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By James C. Dunlop and Tara A. Fumerton

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James C. Dunlop[2] *& Tara A. Fumerton*[3]

In October 2004, we examined the jurisprudence of the Illinois Supreme Court to discern the Court's outlook: was this an "activist" court, or one prone to judicial "restraint," or did it fall somewhere in between?[4] Our overall purpose was to discern whether the Court was exercising a truly judicial function—"to say what the law is"—without regard to outcome, or usurping legislative or executive functions that are the province of those other branches. Focusing on the Court's decision in *Best v. Taylor Machine Works, Inc.*,[5] which invalidated the Civil Justice Reform Amendments of 1995 (a comprehensive tort reform act that included a cap on compensatory damages for noneconomic injuries), we concluded that the Court bore "the hallmarks of judicial activism, amidst occasional tendencies toward restraint."[6] Today, we revisit our prior analysis by examining some key decisions since 2004 that are illustrative of the Court's current judicial philosophy. We look at the Court's more contentious decisions with emphasis not on an exhaustive analysis of all of the Court's jurisprudence since 2004, but on decisions that have either made it into the public eye or that have an impact on areas of the law with wide reach.

The terms "judicial activism" and "judicial restraint" are loaded terms frequently used to attack or defend a decision based on its outcome. The determination of whether a court is engaging in judicial activism on the one hand or judicial restraint on the other, however, must be outcome independent. This important point is often masked by commentators who substitute the political terms "liberal" and "conservative" for judicial "activism" and "restraint." These political terms, however, are irrelevant to the categorization of a court as activist or not. A court comprised primarily of justices who are Republicans can be more activist than a court comprised primarily of justices who are Democrats and vice versa.

The Illinois Supreme Court is comprised of seven justices elected from five districts.[7] The justices are nominated by political parties and then placed on the ballot for a vote by the general electorate.[8] Once elected, each justice must face the electorate every ten years for a "yes" or "no" retention vote.[9] No Illinois Supreme Court justice has ever been voted off the Court.[10]

At the time of the 2004 white paper, *The Illinois Supreme Court: Judicial Activism, With Limits*, the court was comprised of five Democrats and two Republicans. We noted, however, that there was a closely-watched race in the 5th judicial district for the seat on the Illinois Supreme Court being vacated by retiring Justice Philip Rarick, a Democrat. Ultimately, Washington County Circuit Judge Lloyd Karmeier, a Republican, defeated the Democrat candidate in a contest in which the candidates combined to raise a record-setting $9.3 million in political contributions—the largest sum for any state judicial election in history.[11]

With the addition of Justice Karmeier, the Illinois Supreme Court's composition changed to four Democrats and three Republicans. Justice Karmeier is also the first justice from the 5th District not to hail from Madison or St. Clair counties, two jurisdictions regarded as class action/tort havens. The Court's balance may shift significantly again this year due to another highly-publicized judicial race. This November, Justice Thomas Kilbride, a Democrat, is on the retention ballot. Some Illinois citizens, in response to the Court's recent decision in *Lebron v. Gottlieb Memorial Hospital*,[12] which was joined by Justice Kilbride and which invalidated the Illinois legislature's latest attempt to cap noneconomic damages, have organized opposition to that justice's retention. One opponent, the Illinois Civil Justice League's political action committee JUSTPAC, is planning to spend $1 million to defeat Justice Kilbride due, in large part, to Justice Kilbride's support of the majority position in *Lebron*.[13]

The effect of the increasingly-politicized nature of the Illinois Supreme Court races remains to be seen. It is true that many of the recent politically "hot" cases seem to have been decided along party lines. The crucial distinction for our purposes, however, regardless of

party affiliation, lies in the judicial outlook expressed by the justices in their opinions.

Because "judicial activism" has become a pejorative term at both ends of the political spectrum, activist courts will often cloak their activism in the rhetoric of judicial restraint. Therefore, to assess the outlook in any opinion, we must look past that rhetoric. We previously articulated four factors that can aid in evaluating the judicial philosophy of a court: (1) the court's view of the role of the judiciary; (2) the rules of statutory and constitutional interpretation that the court employs; (3) the court's application of *stare decisis*;[14] and (4) the court's use of "public policy" arguments.

Like the United States Constitution, the Illinois Constitution provides that the government shall consist of the legislative, executive, and judicial branches and that each branch is separate and shall not exercise powers properly belonging to another.[15] The role of the judicial branch is to interpret law. An "activist" court, however, will not stay within the confines of its constitutional authority and will infringe on the legislative power by *making* law. It employs rules of statutory and constitutional interpretation in a manner that allows it to supplant the legislature's and constitution drafters' intent with its own. Furthermore, it is quick to abandon the doctrine of *stare decisis* and will often turn to its *own* "public policy" arguments to invalidate the legislature's will. A court exercising "judicial restraint," on the other hand, restricts its role to interpreting law only (even if it disagrees with the wisdom of that law) and employs rules of statutory and constitutional interpretation in a manner to give effect to the legislature's intent. It further gives strong weight to the doctrine of *stare decisis* (unless the precedent is clearly erroneous) and looks to the legislature to establish public policy.

As we did in our 2004 white paper, we have chosen to examine cases here that address politically divisive issues to determine the Court's judicial outlook.

Tort Reform

We begin with cases related to the Illinois legislature's attempt to enact tort reform. We particularly examine how the Court's interpretation of its role and authority versus that of the legislature to strike down damage caps enacted by the Illinois legislature illustrates its activist nature.

1. *Lebron v. Gottlieb Memorial Hospital*

In February 2010, the Illinois Supreme Court held, in a four-two decision, that Public Act 94-677 (eff. August 25, 2005) (the "Act") was facially unconstitutional because it violated the separation of powers clause of the Illinois Constitution.[16] The provision of the Act at issue (codified in *section* 2-1706.5 of the Code of Civil Procedure) created caps on noneconomic damages in medical malpractice cases. Specifically, *section* 2-1706.5 capped the award of noneconomic damages at $1 million for medical malpractice claims brought against a hospital and its personnel and $500,000 against an individual physician or the physician's business.[17] Noneconomic damages refer to intangible damages such as pain and suffering or loss of consortium; the Act did not create any cap for damages of economic loss such as past and future medical expenses or loss of earnings. The legislature created these caps in response to its finding that the rising cost of medical liability insurance has contributed to a reduction of available medical care in portions of Illinois and a looming health-care crisis in this state.[18] *Lebron* was the second time in recent history that the legislature had attempted to establish damages caps. In 1997, the Court in *Best* struck down the legislature's previous attempt to cap noneconomic damages arising in tort more generally at $500,000.

