

# IPRF ISSUES

Risk & Safety Tips from the ILLINOIS PUBLIC RISK FUND

Vol. 8 No. 1 • Quarterly Issue • January 2009

## Illinois Public Risk Fund Moves to Its New Permanent Location!

3333 Warrenville Road, Suite 550  
Lisle, Illinois 60532

Toll-free to reception 888-532-6981

Fax 888-223-1638

A smooth transition took place on December 12, 2008, when The Illinois Public Risk Fund staff (with the exception of two adjustors) moved to their new permanent location. For your convenience, the toll-free numbers to the reception and fax remain the same. An Open House is planned for the Spring.



## A Website You've Got To See!

We now have a real "knock your socks off" Loss Control website. Try it - You'll be in for a real treat! The new site contains many, many more resources and materials for supporting and building a better loss control program.

### **Need Support? Need Programs? Need Promotional Information?**

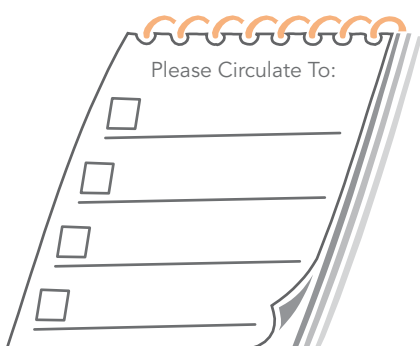
This is where you'll find it. You'll find checklists, audits formats, safety talks, the IPRF Safety Manual, Technical Bulletins and sample programs. This is only an abbreviated list, check it out, you'll be impressed.

**How Do You Get to the Website?** You can get there by connecting to the [www.iprf.com](http://www.iprf.com) website, clicking on loss control and clicking on the link to the loss control site. All you'll need is a user ID and password. Your user ID is your IPRF member number and the password is iprf (lower case).

**Need Help?** Website information: Contact Mary Starke @ 847-726-4098 or Dennis Marolt @ 847-726-4088

**We hope you use and enjoy the new site as we continue to support you, our valued IPRF member!**

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# Americans with Disabilities Act (ADA) Significantly Expanded



On September 25, 2008, the President signed into law the ADA Amendments Act of 2008 (“ADAAA”), which passed Congress with strong bipartisan support. Setting out to restore a “broad scope of protection” under the Americans with Disability Act (ADA), the amendments vastly expand the meaning of “disability” and open the doors to scores of employees formerly ineligible for work-related accommodations, including workers’ compensation and non-occupational disability claimants. The ADAAA becomes effective January 1, 2009, and changes the current ADA in many important ways by:

- Broadening the definition of “disability;”
- Relaxing the definition of “substantially limited;”
- Expanding the definition of “regarded as;”
- No longer considering “mitigating measures;” and,
- Overturning leading U. S. Supreme Court precedent.

## ADA Background

The ADA protects “qualified” individuals against discrimination at work on account of a disability. A qualified individual is one who has a disability and “who, with or without reasonable accommodation, can perform the essential functions” of the job that such person holds or desires. Under existing law, “disability” means:

- A physical or mental impairment that substantially limits one or more major life activities of such individual;
- A record of such an impairment; or,
- Being regarded as having such an impairment.

In general, once the employee informs his or her employer about a disability, then the law contemplates that both parties will work together in what is called the “interactive process.” The purpose of that process is to identify the precise limitations caused by the disability, and to determine how or whether reasonable accommodations can be implemented to allow the employee to overcome those limitations at work.

The ADA and the similar provisions of the Illinois Human Rights Act apply to all private and public Illinois employers with 15 or more employees, including state and local governments and educational institutions.

## Congressional Intent of the New Amendments

The amendments are designed to restore the broad scope of the ADA’s protections, as originally envisioned by Congress. The ADAAA clearly expresses Congress’s intent to overrule Supreme Court and other interpretive case decisions, and expand the class of individuals protected by the ADA. Further evidencing Congress’s expansion objective, the amendments delete language in the ADA characterizing disabled individuals as a “discrete and insular minority” within society.

