
20. Ill. Const. art. VI, § 12(d) (emphasis added).
21. Ill. Const. art. VI, § 3.
22. Ill. Const. art. VI, § 16 (vesting the Supreme Court with general supervisory authority over all courts and specifically authorizing the Supreme Court to "assign a Judge temporarily to any court").
23. We believe that the office held by an Appellate Court Justice is tied to a specific judicial district even though it is often said that Illinois has one appellate court. *See, e.g.*, *People v. Ortiz*, 196 Ill. 2d 236, 255 (2001) ("Although the appellate court is divided into five districts for purposes of election …, Illinois has but one unitary appellate court."). The unitary nature of the appellate court impacts the geographic scope of appellate court rulings but does not mean that the office held by an appellate court Justice is independent of the judicial district to which they were elected or appointed.
24. A conclusion that this aspect of the JDA is unconstitutional as applied to Affected Justices would not affect the constitutionality of the remainder of the JDA. Section 40 of the Act contains a severability provision. Moreover, Option 4a would be constitutional as applied to Justices who, after redistricting, continue to reside in the judicial district to which they were originally elected.
25. *See* JDA, § 5.
26. *Judicial Article of 1970*, Nineteenth Jud. Cir. Ct., Lake Cnty., Ill., http://19thcircuitcourt.state.il.us/1288/Judicial-Article-of-1970 (last visited Sept. 6, 2021).
27/ 1966 Ann. Rep. to the Sup. Ct. of Ill., at 5 (1967).
28. 1976 Ann. Rep. to the Sup. Ct. of Ill., at 19 (1977) [hereinafter 1976 Rep.]; *Judicial Article of 1964*, Nineteenth Jud. Cir. Ct., Lake Cnty., Ill., http://19thcircuitcourt.state.il.us/1287/Judicial-Article-of-1964 (last visited Sept. 6, 2021); Political Graveyard, *Politicians Who Lived in Lake County*, https://politicalgraveyard.com/geo/IL/LA-lived.html (last visited Sept. 6, 2021).
29. 1976 Rep. at 19.
30. *Cf. Romiti v. Kerner*, 256 F. Supp 35, 45 (N.D. Ill. 1966) (rejecting federal constitutional challenge to Justice Schaefer's representation of the First District because there was "nothing unreasonable or arbitrary, nor a dilution of voting rights, in a state constitutional amendment which authorizes a sitting judge of the state supreme court to serve in a district where he is not a resident").
31. *See* text at notes 10-14 and 20-23, *supra*.
32. Ill. Const. art. VI, § 11.
33. *See, e.g., People v. Jones,* 223 Ill. 2d 569, 581 (2006) ("We construe statutes as a whole, so that no part is rendered meaningless or superfluous."); *Gregg v. Rauner*, 2018 IL 122802, ¶ 23 ("The same general principles that govern the construction of statutes also govern our construction of constitutional provisions.").
34. *See, e.g.*, *League of United Latin Am. Citizens Council, No. 4434 v. Clements*, 914 F.2d 620, 636 (5th Cir. 1990) (explaining that although "judges are indisputably representatives of voters…, judges do not represent a specific constituency."); *Blankenship v. Bartlett*, 681 S.E.2d 759, 768 (N.C. 2009) ("Voters do not elect a judge to 'represent' them—that is, to serve as their voice in government and advance their interests. Rather, judges serve the public as a whole.") (citations omitted); *Reichert v. State*, 278 P.3d 455, 476 (Mont. 2012) ("Legislative and executive officials serve in representative capacities, as agents of the people, whose primary function is to advance the interests of their constituencies. Judges, in contrast, 'are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency.'") (quoting *Republican Party v. White*, 536 U.S. 765, 806-07 (2002) (Ginsburg, J., dissenting)). *See also Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 300 (2004) ("[T]he judiciary has no true electoral constituency. Although judges in Illinois are elected, they do not represent the voters in the same way executive officers or legislators do.").
35. *Wells v. Edwards*, 409 U.S. 1095 (1973), *summarily affirming* 347 F. Supp. 453, 454 (M.D. La. 1972) (three-judge district court) (one-person, one-vote principle does not apply to judicial elections). *Accord*, *Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998); *Nipper v. Smith*, 39 F.3d 1494, 1510 n.33 (11th Cir. 1994); *Donahue v. Secretary of Commonwealth*, 403 Mass. 363, 367 n.7 (1988).