In *Lebron*, the Illinois Supreme Court revisited its *Best* decision at length. In *Best*, the Court held that the damages cap at issue in that case violated the special legislation clause of the Illinois Constitution[19] because it hypothetically created separate classes of individuals without a rational basis.[20] For example, the Court agreed with plaintiffs' contention that, among other things, the cap would create a class of individuals who would be fully compensated for their pain and suffering and another class of individuals who would not.[21] Notably, the Court in *Lebron* did not undertake a special legislation analysis. Perhaps this is because the legislature in this Act limited the caps to medical malpractice actions and issued a specific finding that the caps were being implemented in response to the

rising health-care crisis in the state thus providing a rational basis for the caps, in direct response to *Best*.

Instead, the Illinois Supreme Court in *Lebron* emphasized the importance of its *separation of powers* analysis in *Best*. The Court held that its finding in *Best*—that damages caps operated as impermissible legislative remittiturs[22] in violation of separation of powers—was not merely dicta, as defendants had suggested, and, thus, it was "entitled to much weight" and should be followed in *Lebron* "unless found to be erroneous" under the doctrine of *stare decisis*.[23] The Court rejected defendants' argument that remittitur was simply a common law doctrine that the legislature had the authority to alter and that any contrary finding would undermine the Court's other precedents upholding statutes that limit a plaintiff's damages.[24] While the Court acknowledged the legislature's authority to alter the common law, it summarily declared that those powers do not apply here.[25] The Court further declined to "comment on the constitutionality of statutes that are not before us."[26]

Justice Karmeier, joined by Justice Garman, wrote an impassioned dissent in *Lebron*.[27] He emphasized the settled axiom that the judiciary should uphold the constitutionality of a statute whenever possible and refrain from second-guessing the wisdom of the legislature.[28] Moreover, he stated, "While my colleagues purport to defend separation of powers principles, it is their decision, not the action of the General Assembly, which constitutes the improper incursion into the power of another branch of government."[29] With respect to the doctrine of *stare decisis*, he found that the Court's reliance was completely misplaced because, he argued, *Best* was incorrectly decided. He stated, "The doctrine of *stare decisis* is never an inexorable command. When it is clear a court has made a mistake, it will not decline to correct it, even if the mistake has been reasserted and acquiesced in for many years."[30]

Justice Karmeier further criticized the majority for failing to exercise judicial restraint and violating the "justiciability" requirement of article VI, section 9 of the Illinois Constitution, in its rush to invalidate the Act.[31] The plaintiffs in *Lebron* had not yet received any award of damages for their medical malpractice claim (let alone damages in excess of the capped amount); the parties were still in the pleading state of litigation when this appeal was sought.[32] Justice Karmeier wrote, "We have no business telling the General Assembly that it has exceeded its constitutional power if we must ignore the constitutional constraints on our own authority to do so."[33]

In sum, Justice Karmeier harshly criticized the Court's actions in *Lebron*:

> Our job is to do justice under the law, not to make the law. Formulating statutory solutions to social problem is the prerogative of the legislature. Whether there is a solution to the health-care crises is anyone's guess. I am certain, however, that if such a solution can be found, it will not come from the judicial branch. It is critical, therefore, that the courts not stand as an obstacle to legitimate efforts by the legislature and others to find an answer. If courts exceed their constitutional role and second-guess policy determinations by the General Assembly under the guise of judicial review, they not only jeopardize the system of checks and balances on which our government is based, they also put at risk the welfare of the people the government was created to serve.

2. *Ready v. United/Goedecke Services, Inc.*

In *Ready v. United/Goedecke Services, Inc.*,[34] the Court also targeted the legislature's effort to shield a defendant from liability it deemed excessive. The central issue in *Ready* was the meaning of the phrase "defendants sued by the plaintiff" in *section* 2-1117 of the Code of Civil Procedure.[35] *Section* 2-1117 provides that all defendants found liable in tort are jointly and severally liable for medical expenses, but that any defendant whose fault "is less than 25% of the total fault attributable to the plaintiff, *the defendants sued by the plaintiff*, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages."[36] Utilizing similar language, the statute goes on to provide that any defendant whose fault is greater than 25% of the total fault attributable to all of the other parties is jointly and severally liable for all other damages.[37] In other words, if a defendant's comparative fault is assessed at less than 25% it is liable for only *its share of* damages, but if its comparative fault

is greater than 25% it is jointly and severally liable for *all* damages.

The plaintiff in *Ready*, Terry Ready, filed a wrongful death action stemming from the death of her husband in a workplace accident during a pipe-refitting project at a local power plant.[38] Plaintiff named the general contractor of the project, BMW, and its subcontractor, United, as defendants. United and BMW filed third-party complaints against the operator of the power plant. Plaintiff reached settlements with BMW and the power plant operator totaling $1.113 million, leaving United as the only defendant at trial.[39] The trial court refused United's request to add the other defendants to the jury form, which would allow the jury to apportion fault among plaintiff and *all three* defendants that had been sued.[40] The jury found United liable for negligence, awarded damages of $14.23 million, and determined Ready's comparative negligence to be 35%. Accordingly, after offsets for Ready's negligence and settlement by the other defendants, United was liable for $8.137 million.[41]