## Broader Definition of “Disability”

While the amendments leave intact the actual definition of “disability,” they add new provisions designed to broaden the medical conditions encompassed by the definition. Until now, courts have narrowly construed the term “disability” under the Act, especially when it comes to defining exactly what constitutes a substantial limitation, a major life activity, or a perceived disability.

## “Substantially Limited” Standard Relaxed

The ADAAA overturns several U. S. Supreme Court decisions that have narrowly interpreted the meaning of the term “disability,” including *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). In that case, the Supreme Court held that a plaintiff was “substantially limited” only if he or she could show that an impairment prevented or severely restricted performance of activities of central importance to daily life. The amendments state that the “substantially limited” elements of an impairment need not rise to the level of severity suggested in *Toyota* in order to be afforded coverage by the ADA.

The ADAAA also invalidates current EEOC regulations that equate the terms “substantially limits” with “significantly restricted,” and characterizes such an elevated standard as “inconsistent with congressional intent.” While the amendments reject the courts’ and the EEOC’s overly restrictive interpretations, they do not elaborate on what the correct standards or tests should be. The ADAAA, however, does direct the EEOC to issue new regulations to comport with the changes, and make it easier for individuals to establish that an impairment “substantially limits” them in a major life activity.

The ADAAA also instructs, “[T]he question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Accordingly, the amendments provide that a more relaxed standard will apply when determining whether a physical or mental impairment renders one substantially limited, but without any guidance as to how relaxed that standard will or should be. In a nutshell, we will have to wait for the EEOC’s new regulations for the practical implications.

## Additional “Major Life Activities” Recognized

The amendments also call for a broader interpretation of “major life activity.” The ADAAA not only adds specific examples of major life activities, but also expands the phrase to include “operation of a major bodily function.” For example, the new (and non-exhaustive) list of major life activities will include: “caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” Major bodily functions will encompass: “functions of the immune

continued on back page

## What the ADAAA Means for Employers

The amendments are expected to significantly change the current state of disability law. The number of ADA lawsuits will likely increase, and the number being dismissed before trial at the summary judgment stage will likely decrease. Plaintiff’s lawyers will be eager to test the newly revamped, and more “accommodating,” ADA, with a lot of the limitations and hurdles imposed by judicial decisions over the past 2 decades essentially erased.

Without question, the amendments significantly increase the number of Americans falling under the ADA’s umbrella of protection. The absence of guidance on “substantially limits” and the ADAAA’s rejection of two Supreme Court cases eviscerates the 20-year body of case law that has guided employers in the decision-making process up to now. Moreover, even after the EEOC and courts eventually sort out and define these new parameters, summary judgment will become less frequent and jury trials more common. Given the breadth of the amendments, the focus will shift from the initial question of whether an individual has a covered disability to the employee’s ability to perform the essential job functions with or without a reasonable accommodation. The “undue burden” and “direct threat” defenses will also take on new importance.

The ADAAA should impact not only how employers handle disability and accommodation issues that arise in the future, but also should prompt reassessment of prior decisions involving current employees. The most critical inquiry will no longer be whether the employee comes within the ADA’s protection. Rather, as with religion accommodation employment cases, the focus will shift to determining what the essential functions of the job are and whether the proposed accommodation is reasonable or an undue burden under the particular circumstances of each case. This change in priorities brought about by the amendments makes it advisable for employers to look closely at their job descriptions, and take the steps necessary now to ensure their accuracy. In the immediate future, employers should also endeavor to educate HR and management regarding the ADA amendments and their creation of a larger group of covered individuals entitled to protection and accommodation. Additionally, because “regarded as” cases will become much more prevalent, employers need to caution their managers and supervisors to avoid making employment-related decisions based on any impairment without first allowing for a thorough review by HR and legal advisors.