Impact of Daimler on Creditor's Rights

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If the debtor has sufficient funds in the bank to pay the judgment in-full, the creditor, with some exceptions, should be able to collect the judgment by simply serving the bank with a CDA, obtain an answer on the amount of funds held by the bank for the debtor, and get an order from the court for the bank to turn the debtor's funds sufficient to satisfy the judgment over to the creditor.

While this process appears on its face to be relatively straightforward, and it usually is, did *Daimler AG v. Bauman*, 571 U.S. 138 (2014) throw a wrench into the proverbial gears?

Creditors' rights activities directed toward third parties, like banks, are generally considered to be proceedings against the third party, not the judgment debtor. What happens when a creditor serves a CDA on a financial institution that is neither incorporated nor headquartered in a state other than Illinois?

Courts since *Daimler* have held that banks in particular are not subject to general jurisdiction of the state if they are not incorporated or headquartered in that state. Because citations and garnishments are considered to be actions against the third party, the court must be able to obtain jurisdiction over the bank in order to control its actions in any way. Without jurisdiction over the bank, courts do not have the authority to order accounts frozen, the turning over of funds, etc.

For example, if a creditor obtains a judgment against a debtor in Illinois, in order to obtain a court-ordered turnover of the debtor's funds in the bank, the Illinois court must have jurisdiction over the bank.

Prior to *Daimler*, creditors needed not be overly concerned over whether the Illinois court could claim general jurisdiction over the bank that was headquartered in a different state but had a branch location in Illinois because, under *International Shoe*, a bank operating in Illinois clearly had "substantial contacts" with the state in order to grant Illinois courts general jurisdiction over it. Since *Daimler*, however, Illinois courts can only claim general jurisdiction over the bank if it is incorporated or headquartered in Illinois. The creditor in our example could still use a CDA to gain access to the debtor's bank accounts, but only if the bank is incorporated or headquartered in Illinois.

Unintended Consequence #1. An unintended consequence of *Daimler* is that a judgment creditor can only access a judgment debtor's bank accounts if the judgment exists in the state in which the particular financial institution is "essentially at home." A large financial institution such as Wells Fargo Bank appears to be a safe harbor for judgment debtors in Illinois to deposit funds since Wells Fargo Bank is incorporated in Delaware and has its headquarters in California. Since the judgment exists in Illinois, where Wells Fargo Bank is not "essentially at home," Illinois courts cannot obtain general jurisdiction over it. In this example, the creditor could not issue a CDA to any financial institution that is not "essentially at home" in Illinois under the Daimler standard because Illinois courts have neither specific nor general jurisdiction over them.

Unintended Consequence #2. Illinois has also codified the right of its citizens to privacy in their banking activities in the Illinois Banking Act ("Banking Act"). While there are many exceptions in the Banking Act for disclosure of a customer's banking information, a bank that is subject to the Banking Act can only disclose "financial records … in response to a lawful subpoena, summons, warrant, citation to discover assets, or court order …" A ***lawful*** CDA.

Asking whether a bank can disclose private banking information in response to a lawfully issued CDA is the wrong question if the court does not have jurisdiction over the bank in the first place. Every jurisdictional challenge by defendants begins with a lawfully filed complaint and a lawfully issued summons, but just because these documents were lawfully filed, issued, and served does not mean that courts have proper and lawful jurisdiction over the defendant named therein. A CDA is a court order directing the recipient to engage in some activity, and the only way that a court can do that is if the court has jurisdiction over it, as discussed earlier. The court order directing the corporation to do something is void and therefore not lawful if the court does not have the jurisdiction to issue the order in the first place.

Under Illinois law, it is a violation of the Banking Act to "knowingly and willfully" furnish financial records outside of the parameters of the Banking Act. In addition, it is also a violation to "knowingly and willfully" induce or attempt to induce any officer or employee of a bank to disclose financial records in violation of the Banking Act. Simply put, it appears that it would be a crime for a judgment creditor's attorney to issue a CDA to a financial institution and obtain a judgment debtor's private banking information if the financial institution is not subject to the court's general jurisdiction making any response by the financial institution a response to an unlawful CDA.