United appealed, arguing that all original defendants should have been included on the jury form to permit the jury to assign comparative negligence to those defendants for their share of fault.[42] United argued that the phrase "defendants sued by the plaintiff" in *section* 2-1117 meant just that: all defendants that had been sued initially by the plaintiff, which would include BMW and the operator of the power plant. It further argued that if the jury had been asked to consider all defendants' relative fault that it was possible that the jury would have found United to have less than 25% comparative fault and, thus, it would have been only severally liable.[43] The plaintiff, on the other hand, maintained that "defendants sued by the plaintiff" referred only to those defendants who remain in the case when it is submitted to the fact finder. The appellate court held that United's interpretation of the phrase was correct and that the trial court erred by not including the settling defendants on the verdict form and by excluding evidence from which the jury could discern the settling defendants' comparative fault.[44]

The Illinois Supreme Court reversed and sided with the circuit court in a four-two decision.[45] The Court began by articulating principles of statutory interpretation supporting judicial restraint, such as the requirement to look to the actual words of the statute for its "plain and ordinary meaning."[46] The Court found the "plain and ordinary meaning" of the phrase "defendants sued by plaintiff" in the statute to be ambiguous, thus requiring it to turn to other "tools of interpretation" to ascertain its meaning.[47]

This it did by turning to various appellate court decisions and legislative action relating to *section* 2-1117. Importantly for purposes of this discussion, a 1995 appellate court decision, *Blake v. Hy Ho Restaurant, Inc.*,[48] held that settling defendants should not be included in the apportionment of fault under *section* 2-1117.[49] Additionally, the Civil Justice Reform Amendments of 1995 (which were ruled unconstitutional in *Best*) contained amendments to *section* 2-1116 of the Code, which explicitly stated that for purposes of determining comparative fault the term "tortfeasors" shall include any person whose fault is a proximate cause of the injury for which recovery is sought, regardless of whether, among other things, that person may have settled with the plaintiff.[50] In 2003, the legislature amended *section* 2-1117 to exclude the plaintiff's employer from the third-party defendants subject to a finding of fault, but did not address the issue of the phrase in question here.[51]

Using these "tools of interpretation," the Illinois Supreme Court looked to the principle that, "where the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent."[52] The Court concluded that the legislature's failure to address the *Blake* decision in the 2003 amendments was an indication of legislative acceptance of *Blake's* interpretation that "defendants sued by the plaintiff" referred to only those defendants that still remain in the case at the time it was submitted to the fact-finder.[53] Next, the Court analyzed the principle that "an amendment to a statute creates a presumption that the amendment was intended to change the law."[54] The Court concluded that because the 1995 Act purported to include settling tortfeasors on the verdict form that the prior law must have excluded them.[55]

Writing in dissent, Justice Garman critiqued the Court's reasoning, maintaining that the majority's reliance on the 1995 Act for support of its conclusion was based on an incomplete recitation of the cannon of construction dealing with subsequent amendments.[56] According to Illinois precedent, only an amendment to an *unambiguous* statute indicates a legislative intent to change the law; if the statute is *ambiguous* to begin with, no such legislative intent can be inferred.[57] Justice Garman also wrote that the majority overlooked the importance of another appellate court decision, *Lombardo v Reliance Elevator Co.*,[58] in concluding that the legislature acquiesced in the holding in *Blake*.[59] Putting aside her skepticism that the legislature would even have been aware of an appellate decision from almost eight years earlier when it amended *section* 2-1117 in 2003, Justice Garman argued that the majority had espoused no reason why the legislature would be acquiescing in *Blake*, as opposed to the more recent holding in *Lombardo*.[60]

In any event, Justice Garman viewed the extraordinary cannons employed by the majority as unnecessary because the plain meaning of the phrase "defendants sued by the plaintiff" unambiguously referred to those defendants against whom the plaintiff filed suit.[61] Justice Garman stated, "In my opinion, we are most vulnerable to a legitimate accusation of 'legislating from the bench' when we find ambiguity where there is none."[62] Justice Garman further warned that the majority's holding "invites future plaintiffs to reject reasonable settlement offers from minimally responsible defendants with 'deep pockets' in an effort to keep such defendants in the case until judgment."[63] Under the Court's holding in *Ready*, Justice Garman opined, "[a] defendant who is a mere 1% at fault for an injury will be liable for the entire amount of the judgment, less the amount of the settlements with more culpable defendants."[64] The necessary implication of Justice Garman's analysis is that this result is strikingly contrary to the legislature's explicit intent in *section* 2-1117 to limit liability for any defendant whose fault for an injury is less than 25% to the actual percentage of damage that it caused.

Mandatory Retirement Age for Judges

In *Maddux v. Blagojevich*,[65] the Illinois Supreme Court held, in yet another four-two decision, that the Illinois Compulsory Retirement of Judges Act (the "Retirement Act") was unconstitutional because it violated equal protection.[66] In relevant part, the Retirement Act provided that Illinois judges were "automatically retired at the expiration of the term in which the judge attains the age of 75."[67] *Section* 15(a) of Article VI of the Illinois Constitution explicitly states that the Illinois legislature may establish a retirement age for judges.[68] The plaintiffs were Cook County Circuit Court Judge William D. Maddux (who was to turn 75 years old before the expiration of his term in 2010) and five Cook County voters eligible to vote in judicial elections.[69]

The Illinois Supreme Court began its analysis by acknowledging concepts of judicial restraint, finding that "in all cases of statutory construction, our goal is to ascertain and give effect to the intent of the General Assembly in passing the Act, and the enacted language is generally the best evidence of that."[70] The Court then stated, "We may also consider the purpose behind the Act and the evils sought to be remedied, as well as the consequences that would result from construing it one way or the other, a critical consideration for this case."[71]

Stating that it was applying the plain and ordinary meaning to the words in the statute, and choosing definitions from Webster's Third New International Dictionary and Black's Law Dictionary with respect to the verb "retire," the Court found that the Act required mandatory, *permanent* retirement for all judges at the expiration of the term in which they reach age 75.[72] This raised equal protection concerns, the Court concluded, because it created two distinct classes of citizens 75 years or older: those who held judicial office when they turned 75 years old and who, thus, were rendered permanently retired at the end of their term and unable to run for election; and those who did not hold judicial office when they turned 75 years old and who, thus, escaped the confines of the Act and were permitted to seek election. Because of the invidious classification as a result of the definition

it applied to the statute, the Court found no rational basis for this classification.[73]