The ADA Amendments Act makes important changes and additions to an already complex law. In the context of workers’ compensation claims and disability

benefits, the ADAAA states that the amendments do not alter the standards for determining eligibility for benefits under applicable state workers’ compensation laws, or under state and federal disability programs. This means that the new law does not change the definitions of “disabled” used for workers’ compensation and other benefit claims. But, applicable state workers’ compensation and other disability benefit statutes will not protect an employer from a charge that it failed to reasonably accommodate a workers’ compensation claimant after the January 1, 2009 effective date of the amended ADA.

Under the ADAAA, more employees will simply satisfy the definition of disability under the law and be entitled to reasonable accommodations for their impairments, including those employees who have suffered on-the-job injuries. After New Year’s 2009, return to work programs will have to shift their application and focus from questioning whether an employee meets the technical definition of a “qualified person with a disability” under the ADA, to providing reasonable and effective accommodations for returning workers. Some commentators suggest that with the effective date of the ADAAA, all covered employers will simply have to implement return-to-work programs as a reasonable accommodation for any employee desiring to come back after a work-related injury or disability. Fortunately, the new amendments retain the current, established guidelines to the effect that the ADA’s obligations are not triggered by impairments that are “transitory and minor,” defined as impairments that have an actual or expected duration of 6 months or less. But, the ADAAA clearly changes the return-to-work landscape by requiring employers to make disability determinations without consideration of mitigating measures, such as medication, medical supplies, hearing aids, and assistive technology. As a consequence, employers will have to be mindful that an employee may be “disabled” and genuinely entitled to the protections accorded by the ADA even though he or she may be experiencing no symptoms whatsoever because of medication or other ameliorative measures. Finally, with a greatly increased population of potential ADA claimants, there is a substantial likelihood for challenges to the following all too common employment practices and policies, already deemed illegal by the EEOC under the existing ADA:

- Alternative, modified, or light-duty is not offered;
- Permanent alternative work or modified duty is not offered;
- Every employee must be 100% before returning to work; and
- Every employee must be returned to “full duty” before he or she can be reinstated.

# LOSS CONTROL TRAINING FOR 2009

Many of you have taken advantage of our Regional Training and Online Training programs. Now we have improved and expanded our offerings. There is a course or program for everyone. Look them over and sign up today. If you need more information, visit our website at [www.iprf.com](http://www.iprf.com), click on Loss Control and enter your ID (IPRF member number) and password (iprf) lower case.



## Training Offered:

- **Regional Seminars I, II and III** – We've updated our popular Regional Seminars for presentation in South, Central and Northern Illinois.
- **Cliff Notes Seminar** – A one day session summarizing the Regional Seminars is offered to those of you who want to attend an abbreviated one day session. This is a great refresher or a shorten version of the I, II and III sessions.
- **Specialty Courses** are customized for similar members such as Police, Fire, Park Districts and Schools.
- **Webinars** – Are being offered, enabling you to complete 1-2 hour training on a variety of subjects from the convenience of your office or home.
- **Online Training** is a very popular method of educating employees. IPRF continues to offer this option with an expanded course listing. This is a convenient way to train your employees on over 50 different topics.

## SCHEDULE FOR SEMINARS/COURSES/WEBINARS:

**Level I Training** – An introduction to loss control concepts and ideas  
 February 10 – Fairview Heights, IL  
 February 12 – Carbondale, IL  
 February 17 – Springfield, IL  
 February 19 – Tinley Park, IL  
 February 24 – Mundelein, IL  
 February 26 – Bolingbrook, IL

**Level II Training** – Covers intermediate program elements and their applications  
 April 14 – Fairview Heights, IL  
 April 16 – Carbondale, IL  
 April 21 – Springfield, IL  
 April 22 – Tinley Park, IL  
 April 28 – Mundelein, IL  
 April 30 – Bolingbrook, IL

**Level III Training** – More advanced safety topics and presentations  
 September 9 – Fairview Heights, IL  
 September 10 – Carbondale, IL  
 September 15 – Springfield, IL  
 September 17 – Tinley Park, IL  
 September 22 – Mundelein, IL  
 September 24 – Bolingbrook, IL

**Safety Cliff Notes** – A capsule version of the Regional Sessions I, II and III. Great as a refresher.  
 March 24 – Fairview Heights, IL  
 May 19 – Springfield, IL  
 October 13 – Tinley Park, IL

**Specialty Courses** – Customized courses for members who are in the same business. This enables you to share experiences and issues you have in common.

