The Illinois Supreme Court: Judicial Activism, With Limits

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In this article, we review Illinois Supreme Court cases in an attempt to discern the judicial outlook of the Illinois Supreme Court.[4] Is the Illinois Supreme Court prone to judicial "activism" or to judicial "restraint," or does it fall somewhere in between? First we examine a seminal constitutional case in the area of tort reform, *Best v. Taylor Machine Works, Inc.*, 179 Ill.2d 367 (1997), which provides a useful illustration of judicial activism. To discern the limits on such activism, we focus on four questions:

1. What does the court view as the proper role of the judiciary?
2. What rules of statutory and constitutional interpretation does the court employ?
3. When should *stare decisis* bind the court, and when should precedent be overturned?
4. How does the court use "public policy" arguments in deciding a case?

Before we begin this analysis, however, it is important to first define the terms judicial "activism" and judicial "restraint."

All too often, the general public, politicians, and the media label judges and courts as "liberal" or "conservative" based on whether the outcomes of the cases before them correspond to the commonly accepted *political* meanings of those terms. Here we eschew political terms all together. We seek instead to ascertain how the Illinois Supreme Court exercises the *judicial* role bestowed upon it by Article VI of the Illinois Constitution and the principle of separation of powers. That judicial role was aptly described by the Illinois Supreme Court in *Jorgensen v. Blagojevich,* 211 Ill. 2d 286 (2004), when the Court quoted Alexander Hamilton in *Federalist No. 78,* who said that "[the judiciary] may truly be said to have neither force nor will, but merely judgment."[5] Whether the Illinois Supreme Court is an "activist" institution that seeks to impose political and legal outcomes by force or will, or instead exercises judicial "restraint" in that it exercises merely "judgement," is the subject of this white paper. We begin with the assumption that the judicial role does not properly

1 This white paper represents the views of the authors solely, and not the view of Jones Day, its partners, employees, or agents.
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4 Our analysis, while objective (we sought cases that illustrate principles of the court's judicial philosophy without regard to outcome or the particular nature of the illustration), it is not exhaustive. The purpose of this effort is to provide a basis for discussion and to invite the reader to examine prospectively the rulings of the Illinois Supreme Court, particularly in light of any changes in its composition that may result from the 2004 election cycle.
5 *Jorgensen,* 211 Ill. 2d at 301.

contain within it a "legislative" or "policy-making" function. Under a separation of powers structure, those functions belong to the legislature and to the executive. In such a system, judges do not determine social policy. Judges interpret the law as enacted by legislators within the confines of the statutes enacted and of the federal and state constitutions.

The common political perception of judges as liberal or conservative is reinforced by the fact that in many jurisdictions' judges achieve their positions by election on partisan ballots. In Illinois, the supreme court justices are nominated by political parties and then placed on the ballot. The Illinois Supreme Court is comprised of seven supreme court justices elected from five districts.[6] Three justices are elected from the first district, which is comprised of Cook County (encompassing heavily Democratic Chicago and its closer suburbs), and each of the remaining four "downstate" districts elects one justice.[7] Supreme court justices in Illinois are not elected in a political vacuum.

Currently, in 2004, the court is comprised of five Democrats and two Republicans, but a closely watched race in the 5th judicial circuit to replace a retiring Democrat may change that balance. The 5th judicial circuit includes of Madison and St. Clair counties, where more plaintiff's tort class actions are filed each year than in any other U.S. jurisdiction. The retiring Democrat, Justice Philip Rarick, and the Democratic candidate to replace him, Appellate Court Judge Gordon Maag, both hail from Madison County; the Republican candidate, Lloyd Karmeir, if elected, would be the first justice in decades from the 5th Circuit who does not hail from either Madison or St. Clair county.

Although campaigning directly on issues (as opposed to one's personal integrity, legal acumen and experience, temperament, and fitness for office) is prohibited, the political leanings of the justices are often well known to informed voters. Evidence that such leanings influence the court's jurisprudence would be one harbinger of an "activist" court, and in Illinois, the political expectations associated with the 5th Circuit race seem to presume that the justices are, in fact, influenced by their political views.