The Court's task was complicated by another possible interpretation of the Retirement Act—one that had previously been put forth by an appellate court in a different case, *Anagnost v. Layhe*.[74] In *Anagnost*, the court of appeals had interpreted the Retirement Act to not prevent *any* citizen 75 years or older from seeking *election*, but to simply prevent sitting judges who attained the age of 75 during their term from seeking *retention*.[75] This interpretation was reasonable, *Anagnost* held, because of the distinction between retention elections and open elections—open elections were better-suited to allow voters to assess the fitness of a 75-year-old to hold office.[76] While the Illinois Supreme Court acknowledged that there is some evidence to support the conclusion that "fitness" was a concern behind both section 15(a) of Article VI and the Retirement Act, in the Court's view that interest was not realized by *Anagnost's* interpretation because concern "about the infirmities of age" would exist for any person 75 and older.[77] The Court's reasoning did not consider that the legislature may have intended to leave this judgment in the hands of voters and not the Court.

The Court also stated that *any* attempt by the legislature to establish a mandatory retirement age for judges may run afoul of the current Illinois Constitution, even though that power is expressly granted by one provision of the Constitution. According to the Court, a tension exists between *section* 15(a) of article VI of the Illinois Constitution, which grants the legislature the power to establish mandatory retirement ages and *section* 11 of article VI, which establishes only three criteria for eligibility to be a judge, none of which is an age limitation.[78] The Illinois Supreme Court invalidated the legislature's enactment and stated, "It may well be that the route to mandatory retirement for judges lies in constitutional amendment."[79]

Justice Karmeier, writing in dissent, strongly criticized the majority opinion.[80] He wrote that "it is the duty of a court to construe a statute in a manner upholding its constitutionality, if such construction is reasonably possible."[81] Justice Karmeier concluded that *Anagnost* had fulfilled that duty by interpreting the Retirement Act as reasonable and consistent with the commonly understood meaning of "retirement": a 75-or-over judge is required to "retire" by withdrawing from his present office and not seek retention, but is permitted to "re-start" his career by running in an open election.[82]

Judge Karmeier observed that the equal protection challenge upon which the majority found the Act unconstitutional was not raised by plaintiffs: "for the majority to raise the issue [on its own] directly conflicts with the court's obligation to uphold the constitutionality of a statue whenever it is reasonably possible to do so."[83] Additionally, Judge Karmeier opined that the majority's suggestion that an inherent conflict exists between *section* 11 of Article VI of the Illinois Constitution (which sets for the eligibility for judicial office) and *section* 15(a) of Article VI (which pertains to retirement of judges) leads to an illogical result. If *section* 11 contains the exclusive list of eligibility criteria for judicial office, trumping the retirement provisions in *section* 15(a), it must likewise trump the other provisions in *section* 15 addressing situations in which judges can be removed from the bench.[84] Justice Karmeier grounded his conclusion, therefore, at least in part on the principle that courts are duty-bound to exercise restraint and uphold legislation whenever possible.

Workers' Compensation

A series of recent decisions by the Illinois Supreme Court in the workers' compensation arena has drawn accusations by some observers that the Court has a pro-claimant bias. Our concern, however, is the way in which the Court reaches an outcome, not the outcome itself. For the most part, these cases reflect the Court exercising its powers within the confines of its constitutional authority and attempting to give effect to the legislature's intent without imposing its own. Moreover, there is cohesion within the Court, as these cases are, for the most part, unanimous.

In *Twice Over Clean, Inc. v. Industrial Commission*,[85] the Illinois Supreme Court overruled the appellate court and upheld the circuit court's determination that the claimant, Howard Haulk, was entitled to an award of worker's compensation for a heart attack

that he experienced while on a work assignment as a laborer for Twice Over Clean.[86] The principal dispute on appeal was whether there was a sufficient causal connection between Haulk's injury and his work in light of the fact that his own physician had agreed that Haulk was a "heart attack waiting to happen."[87] The appellate court found that the "normal daily activity" exception applied in this situation and reversed the circuit court's determination.[88]

The Illinois Supreme Court, however, held that the appellate court misapplied the "normal daily activity" exception. The relevant question was not whether Haulk's heart attack could have happened at any time, but whether his work activities were a causative factor in hastening his preexisting condition.[89] The evidence established that at the time Haulk experienced his heart attack, he was performing manual labor by removing forty-five- to fifty-pound bags of asbestos down a four to five-story building, in five-degree-above-zero weather, while wearing a large, air-pack-driven facial respirator and protective clothing.[90] Accordingly, the Court concluded that there was an adequate basis in the record to conclude that Haulk's work activities on that day aggravated or accelerated his preexisting coronary artery disease and, therefore, was a cause of the heart attack that he suffered.[91]

In *Beelman Trucking v. Illinois Workers' Compensation Commission*,[92] the Court employed traditional principles of statutory interpretation to determine that the Workers' Compensation Act permitted a claimant to receive awards for both permanent total disability under *section* 8(e)(18) and permanent partial disability under *section* 8(e)(10) of the Act for injuries arising out of a single accident.[93] It was undisputed that the plaintiff, Jack Carson, had suffered paralysis in both legs, paralysis below the shoulder in his left arm, and the surgical amputation of his right arm above the elbow as a result of a vehicular accident that arose out of, and in the course of, his employment with the defendant, Beelman Trucking.[94] What was in dispute was whether *section* 8(e)(18) provided the maximum benefits sustained in a single action or whether a claimant could also seek compensation for other injuries resulting from the same accident pursuant to *section* 8(e)(10).[95]