**Fire Departments** March 26 – Fairview Hts, IL  
 March 31 – Mundelein, IL

**Park Districts** May 21 – Springfield, IL  
 May 26 – Tinley Park, IL

**Schools** June 16 – Mundelein, IL  
 June 18 – Tinley Park, IL

**Police Departments** June 11 – Mundelein, IL  
 June 23 – Tinley Park, IL

**Webinars** – We are now offering 1-2 hour sessions you can access from your home or office computer.

**Intro to Ergonomics** February 13th 8:00 am  
 June 17th 3:00 pm,  
 October 14th 8:00 am

**Office Ergonomics** February 17th 8:00 am  
 June 18th 8:00 am  
 October 19th 3:00 pm

**Slips/Trips/Falls** February 13th 3:00 pm  
 June 17th 8:00 am  
 October 14th 3:00 pm

**Effective Safety Committees** February 17th 3:00 pm  
 June 18th 3:00 pm  
 October 19th 8:00 am

**Safety Management for Results** March 26th 8:00 am  
 August 10th 3:00 pm  
 October 26th 8:00 am

**Back Safety and Material Handling** March 27th 8:00 am  
 August 18th 8:00 am  
 October 7th 3:00 pm

**Leveraging Your Safety Culture** March 5th 3:00 pm  
 August 20th 8:00 am  
 October 1st 8:00 am

**Return to Work** August 5th 8:00 am  
 July 22nd 8:00 am  
 July 23rd 3:00 pm

**For more information and Sign Up:**  
**Seminars/Webinars:**  
**Bonnie Rapp • 847-726-4095**  
**Online Training:**  
**Veronica Graf • 847-726-4092**

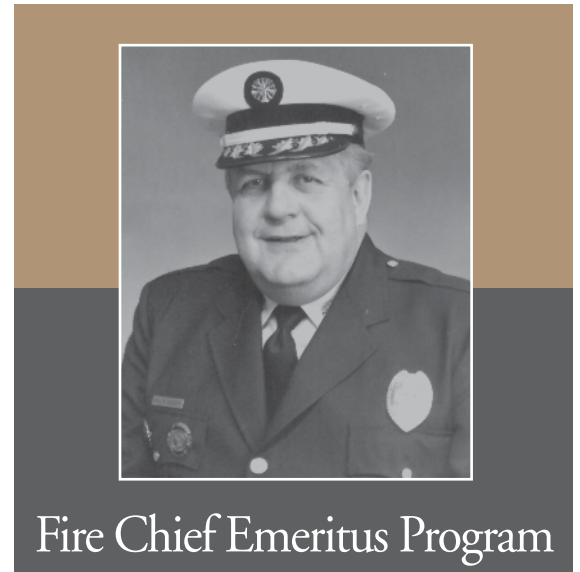
## HIGH-VISIBILITY SAFETY VESTS

On August 10, 2005, President Bush signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which authorizes the Federal surface transportation programs for highways, highway safety, and transit for the 5-year period 2005-2009. Pursuant to this law, the Federal Highway Administration (FHWA) proposed a new federal regulation on April 24, 2006 published in volume 71 Federal Register, page 20925 (71 Fed. Reg. 20925) that requires all workers within the right-of-way of a Federal-aid highway to wear an ANSI 107 (2004) Class 2 or 3 high-visibility vest. On November 24, 2006 the FHWA published the final rule, **for more information contact [respondersafety.com](http://respondersafety.com).**



## March is Workplace Eye Safety Month

Annually, more than 800,000 American workers suffer an eye injury on the job and close to 36,000 employees require time off due to eye injuries, the U.S. Department of Labor estimates, costing employers more than \$300 million. The good news is that nearly all workplace eye injuries can be prevented by wearing proper eye protection (an estimated 90 percent). That's why Prevent Blindness America established Workplace Eye Health and Safety Awareness Month, an annual March observation to help employers and employees see the significance of protecting vision. Check out tips from the National Safety Council about workplace eye safety.