Unintended consequence #3. In addition to its being illegal to attempt to induce a financial institution to disclose a debtor's private banking information in violation of the Banking Act, it could also subject the judgment creditor and its attorneys to civil liability for invasion of privacy.

In order for a plaintiff to state a cause of action for the public disclosure of private facts, which is a branch of the tort of invasion of privacy, a plaintiff's complaint must state that 1) the defendant gave publicity 2) to the plaintiff's private, not public, life; 3) the matter publicized was highly offensive to a reasonable person; and 4) the matter published was not of legitimate public concern.

Giving publicity. When a financial institution responds to a CDA, it completes written interrogatories that state, among other things, the types of accounts that the judgment debtor has, the amount of money in each account, and whether the judgment debtor has a safety deposit box. Those interrogatories are then sent to the judgment creditor's attorney and also filed with the court. With such court filings being a matter of public record once they are filed with the court, it is clear that such answers are given publicity.

Private, not public, life. As is made quite clear by the Banking Act, a person's financial records or financial information is private and can only be disclosed to third parties under rather limited circumstances. It is a crime not only to disclose such private information if the disclosure does not fall into one of the Banking Act's exceptions but also to attempt to induce an officer of a financial institution to make such disclosures. Banking information is private, not public.

Highly offensive. Banking information is private, and the Banking Act codifies it as such. If it were not highly offensive to publish someone's private banking information for public consumption, why would the legislature create protection for this information, going so far as to make it a crime to do so? Whether information is "highly offensive" is a question of fact for a jury to determine. The test to determine if something is "highly offensive" is whether "the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." In *Lovgren*, the Illinois Supreme Court held that the plaintiff's allegation that the defendant had placed notices in the newspaper stating that the plaintiff was going to sell his farm at a public auction when he had no intention of doing so, which publication made it practically impossible to obtain refinancing of his mortgage loan, was sufficient to plead facts that a jury could find "highly offensive." The fact that it is a business offense to disclose a person's private banking information surely means that disclosure of such information meets the test of being "highly offensive."

Public concern. A person's banking information is hardly of public concern. Even public figures or politicians are not required to disclose any of their private

banking information to the public. Prior to and after being elected, President Trump flouted norms of the presidency by famously refusing to release his federal income tax returns for the public to view and scrutinize. If the income tax returns of a person running for the highest office in the land are private and not of public concern, how can it be argued that the average judgment debtor's banking information is any different?

Beyond just the prospect of civil liability for this alleged tortious conduct, judgment creditors and their counsel could possibly be named as defendants in class action litigation. A class of plaintiffs consisting of every judgment debtor that had her private banking information improperly and illegally released into the public sphere could wreak havoc on the bottom line of each and every financial institution that finds itself defending against such a cause of action.

Unintended consequence #4. The analysis above regarding a judgment creditor or her attorney being subject to defending against a suit sounding in tort for invasion of privacy also applies to employees of financial institutions themselves. Just as it is unlawful to induce a financial institution to disclose private banking information, it is also unlawful for an officer or employee of a financial institution to make the same disclosures after being so induced. If disclosure of such private banking information could make a judgment creditor liable under the tort of invasion of privacy, it is likely that the financial institution making the unlawful disclosure would be equally liable under the law.■

Ethical Practices in the Email Age: Rule of Professional Conduct 4.2 and 'Reply All' Emails

BY DAVID W. INLANDER & RONALD D. MENNA, JR.

As more and more legal communications are via email rather than carefully proof-read letters sent via the U.S. mail, new ethical minefields are being discovered. For example, the New Jersey Supreme Court's Advisory Committee on Professional Ethics recently opined on the intersection of ABA Model Rule of Professional Conduct 4.2[1] and the use of "Reply All" function in emails when your client and opposing counsel are both recipients[2], coming to a different conclusion than the ISBA had in 2019.[3] This article will discuss the use of the "reply all" in emails and suggest best practices to use in light of competing ethical advisory opinions.