Section 8(e) of the Act provides for compensation of a worker who suffers a permanent partial disability. This section is organized into schedules awarding benefits in terms of a fixed number of "weeks" (equal to 60% of the worker's "average weekly wage") depending on the specific type of loss suffered by the worker.[96] Applicable to this case is *subsection* 10 of *section* 8(e), which provides for the number of weeks to be paid for injuries to an arm.[97] *Subsection* 8(e)(18) provides that "[t]he specific case of loss of both hands, both arms, or both feet, or both legs, or both eyes, or of any two thereof . . .constitutes total and permanent disability," which is to be compensated according to *section* 8(f).[98] *Section* 8(f), in turn, provides for a life payment equal to 66 2/3% of the worker's average weekly wage in the case of "complete disability," which renders the employee wholly and permanently incapable of work *or* in the specific case of "total and permanent disability" as provided in *section* 8(e)(18).[99] The Commission and circuit court awarded Carson total and permanent disability benefits for the paralysis of his two legs pursuant to *section* 8(e)(18), but also awarded him permanent partial disability for the injuries to his arms under *section* 8(e)(10).[100]

Beelman argued that because a worker cannot be more than totally and permanently disabled under the commonly accepted definition of "total," *section* 8(e)(18) provided the maximum benefit for injuries sustained in a single accident.[101] Interpreting the statute to effectuate all of its provisions, the Illinois Supreme Court rejected Beelman's contention. By distinguishing between "total and permanent disability" and "complete disability," the Court reasoned that the legislature clearly contemplated a situation where a worker could suffer "total and permanent disability" that is defined in *section* 8(e)(18) while not being rendered wholly incapable of work.[102] Moreover, the Court held that if *section* 8(e)(18) did operate as a cap, Carson's increased disability for loss of use of his arms would be uncompensated, a result not supported in the statutory language or the Court's prior findings that the Workers' Compensation Act is to be liberally construed to accomplish its goal of providing financial protection for injured workers.[103]

Finally, in *Interstate Scaffolding, Inc. v. Illinois*

Workers' Compensation Commission,[104] the Illinois Supreme Court held that an employer's obligation to pay temporary total disability does not cease because the employee had been discharged—whether or not the discharge was for "cause."[105] In reaching this conclusion in this case of first impression in Illinois, the Court turned to the text of the Workers' Compensation Act. The Court found that a "thorough examination of the Act" revealed that it is silent with respect to the denial of benefits as a result of an employee's dismissal.[106] The Court held that whether an employee has been discharged for a valid cause or whether the discharge violates some public policy are issues completely unrelated to an employee's entitlement to benefits.[107]

Class Actions

In 2004, at the time of our previous white paper, the American Tort Reform Foundation ("ATRF") ranked Madison County and St. Clair County as the #1 and #2 jurisdictions exhibiting the worst judicial abuses in the nation.[108] Madison County, in particular, had been at or near the top of ATRF's annual "Judicial Hellhole" rankings for several years. Beginning in 2005, however, these counties' rankings on the list began to drop and by 2007 they had moved off of the "Judicial Hellhole" list altogether into the ATRF's "Watch List," where they have remained ever since.[109] In 2005, the Illinois Supreme Court issued a series of decisions that limited class actions related to the Illinois Consumer Fraud and Deceptive Business Practices Act[110] ("Consumer Fraud Act") that had made Illinois the jurisdiction of choice for plaintiffs' lawyers filing nationwide class-actions.

The first of the decisions, *Avery v. State Farm Mutual Automobile Insurance Co.*,[111] invalidated a billion-dollar class-action plaintiffs' verdict for breach of contract and Consumer Fraud Act claims, holding that class certification was improper for numerous reasons and that, in any event, no sub-class could be certified because the plaintiffs had failed to establish any actual damages.[112] In *Avery*, five named plaintiffs (only one of whom was a resident of Illinois) represented a nationwide class of State Farm Mutual Automobile Insurance Company ("State Farm") policyholders who alleged that State Farm breached their policy agreements and violated the Consumer Fraud Act by specifying the use of car repair parts that were not affiliated with the original equipment manufacturers ("non-OEM" parts) in approving claims for the repair of policyholders' vehicles.[113] The plaintiffs alleged that State Farm's practice of specifying the use of non-OEM parts constituted an actionable misrepresentation under the Consumer Fraud Act regarding the "standard, quality or grade of the goods and services" provided under the State Farm insurance policy.[114] State Farm opposed class certification because the substance of policies varied from state to state (destroying the element of commonality), and because four of the five named plaintiffs had little to no connection with the State of Illinois.[115] The Illinois Supreme Court agreed with State Farm.

While the eighty-one page opinion in *Avery* was generally considered a blow to proponents of a permissive interpretation of class action requirements, of particular importance was the Court's ruling that the Consumer Fraud Act could not be the basis of a nationwide class.[116] The Court held, as a matter of statutory interpretation, that the Act can only apply "if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois."[117] As applied to the facts of this case, the Court held that the Act did not permit a cause of action for out-of-state plaintiffs because the "overwhelming majority of circumstances relating to [their] disputed transactions" occurred outside of Illinois.[118] Moreover, since the lone Illinois-named plaintiff had failed to suffer any actual damage as a result of the violation of the Act, all of the Illinois Consumer Fraud Act claims were dismissed.[119]

In a separate opinion, concurring in part and dissenting in part, Justice Freeman implied that the stark language and apparent shift in philosophy advanced by the majority was a direct reaction to the allegations of abuse in the class action arena that have been leveled at the Illinois courts.[120]

A few months later, in November 2005, the Illinois Supreme Court issued a second decision that made it more difficult for out-of-state plaintiffs to file class actions in Illinois in *Gridley v. State Farm Mutual Automobile Insurance Co*.[121] Gridley, a Louisiana resident, filed suit in Madison County as

a representative of a nationwide class of individuals who had purchased automobiles that were previously declared a "total loss" by State Farm and for which State Farm failed to obtain a salvage title, as required by Louisiana statute.[122] In his suit, Gridley alleged two causes of action: (1) unjust enrichment and (2) violation of the Illinois Consumer Fraud Act.[123] State Farm moved to dismiss the complaint, arguing that the Illinois Consumer Fraud Act could not apply to Gridley's complaint (which was premised on events in Louisiana) and that Gridley's remaining common law claim should be dismissed pursuant to the doctrine of *forum non conveniens*.[124] The circuit court denied State Farm's motion in its entirety, reasoning that Illinois had a "significant interest" in the litigation because State Farm was headquartered in Illinois and Gridley sought recovery under Illinois law.[125]