Fire Chief Emeritus Program

When the Illinois Fire Chief's Association (IFCA) developed a program designed to offer special recognition to retired Fire Chiefs from across Illinois who made significant contributions to the fire service in Illinois during their tenures as Fire Chief, Paul Boecker's "name was in the forefront."

The review committee met on August 22, 2008 at the Bourbonnais Fire Department to review the inaugural group of candidates who were nominated for this designation. The candidates offered a wide range of significant accomplishments during their tenures as leaders of their respective fire departments and local regions, with positive impacts for the collective fire service across the state. This field of candidates represented a mix of attributes that exemplified perfectly, the requirements set forth in the design of this program.

Several of the candidates were early trailblazers by designing, fighting for, and implementing programs that we now take for granted.

For ten years, prior to joining the Lisle Woodridge Fire District as Fire Chief, Paul was a Casualty Claim Supervisor for a major insurance company, as well as a part time Naperville Fire Officer. In his 23 years with the District, he oversaw the beginning of the paid firefighting force and, as Administrator, was responsible for obtaining all insurance coverages for the District. **It is an honor to report that Paul Boecker II was unanimously recommended for Fire Chief Emeritus status by the committee.** Paul offers the unique perspective of an IPRF President and board member, an officer, a former consumer of services relating to worker's compensation, a former Claims Supervisor, and a coordinator of member services for public entities insured by the Illinois Public Risk fund. ***Congratulations Paul!***

## Bloodborne Pathogens Costs to Employers

The United States Court of Appeals for the Third Circuit recently ruled that healthcare employers must not only pay for the cost of the medical evaluations and vaccinations for workers who have had a bloodborne pathogen exposure, but also must (1) reimburse workers for transportation expenses incurred to obtain care, and (2) compensate workers for their non-work hours spent receiving initial or follow-up bloodborne pathogen exposure treatments. The case arising from Pennsylvania is Secretary of Labor v. Beverly Healthcare-Hillview, No. 06-4810 (3d Cir. Sept. 4, 2008).

This ruling confirmed OSHA's Director of Compliance Programs opinion letter dated July 7, 1999. That opinion letter, issued in response to questions raised by the International Association of Fire Fighters, provided that (1) transportation costs incurred for medical evaluations and procedures including the hepatitis B vaccine and vaccination series and post-exposure evaluation and follow-up, including prophylaxis, must be covered by the employer; and (2) when receiving the hepatitis B vaccine or commuting to have it administered, employees must be considered "on-duty" for compensation purposes.

Neither the court nor the opinion letter offers guidance with respect to the compensation rate to be paid to former employees receiving initial or follow-up bloodborne pathogen exposure treatments.

# Paying for Your Safety Program Just Got Easier!

## GRANT PROGRAM 2009

If you are like most members of IPRF, the grant money that was provided in 2008 by IPRF offered great relief to ease the burden of your safety related purchases. By working together to control costs, we are able to provide these grants to our membership. Once again, we are pleased that in 2009 we are able to offer our Safety and Educational Grant Program, as announced to members in November 2008. Response deadline from IPRF members is March 15, 2009. To be eligible for receiving a grant, you must have been an IPRF member previous to December 15, 2007, and currently be in good standing. Grants will be paid to eligible members by May 1, 2009. For further information, contact your agent or visit us online @ [www.iprf.com](http://www.iprf.com).

(ADA) continued from page 2

system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." The amendments also clarify that the impairment at issue need only limit one major life activity to qualify the individual for the protections accorded by the ADA.