ABA Model Rule of Professional Conduct 4.2 states that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[4] In ISBA Professional Conduct Advisory Opinion 19-05, it held that including a client in an email does not constitute consent to allow communication by opposing counsel and that under a contrary holding "the purposes of Rule 4.2 could be thwarted."[5] In the case of receipt of an email where opposing counsel's client is copied, the ***receiving*** attorney "must make a good faith determination" as to whether consent has been granted.[6] "The easiest and most direct way to determine whether the receiving lawyer can ethically 'reply all' is to ask the sending lawyer."[7] ISBA Op. 19-50 concludes that: "the better practice is for the lawyer to avoid sending a cc to that client. At the same time, and for the reasons stated above, a recipient attorney violates Rule 4.2 if he or she, having received an e-mail with such a cc and knowing the person cc'd to be a represented party, includes that party in an e-mailed reply in the absence of some form of consent from the sending lawyer."[8]

New Jersey's EO 739 rejects this reasoning and holds that a lawyer who includes his/her client in an email chain impliedly consents to his/her client receiving any replies directly from opposing counsel, stating:

"While under RPC 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the 'to' or 'cc' field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread. If the lawyer merely wants the client to see a copy of the correspondence but does not want the client to receive subsequent emails from other lawyers, then use of the 'bcc' field would accomplish that goal."[9]

The New Jersey Advisory Committee analogized this to a conference call in which the attorney, his/her client and opposing counsel are all participating. In such a case, the attorney has "impliedly consented to opposing counsel speaking on the call and thereby communicating both with the opposing lawyer and that lawyer's client."[10]

Suggested Best Practices: While NJ EO 739 is, currently, the minority view[11], the ethical opinions raised show that including

your client on an email with opposing counsel is fraught with peril. We agree with ISBA Op 19-50 that the best practice is still to ***not*** include your client in emails with opposing counsel (even using the "bcc" field) and, instead, send you client a separate email.[12] That way, the inadvertent use of "reply all" will not disclose any confidences or unintentionally place opposing counsel in a potential trick bag.■

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1. All fifty states have adopted ABA Model Rule of Professional Conduct 4.2. Illinois adopted it with no variation, and New Jersey's version has a minor variation. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_2.pdf (*last visited August 9, 2021*).
2. New Jersey Supreme Court's Advisory Committee on Professional Ethics Opinion 739 (March 10, 2021) https://www.njcourts.gov/notices/2021/n210316a.pdf (*last visited August 9, 2021*) (hereinafter "NJ EO 739").
3. ISBA Professional Conduct Advisory Opinion 19-05 (October 2019) https://www.isba.org/sites/default/files/ethicsopinions/04-02.pdf (*last visited August 9, 2021*) (hereinafter "ISBA Op. 19-50").
4. Illinois Rule of Professional Conduct 4.2 https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/57e0877f-9cce-4d8c-81e7-609467a91686/RULE%204.2.pdf (*last visited August 9, 2021*).
5. ISBA Op. 19-50, *supra*, at 2.
6. ISBA Op. 19-50, *supra*, at 3, *quoting* North Carolina State Bar, Formal Ethics Opinion 2012-7 (October 25, 2013) https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-7/ (*last visited August 9, 2021*).
7. ISBA Op. 19-50, *supra*, at p. 3, *quoting* Alaska Bar Association, Ethics Opinion 2018-1, (January 18, 2018) https://alaskabar.org/wp-content/uploads/2018-1.pdf (*last visited August 9, 2021*).
8. ISBA Op. 19-50, *supra*, at 3.
9.NJ EO 739, *supra*, at 3 [footnote omitted].
10. NJ EO 739, *supra*, at 2.
11. *See, e.g.*, Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal 2020-100 (January 22, 2020) https://www.dcba-pa.org/userfiles/files/events/brochures/820_1.pdf?mc_cid=0b5b440cff&mc_eid=c473764433 (*last visited August 9, 2021*); ISBA Op. No, 19-05, fn. 2, *supra*; Alaska Bar Association Ethics Opinion No. 2018-1 (January 18, 2018), *supra*; South Carolina Bar Ethics Advisory Opinion 18-04 (2018) https://www.scbar.org/media/filer_public/f6/59/f65974b8-7721-45ab-96e3-c1ba881a2e5c/18-04.pdf (*last visited August 9, 2021*); Kentucky Bar Association Ethics Opinion KBA E-442 (November 17, 2017) https://cdn.ymaws.com/www.kybar.org/resource/resmgr/ethics_opinions_(part_2)_/KBA_E-442.pdf (*last visited August 9, 2021*); New York State Bar Association Ethics Opinion 1076 (December 8, 2015) https://nysba.org/ethics-opinion-1076/ (*last visited August 9, 2021*); North Carolina State Bar 2012 Formal Ethics Opinion 7 (October 25, 2013), *supra*; New York City Bar Association Formal Opinion 2009-01 (January, 2, 2009) https://www2.nycbar.org/pdf/report/uploads/20071674-Formal_Opinion_2009-1_No-contact_Rule_and_Communications_Sent_Simultaneously_to_Represented_Persons_and_Their_Lawyers.pdf (*last visited August 9, 2021*).
12. ISBA Op. 19-50, *supra*, at 3. *See also,* J D Supra, *New Jersey Issues Guidance to Attorneys Regarding 'Reply All' Emails* (March 23, 2021) ("Regardless of what state an attorney is practicing in, they should pay particular attention to who is copied on any email they receive before responding to all, and if there are any doubts about whether there is consent to reply to all email recipients, attorneys should check with opposing counsel to be sure. Best practices also suggest that attorneys should avoid copying their clients on emails they send to opposing counsel so as not to imply consent for opposing counsel to communicate with the client. Any email sent to opposing counsel can just as easily be forwarded to a client.") https://www.jdsupra.com/legalnews/new-jersey-issues-guidance-to-attorneys-6366355/ (*last visited August 9, 2021*); Michael Kennedy, *NJ Committee concludes that a lawyer who copies a client on an email to opposing counsel impliedly consents to "reply-all."* (March 26, 2021) ("I'm not as concerned that the receiving lawyer might reply-all as I am that the sending lawyer puts their client at risk of doing the same, thereby disclosing confidential information to opposing counsel. Thus, to me, the lawyer who copies a client on certain emails to opposing counsel risks running afoul of Rule 1.1 (competence) and Rule 1.6 (confidentiality).") https://vtbarcounsel.wordpress.com/2021/03/26/nj-committee-concludes-that-a-lawyer-who-copies-a-client-on-an-email-to-opposing-counsel-impliedly-consents-to-reply-all/ (*last visited August 9, 2021*).