Again, the Illinois Supreme Court sided with State Farm. First, the Court affirmed its prior decision in *Avery* and held that the plaintiff could not assert an Illinois Consumer Fraud Act because the Act did not apply to fraudulent transactions that take place outside of Illinois.[126] Second, the Court held that the circuit court abused its discretion in denying State Farm's *forum non conveniens* motion, because all relevant factors strongly favored dismissal in favor of a Louisiana forum, especially since virtually all material events occurred in the State of Louisiana.[127]

In December 2005, the Illinois Supreme Court issued a third important class action decision. In *Price v. Philip Morris, Inc.*, the Court reversed and remanded with instructions to dismiss another class action case from Madison County that had resulted in astronomical damages of over $10 billion.[128] The plaintiffs in *Price* alleged that Philip Morris's use of the terms "light" and "lowered tar and nicotine" in connection with its Cambridge Lights and Marlboro Lights cigarettes was false and deceptive under the Illinois Consumer Fraud Act.[129] The circuit court certified an Illinois class of consumers who purchased these cigarettes for personal consumption between their introduction (late 80's/early 70's) and 2001.[130]

On appeal directly to the Illinois Supreme Court, Philip Morris attacked the circuit court's rulings on multiple fronts, including improper class certification.[131] The court's decision, however, focused on whether section 10(b)(1) of the Illinois Consumer Fraud Act barred the plaintiffs' claims.[132] Section 10(b)(1) of the Act explicitly provides that the Act shall not apply to actions "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States."[133] In the context of this case, the specific question analyzed by the Court was whether the actions of the Federal Trade Commission ("FTC"), a federal entity that had jurisdiction over the advertising and testing of cigarettes, met this requirement. After extensive discussion and review of all available authorities, the Illinois Supreme Court concluded that the FTC did specifically authorize all United States tobacco companies (including Phillip Morris) to use the terms in question, and, therefore, that the plaintiffs' claims were barred by section 10(b)(1).[134] The Court also expressed concerns with other aspects of the circuit court's decision, in particular noting its skepticism that members of the plaintiff class were actually deceived by the use of the terms, a requirement of the element of proximate cause, and its "grave reservations" about the circuit court's "novel approach" to the calculation of damages.[135]

In a dissenting opinion, Justice Freeman once again expressed his concerns that the Court's rulings were, in part, overcompensating for perceived injustices with respect to class actions arising from certain jurisdictions. Specifically he stated,

> Aspects of the court's opinion today and in its opinion in *Avery* cause me to fear that a majority of my colleagues will continue to hold large class actions to different standards in an effort to reduce the perception that the Illinois court system serves as a playpen for the disingenuous class action practitioner.[136]

The dramatic shift in class action jurisprudence occurred after the election of Justice Karmeier to the Illinois Supreme Court. Justice Karmeier was the first justice to be elected from the 5th district who was not associated with the popular class action jurisdictions of Madison or St. Clair Counties. While Justice Karmeier was not the deciding vote in any of these cases, the level of attention accorded his race in 2004 with respect

to these issues and his resulting election may all be factors that gave rise to the shift in the Court's outlook perceived by Justice Freeman.

Gun Control

One politically-divisive issue that frequently draws accusations of judicial activism is that of gun control, especially in Illinois, as Chicago has some of the nation's strictest gun control laws while simultaneously being among the nation-wide leaders in gun-related crime. Against this backdrop, and prior to the U.S. Supreme Court's decision in *McDonald v. City of Chicago*,[137] which struck down Chicago's gun ban as a violation of the U.S. Constitution's Second Amendment, the Illinois Supreme Court decided *City of Chicago v. Beretta U.S.A. Corp.*[138] This case held that a public nuisance claim could not be maintained against gun manufacturers, dealers, and distributors. This decision remains relevant in the wake of *McDonald*, as Chicago's Mayor Daley and the city council have tried to seek the maximum permitted regulations under the U.S. Supreme Court's ruling, and also in light of a spate of recent shootings of bystanders and shooting deaths of children who were playing with guns.

In *Beretta*, the City of Chicago and Cook County sued eighteen gun manufacturers, four distributors, and eleven dealers of handguns, alleging that the defendants' conduct in designing, manufacturing, distributing, and selling certain models of handguns was done with the knowledge, if not the intent, that a significant number of the guns will be possessed illegally in Chicago, creating a public nuisance that violates the right of Chicago residents to be free from the threat of gun violence and from jeopardy to health and safety.[139] The plaintiffs alleged that the named defendants were disproportionately responsible for putting into the stream of commerce guns used in the commission of crimes, as evidenced by tracing statistics compiled by the United States Bureau of Alcohol Tobacco and Firearms.[140] Examples of the defendants' alleged offensive conduct included selling firearms to Chicago residents when they knew it is illegal for those customers to use or possess the guns in the city; designing guns with features that appeal to criminals such as ease of concealment, resistance to fingerprints, and the ability to fire many rounds from a single clip; and saturating the market in areas where gun-control laws are less restrictive, knowing that persons will bring guns into other jurisdictions such as Chicago to use or resell them in an illegal market.[141] The Cook County circuit court granted the defendants' motion to dismiss.[142] The appellate court reversed the circuit court and found that the plaintiffs had sufficiently stated a cause of action for public nuisance.[143] Several entities filed amici briefs on both sides of the issue.