### Expansion and Clarification of "Regarded As"

Another significant change implemented by the amendments is that plaintiffs alleging discrimination based on a perceived disability no longer must prove that their employer perceived them as substantially limited in a major life activity. Thus, the ADAAA overturns the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which required ADA "regarded as" plaintiffs to show that their impairment at issue actually limited or was perceived to limit a major life activity. Now, the ADA prohibits taking adverse employment action against someone because of an impairment or the belief that he or she has an impairment. This easily met standard guarantees the future proliferation of litigation under the "regarded as" prong of the Act's disability definition.

Notably, while the amendments do not address how long an impairment must last, they do clarify that impairments properly characterized as "minor and transitory" do not qualify for "regarded as" claims. "Transitory" is defined as six (6) months or less. "Minor" is not specifically defined. Unfortunately, the amendments do not address whether minor and transitory impairments are excluded from the other two prongs of the disability definition, substantially limiting impairment and a record of such an impairment.

The ADAAA also provides long-awaited clarification on whether employers are obligated to accommodate "regarded as" employees. The amendments make clear that an employee with no actual impairment has no cause of action under the ADA for failure to accommodate, recognizing that forcing employers to accommodate someone with a misperceived impairment contradicts logic and common sense.

### Other Significant Amendments

The ADAAA makes other significant clarifications and changes to the Act that will effectively expand the law's coverage. The two most important deal with treatment of "mitigating measures" and episodic medical conditions.

### "Mitigating Measures" No Longer Considered

In *Sutton*, the U.S. Supreme Court held that any measures employed to mitigate the effect of an impairment on daily life activities, such as medication or prosthetic devices, could be taken into consideration when determining one's eligibility under the ADA. The ADAAA rejects *Sutton's* holding, and explicitly prohibits consideration of "the ameliorative effects of mitigating measures" in determining whether an impairment substantially limits a major life activity. Mitigating measures include medication, prosthetic limbs, mobility devices, hearing aids, use of assistive technology, reasonable accommodations, auxiliary aids and services, or the very broad and ambiguous "learned behavior or adaptive neurological modifications." In other words, the ADA analysis cannot take into consideration any adaptive measures used, even if these measures allow the individual to successfully manage their impairments (e.g., someone with insulin-controlled diabetes). Under the new law, employers may need to reasonably accommodate individuals, even if they are fully able to perform their job duties or are unimpaired in all other major life activities, while taking medication or using prescribed medical devices.

One exception to this prohibition allows for consideration of a person's use of "ordinary eyeglasses or contact lenses" when analyzing whether an individual with vision problems is covered under the ADA.

### Episodic Conditions Covered if Substantially Limiting When Active

The amendments also extend ADA protection to those individuals with episodic impairments or conditions in remission if their impairment substantially limits a major life activity in its active state (e.g., cancer in remission, multiple sclerosis).

William N. Krucks, Partner and Attorney • Freeborn & Peters LLP  
311 South Wacker Drive, Suite 3000 • Chicago, IL 60606  
312.360.6504 (direct) • 312.360.6000 (main) • 312.360.6572 (fax)  
Web: [www.freebornpeters.com](http://www.freebornpeters.com) • Email: [bkrucks@freebornpeters.com](mailto:bkrucks@freebornpeters.com)



## Need More Newsletters?

If you would like IPRF Issues newsletter mailed to additional department heads, please contact:

Paul H. Boecker, IPRF President  
624 Columbine Avenue, Lisle, IL 60532  
Phone (630) 271-0600 • Fax 630-271-0643 • email [pboecker@iprf.com](mailto:pboecker@iprf.com)

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### Illinois Public Risk Fund Claims Directory