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

- David L. Kelly, cook county Circuit, 5th Subcircuit, Ju.y 9, 2021
- Hon. Marc L. Buick, 23rd Circuit, July 10, 2021
- Bianca Camargo, 16th Circuit, 1st Subcircuit, August 9, 2021
- John W. Wilson, Cook County Circuit, 1st Subcircuit, August 13, 2021

2. The circuit judges have appointed the following to be associate judge:

- Brenda L. Claudio, 21st Circuit, August 2, 2021
- Stephanie P. Klein, 23rd Circuit, August 9, 2021

3. The following judges have retired:

- Hon. Stephen J. Connolly, Associate Judge, Cook County Circuit, July 2, 2021
- Hon. Ronald J. Gerts, Associate Judge, 21st Circuit, July 2, 2021
- Hon. Raymond L. Jagielski, Cook county Circuit, 14th Subcircuit, July 2, 2021
- Hon. John Belz, 7th Circuit, July 5, 2021
- Hon. Darryl B. Simko, Associate Judge, Cook County Circuit, July 7, 2021
- Hon. Joan M. Kubalanza, Associate Judge, Cook County Circuit, July 9, 2021
- Hon. Robbin J. Stuckert, 23rd Circuit, July 9, 2021
- Hon. Steven J. Goebel, Associate Judge, Cook County Circuit, July 10, 2021
- Hon. James R. Murphy, 16th Circuit, 1st Subcircuit, July 11, 2021
- Hon. Gregory G. Chickris, Associate Judge, 14th Circuit, July 31, 2021
- Hon. Daniel Lynch, Cook County Circuit, August 20, 2021
- Hon. James L. Kaplan, Associate Judge, Cook County Circuit, August 22, 2021
- Hon. Jeanne R. Cleveland, Cook County Circuit, 9th Subcircuit, August 31, 2021
- Hon. Nicholas Geanopoulos, Associate Judge, Cook County Circuit, August 31, 2021
- Hon. Colleen A. Hyland, Associate Judge, Cook County Circuit, August 31, 2021

4. The following judge has resigned:

- Hon. Christopher E. Lawlor, Cook County Circuit, 15th Subcircuit, August 31, 2021■