In reversing the appellate court and upholding the dismissal of the circuit court, the Illinois Supreme Court carefully examined each element of a public nuisance claim.[144] The Court ultimately found that the plaintiffs' claim failed because it did not meet all of the required elements.[145] In reaching this conclusion, the Court was mindful of the legitimate and significant public interest in reducing gun crime. The Court noted in several instances, however, that the arguments made by the plaintiffs were more appropriate to place before the legislature than the judiciary. For example, with respect to the element of "unreasonable interference," the Court stated that "an analysis of the harm caused by firearms versus their utility is better suited to legislative fact-finding and policymaking than to judicial assessment."[146] The Court concluded its opinion by noting:

> Any change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of the courts. In response to the suggestion of *amici* that we are abdicating our responsibility to declare the common law, we point to the virtue of judicial restraint.[147]

The Court also decided a sister case to *Beretta* on the same day. In *Young v. Bryco Arms*, representatives of individuals killed in the City of Chicago in crimes involving illegal guns brought a public nuisance claim against a group of gun manufacturers and distributors.[148] The Illinois Supreme Court decided *Young* in favor of the defendants as well and further commented on the judiciary's and legislature's respective roles on this issue:

> Ultimately, our conclusion that the doctrine of public nuisance does not encompass the

> novel claim made by plaintiffs is a public policy determination. We note that despite the existence of numerous statutes declaring various practices and conditions to constitute public nuisances, we have no indication from the legislature that it would be inclined to impose public nuisance liability for the manufacture and sale of a product that may be possessed legally by some persons, in some parts of the state. We are reluctant to interfere in the lawmaking process in the manner suggested by plaintiffs, especially when the product at issue is already so heavily regulated by both the state and federal governments. We, therefore, conclude that there are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms.[149]

The Court similarly deferred to the legislature in another recent case involving handguns. In *Illinois v. Diggins*, the defendant was convicted of aggravated unlawful use of a weapon in violation of section 24–1.6(a)(1) of the Criminal Code following a jury trial in Peoria County.[150] The defendant appealed the conviction, asserting that the trial court erred as a matter of law when it instructed the jury that the center console of his car (in which the guns at issue were found) was not a "case" pursuant to Section 24–1.6(c)(iii) of the Criminal Code, which provides that a person is *not guilty* of aggravated unlawful use of a weapon if the weapon is "unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card."[151] The appellate court reversed the conviction and remanded for a new trial, finding that the plain meaning of the word "case" encompassed a vehicle's center console.[152]

In urging the Illinois Supreme Court to reach a different conclusion, the state requested that the court utilize various cannons of statutory construction and look to legislative history to find that "case," as used in the statute, did not include a car console.[153] Finding the word "case" unambiguous according to its common definition, and finding the suggested canons of construction logically inapplicable, the Court declined to consider legislative history and affirmed the appellate court's ruling.[154] The Court further stated, "[O]ur result is controlled by the plain language of section 24–1.6(c)(iii) as enacted by the legislature. We are not at liberty to depart from the language employed. Whether the statute is wise or the best means to achieve the desired result are matters left to the legislature, not this court."[155]

Conclusion

Our review of cases makes it clear that it is impossible to categorize the Illinois Supreme Court as prone entirely to judicial activism or to judicial restraint.

On balance, the Court has engaged in a more activist judicial interpretation in matters of tort reform and judicial prerogatives; in those areas it has generally declined to enforce legislatively-imposed damage caps and to preserve and even extend judicial power.

At the same time, in its recent jurisprudence concerning class actions and proposed expansions of the common law doctrine of nuisance to include the distribution of firearms, the Court has been decidedly more restrained.

There are some in Illinois who have speculated that political events may play a part in these decisions. They have suggested, for example, that Justice Karmeier's replacement of a justice who hailed from a favorable class action jurisdiction in an election that featured public debate about the need for class action reform and the power of the class action trial bar had an impact on the outlook of other justices whose activism on tort reform now does not extend to class actions.

Similarly, some have implied that downstate (i.e. non-Chicago) interest in firearm ownership and the political strength of groups like the Illinois State Rifle Association could have a political impact on the court's jurisprudence regarding the ownership and use of firearms.

It is impossible to know whether either of these scenarios had an impact without empirical study.

What can citizens do to counteract the influence of politics—of any hue—on the judicial process? The short answer is to engage in a vigorous public debate about the proper role of our courts, using the elections process as a key inflection point.

Endnotes

1 This article represents the view of the authors solely, and not the view of Jones Day, its partners, employees, or agents.

2 Counsel, Jones Day

3 Associate, Jones Day

4 *See* James C. Dunlop & Tara A. Fumerton, *The Illinois Supreme Court: Judicial Activism, With Limits*, The Federalist Society (October 2004).

5 179 Ill.2d. 367 (1997).

6 *Id.* at 10.

7 Ill. Const. (1970) art. VI, § 3.

8 Ill. Const. (1970) art. VI, § 12.

9 Ill. Const. (1970) art. VI, §§ 10 and 12.

10 Ameet Sachdev, *Negative Politics Creep into Illinois Supreme Court Retention Race*, Chicago Tribune, August 24, 2010.

11 *Time to Reform How Illinois Picks Judges*, Chicago Sun Times, August 23, 2010.

12 237 Ill. 2d 217 (2010). *Lebron* is discussed in more depth below.

13 Sachdev, *supra* note 10.

14 *Stare decisis* is a Latin phrase that means "to stand by things decided." It is the legal doctrine that provides that matters that have been decided in earlier judicial decisions are generally not open for examination when they arise in later cases.

15 Ill. Const. (1970) art. II, § 1.

16 Lebron v. Gottlieb Mem'l Hosp., 237 Ill. 2d 217, 250 (2010). Chief Justice Fitzgerald delivered the judgment and opinion of the court, and Justices Freeman, Kilbride and Burke concurred. Justice Karmeier, joined by Justice Garman, dissented in the judgment and opinion. Justice Thomas took no part in the decision of the case. *Id.* at 223.

17 *Id.* at 228.

18 *Id.* at 229.

19 The special legislation clause of the Illinois Constitution provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Ill. Const. (1970) art. IV, § 13. In *Best*, the Court stated that "the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis." *Best*, 179 Ill. 2d at 391.

20 *Best*, 179 Ill. 2d at 402-10.

21 *Id.*

22 A "remittitur" is ordinarily a decision by a judge to reduce a jury's award of damages as excessive.

23 *Lebron*, 237 Ill. 2d at 237.

24 *Id.* at 245.

25 *Id.*

26 *Id.* at 247.

27 Justices Karmeier and Garman concurred in the majority opinion only to the extent that the majority held that the circuit court erred in holding *section* 2-1706.5 unconstitutional "as applied." *Id.* at 261.

28 *Id.* at 260.