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CONTACT	MEMBERS BY AREA CODE	PHONE FAX
Sharon Barnes <i>Claims Specialist, Sr.</i> <a href="mailto:sbarnes@ccmsi.com">sbarnes@ccmsi.com</a>	630 F-Z 815 Lb-Z 309 A-Z	(630) 649-6061 <i>(217) 477-5941</i>
Glenn Macey <i>Claims Specialist, Sr.</i> <a href="mailto:gmacey@ccmsi.com">gmacey@ccmsi.com</a>	630 A-E 815 A-La	(630) 649-6057 <i>(217) 477-5939</i>
Ginger Beer <i>Claims Specialist</i> <a href="mailto:vbeer@ccmsi.com">vbeer@ccmsi.com</a>	217 J-Z 618 A-L	(630) 649-6062 <i>(217) 477-7281</i>
Susan Feigl <i>Claims Specialist</i> <a href="mailto:sfeigl@ccmsi.com">sfeigl@ccmsi.com</a>	217 A-I 618 M-Z	(630) 649-6058 <i>(217) 477-5940</i>
Mari Curless <i>Medical Only Representative</i> <a href="mailto:mcurless@ccmsi.com">mcurless@ccmsi.com</a>	217 618	(630) 649-6060 <i>(217) 477-7284</i>
Shari Heitman <i>Medical Only Representative</i> <a href="mailto:sheitman@ccmsi.com">sheitman@ccmsi.com</a>	630 / 309 815	(630) 649-6063 <i>(217) 477-7286</i>
Cheryl Foisy <i>Unit Claims Clerk</i> <a href="mailto:cfoisy@ccmsi.com">cfoisy@ccmsi.com</a>		(630) 649-6065 <i>(217) 477-7288</i>
Sue LeBlanc <i>Unit Claims Supervisor</i> <a href="mailto:sue.leblanc@ccmsi.com">sue.leblanc@ccmsi.com</a>		(630) 649-6072 <i>(217) 477-5929</i>
Christine Dapper <i>Claim Consultant</i> <a href="mailto:cdapper@ccmsi.com">cdapper@ccmsi.com</a>	708 N-R 847 A-F	(630) 649-6059 <i>(217) 477-7283</i>
<i>To be determined</i>	708 A-M / S-Z 847 G-Z	(630) 649-6069 <i>(217) 477-7282</i>
Nancy Radzienta <i>Medical Only Representative</i> <a href="mailto:nradzienta@ccmsi.com">nradzienta@ccmsi.com</a>	708 847	(630) 649-6068 <i>(217) 477-7285</i>
May SooHoo <i>Unit Claims Clerk</i> <a href="mailto:msoohoo@ccmsi.com">msoohoo@ccmsi.com</a>		(630) 649-6066 <i>(217) 477-7287</i>
Kim DiPirro <i>Unit Claims Supervisor</i> <a href="mailto:kdipirro@ccmsi.com">kdipirro@ccmsi.com</a>		(630) 649-6071 <i>(217) 477-5937</i>
Laura Reyes <i>Claims Manager</i> <a href="mailto:lreyes@ccmsi.com">lreyes@ccmsi.com</a>		(630) 649-6039 <i>(217) 477-5909</i>
Paul Boecker III <i>Assistant Claims Manager</i> <a href="mailto:pboecker@ccmsi.com">pboecker@ccmsi.com</a>		(630) 649-6053 <i>(217) 477-5912</i>
Barbara Keller <i>Claim Specialist, Subrogation</i> <a href="mailto:bkeller@ccmsi.com">bkeller@ccmsi.com</a>		(630) 649-6067 <i>(217) 477-7280</i>
Elaine Serafino <i>Claims Representative</i> <a href="mailto:eserafino@ccmsi.com">eserafino@ccmsi.com</a>		(630) 649-6064 <i>(217) 477-7289</i>

3333 Warrenville Road, Suite 550, Lisle, IL 60532

### For Additional Information

about Illinois Public Risk Fund, letters of news or comments, please contact:

Paul H. Boecker, IPRF President  
624 Columbine Avenue • Lisle, Illinois 60532  
Phone 1-630-271-0600 • Fax 1-630-271-0643 • email [pboecker@iprf.com](mailto:pboecker@iprf.com)

### IPRF Issues

Pat Andrews, *Editor*  
Peggy O'Brien, *Graphic Designer*

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