Based on the political nature of Illinois Supreme Court elections, it is possible that that the state could end up with an activist court that is either politically liberal, or conservative, or at times both. This is contrary to the doctrine of judicial restraint, which in essence is outcome agnostic. Judges who practice this philosophy understand that the role of the judiciary is separate and distinct from that of the legislative and executive branches, and that there are limits not only to their jurisdiction, but to their function as well. When interpreting statutes, they look primarily to the plain language of the statute to discern its meaning and the legislature's intent, with an understanding that what a legislature intended is best illustrated by what it enacted, not by the myriad debates that preceded the enactment. They are careful in instances where that intent is unclear from the plain text of the statute not to rely on legislative history that forces a plainly contrary reading of the law actually written. The rely on plain text readings when interpreting the U.S. and state constitutions, and where the text is ambiguous, do not stray from the discernable original intent of the framers and ratifiers. Finally, in the limited circumstances in which public policy should be taken into consideration, they look again to the legislature, and in some cases the executive, to determine what the public policy of the state is, and do not substitute their judgement for that of the elected representatives of the people.

Based on the political nature of Illinois Supreme Court elections, it is possible that that the state could end up with an activist court that is either politically liberal, or conservative, or at times both. This is contrary to the doctrine of judicial restraint, which in essence is outcome agnostic.

"Activist" judges, on the other hand, are not outcome agnostic. In some cases, activist judges will first decide the outcome of a case, and then work backwards to determine the rationale they will use to justify the decision. They often blur the distinction between the judicial, legislative and executive function. They do not leave their social and/or political agendas at the door to the courthouse, but decide cases based on them. They honor the plain text of statutes as indica-

6 ILL. CONST. (1970) art. VI, § 3.
7 Id.

tive of legislative intent only in the breach, preferring to mine obscure floor speeches and committee reports for nuggets of "intent" that support their preferred outcome. "Judicial activism" of this sort may take place on either side of the political spectrum. A politically conservative judge who contrives grounds that betray the plain text of a statute to avoid the effect of a tax increase is as much an activist as a politically liberal judge who finds a right to gay marriage by relying on an amalgam of constitutional provisions in light of "evolving standards," without reference to the original intent of their framers or ratifiers or the historical context of their ratification.

In Best v. Taylor Machine Works, Inc., 689 179 Ill. 2d 367 (1997), the Illinois Supreme Court struck down, in their entirety, the Civil Justice Reform Amendments of 1995 (the "1995 Amendments") as violating the Illinois Constitution.

In practice, courts may seesaw between judicial activism and judicial restraint, falling somewhere along a continuum between the two. Often times it is difficult to determine exactly where a court falls along this spectrum. The cases that give us the most insight into the ideological makeup of the court are often cases dealing with politically divisive issues. In these type of cases, there is often a clear directive by the legislature, but also significant public opposition to the legislation passed. This situation often illuminates the judicial philosophy of the court because either the court will uphold the legislation that many individual judges may find contrary to their personal or political beliefs, or the court will find any way possible to strike down the legislation. Of course, whether the legislation is upheld or stuck down is not definitive proof of the court's philosophical leanings, because a third possibility is that the legislation is clearly in violation of either the state constitution or the United States Constitution. To begin our discussion of the ideology of the Illinois Supreme Court, we will examine its treatment of the politically "hot" issue of tort reform.

In *Best v. Taylor Machine Works, Inc.,* 689 179 Ill. 2d 367 (1997), the Illinois Supreme Court struck down, in their entirety, the Civil Justice Reform Amendments of 1995 (the "1995 Amendments") as violating the Illinois Constitution. The 1995 Amendments were a comprehensive attempt by the Illinois legislature to reform the Illinois tort system. *Best* challenged the following four specific provisions of the 1995 Amendments: 1) the $500,000 limit on compensatory damages for noneconomic injuries in tort cases; 2) the abolition of joint and several liability; 3) the provision giving credit against the third-party tortfeasor's liability based on the liability of the employer; and 4) discovery provisions that mandated the unlimited disclosure of personal injury plaintiffs' medical information to any party that has appeared in the action. The 1995 Amendments also contained a severability provision, which the court did not enforce.

At the beginning of its decision in *Best*, the Illinois Supreme Court adopted the mantle of judicial restraint. The court stated, "The role of this court in considering the constitutionality of [the 1995 Amendments] is not to judge the prudence of the General Assembly's decision that reform of the civil justice system is needed. We recognize that we should not and need not balance the advantages and disadvantages of reform."[8] The court went on to state that circuit court, which had invalidated the 1995 Amendments based in part on the speed of their passage after limited debate, had erred in considering the legislature's "demeanor" in passing the 1995 Amendments.[9] The supreme court found that the circuit court did not have the authority to question the findings of the legislature. The court stated, "Courts are not empowered to 'adjudicate' the accuracy of legislative findings…. Our task is limited to determining whether the challenged legislation is constitutional, and not whether it is wise."[10] The court, however, quickly abandoned any semblance of judicial restraint and proceeded to substitute its judgement for the legislature's by rejecting the evidence relied upon by the Illinois General Assembly as unsupportive of the public policy set forth in the 1995 Amendments regarding tort reform, and rewriting public policy expressly to include a judicially-established component.