29 *Id.* at 260-61.

30 *Id.* at 272.

31 *Id.* at 270.

32 *Id.* at 267.

33 *Id.* at 270.

34 232 Ill. 2d 369 (2008).

35 *Id.* at 374.

36 *Id.* at 374-75 (quoting Ill. Rev. Stat. 1987, ch. 110, par. 2-1117) (emphasis added).

37 *Id.*

38 *Id.* at 371.

39 *Id.* at 372.

40 *Id.* at 373.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at 373-74.

45 *Id.* at 383.

46 *Id.* at 375.

47 *Id.* at 379-80 (internal citations omitted).

48 273 Ill. App. 3d 372 (Ill. App. Ct. – 5th Dist. 1995).

49 *Id.* at 378.

50 *Id.* at 380-81.

51 *Id.* at 374 n.2. Before the Illinois Supreme Court, all parties agreed that the pre-2003 version of *section* 2-1117 was applicable to the plaintiff's case. *Id.* at 374.

52 *Id.* at 380.

53 *Id.*

54 *Id.*

55 *Id.* at 382.

56 *Id.* at 397. Justice Karmeier joined Justice Garman in

dissent.

57 *Id.* (citing Williams v. Staples, 208 Ill. 2d 480, 496 (2004)).

58 315 Ill. App. 3d 111 (Ill. App. Ct. – 1st Dist. 2000) (holding that settling defendants were properly listed on the verdict form).

59 *Ready*, 232 Ill. 2d at 402.

60 *Id.* at 403.

61 *Id.* at 390-95.

62 *Id.* at 404.

63 *Id.* at 406.

64 *Id.*

65 233 Ill. 2d 508 (2009).

66 *Id.* at 530.

67 *Id.* at 513 (quoting 705 ILCS 55/1 (West 2006)).

68 Ill. Const. (1970) art. VI, § 15(a).

69 *Maddux*, 233 Ill. 2d at 510-11.

70 *Id.* at 513.

71 *Id.*

72 *Id.* at 514.

73 *Id.* at 526.

74 230 Ill. App. 3d 540 (Ill. App. Ct. – 1st Dist. 1992).

75 *Maddux*, 233 Ill. 2d at 515.

76 *Id.* at 519.

77 *Id.* at 521.

78 *Id.* at 529.

79 *Id.* at 530.

80 Justice Garman joined Justice Karmeier in his dissent. *Id.* at 549.

81 *Id.* at 533.

82 *Id.* at 540-41.

83 *Id*. at 545.

84 *Id.* at 547-48.

85 214 Ill. 2d 403 (2005).

86 *Id.* at 405.

87 *Id.* at 409.

88 The "normal daily activity" exception provides that workers' compensation will be denied to an employee who suffers an injury on the job if the employee's health has so deteriorated that any normal daily activity is an overexertion to the point that there is not a sufficient causal connection between the injury and employment. *See* Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 208-12 (2003).

89 *Twice Over Clean*, 214 Ill. 2d at 413.

90 *Id*. at 406.

91 *Id.* at 416.

92 233 Ill. 2d 364 (2009).

93 *Id.* at 380.

94 *Id.* at 367-68.

95 *Id.* at 368-70. The parties also disputed the propriety of awards for expenses relating to Carson's home computer system and insurance premium, but we do not discuss those issues here.

96 *Id.* at 371.

97 *Id.*

98 *Id.* at 372.

99 *Id*.

100 *Id*. at 368.

101 *Id*. at 373.

102 *Id.*

103 *Id*. at 377-80.

104 236 Ill. 2d 132 (2010).

105 *Id.* at 149.

106 *Id*. at 146.

107 *Id.* at 149.

108 ATRF, Judicial Hellholes 6 (2004).

109 *Compare* ATRF, Judicial Hellholes (2005) *with* ATRF, Judicial Hellholes (2006); ATRF, Judicial Hellholes (2007); ATRF, Judicial Hellholes (2008); *and* ATRF, Judicial Hellholes (2009).

110 815 ILCS 505/1 *et seq.*

111 216 Ill.2d 100 (2005).

112 *Id.* at 203-04.

113 *Id.* at 109-10.

114 *Id.* at 110-11 (internal citations omitted).

115 *Id.* at 113.

116 *Id.* at 185.

117 *Id.* at 187.

118 *Id.* at 188.

119 *Id.* at 195-96.

120 *Id.* at 236.

121 217 Ill.2d 158 (2005).

122 *Id.* at 161.

123 *Id.*

124 *Id.* at 162.

125 *Id.*

126 *Id.* at 166.

127 *Id.* at 171.

128 Price v. Phillip Morris, Inc., 219 Ill. 2d 182, 185 (2005).

129 *Id.* at 209. The plaintiffs also raised claims under the Illinois' Uniform Deceptive Trade Practices Act.

130 *Id.* at 211-12.

131 *Id.* at 232-33.

132 *Id.* at 233.

133 *Id.* at 234 (quoting 815 ILCS 505/10b(1) (West 1998)).

134 *Id.* at 265-66.

135 *Id.* at 271.

136 *Id.* at 327-28.

137 561 U.S. _____(2010) (Slip op. ____, No. 08-1521, June 28, 2010).

138 213 Ill. 2d 351 (2004).

139 *Id.* at 362-363.

140 *Id.* at 358-60.

141 *Id.*

142 *Id.* at 356.

143 *Id.*

144 The elements of a public nuisance cause of action are: (1) the existence of a right common to the general public; (2) a substantial and unreasonable interference with that right by the defendant; (3) proximate cause; and (4) actual injury. *Id.* at 369.

145 *Id*. at 432.

146 *Id.* at 384.

147 *Id.* at 432.

148 213 Ill. 2d 433, 436-47 (2004).

149 *Id.* at 455-56 (internal citations omitted).

150 235 Ill. 2d 48, 50-51 (2009).

151 *Id.* at 53-54 (quoting 720 ILCS 5/24 – 1.6(c)(iii) (West 2006)).

152 *Id*. at 53.

153 *Id.* at 56-57.

154 *Id.* at 57.

155 *Id.* at 58.

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