8 *Best,* 179 Ill. 2d at 377.
9 *Id.* at 381-382.
10 *Id.* at 389-390 (internal citations omitted).

The opinion in *Best* focused on the damages cap provision in the 1995 Amendments because the court determined that this provision was the "heart" of the amendments.[11] The first challenge to the damages cap provision that the Court discussed was that it violated the special legislation clause[12] of the Illinois Constitution. The Illinois Supreme Court has consistently held that "the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group with a sound, reasonable basis."[13] In essence, in resolving special legislation challenges the court applies the same "rational basis" test used in equal protection analysis. That is, the court looks to see whether the classification under scrutiny is related to a legitimate government interest.[14]

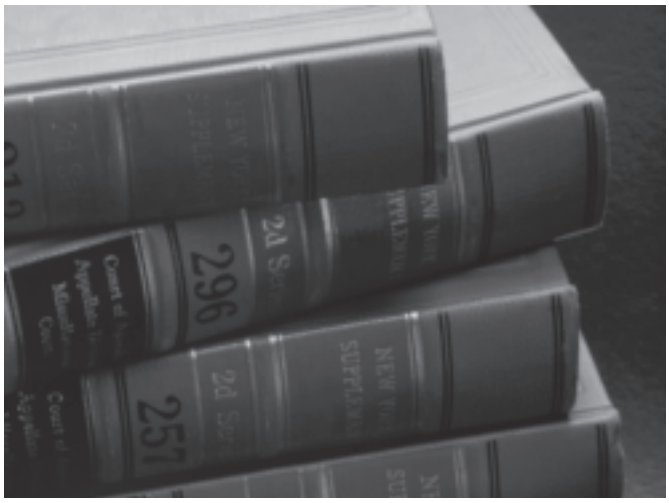
The Illinois Supreme Court found, by using hypothetical situations, that the non-economic damages cap could create three arbitrary classifications that, in its view, have no reasonable connection to the stated legislative goals, particularly the goals to provide rationality and consistency to jury verdicts. The court stated that "the $500,000 limit does not reestablish the credibility of the tort system, and does nothing to assist the trier of fact in determining appropriate damages for non-economic injuries. The limitation actually undermines the stated goal of providing consistency and rationality to the civil justice system."[15] The Illinois Supreme Court also held that the cap on non-economic damages violated the separation of powers clause of the Illinois Constitution, because the cap on damages contravened the traditional authority of the courts to assess, on a case-by-case basis, whether a jury's damages award is excessive.[16]

The *Best* court's entire framework of analysis bespeaks its activism. The adoption by the court of the plaintiffs' asserted classifications (plaintiffs whose economic and non-economic injuries together are less than $500,000, and who are thus made whole under the 1995 Amendments, versus plaintiffs whose combined damages exceed the limit and are not made whole) is an activist construction. An alternative view, consistent with the framework erected by the legislature and not entirely *post hoc* like the analysis in *Best*, would be that the legislature envisioned one class, comprised of all citizens potentially subject to injury, but in varying and indeterminate amounts, being equally subject to the damage cap. Indeed, the legislature issued findings as to the indeterminate nature of non-economic damages and its effect on insurance rates and availability, but the *Best* majority found the evidence to support this wanting.

Justice Miller, in dissent, pointed out that the rational basis test did not require proof of the sufficiency of legislative evidence or that the legislature was right to rely on it, only that it plausibly could support the policy and classifications based on it. According to Justice Miller, "[T]he court reaches conclusions that are far different from what our precedents require, and that strike at the heart of the venerable and fundamental relationship between the legislative and judicial branches. The majority undermines these principles when it effectively substitutes its own view of public policy for the legislature's considered judgment."[17] Justice Miller went on to state, "We have never before required legislation under rational basis scrutiny to qualify under a standard as rigorous as that applied by the majority."[18]

The court's decision in *Best* appears to be the height of its judicial activism in recent years, at least in the area of tort reform. Since *Best,* the court seems to be applying a theory of increasing judicial restraint. While the Illinois Supreme Court has not overruled *Best*, it has distinguished many cases that could have suffered the same fate as the 1995 Amendments. Most notably, in 2001, the court, in *Miller v. Rosenberg*[19], upheld legislation that provided that a malicious prosecution plaintiff need not plead and prove special injury if the action arises out of a prior suit for medical malpractice, against allegations that the statute violated the special legislation clause of the Illinois Supreme Court. Also in 2001, the court reversed a circuit court's determination that subsections (d), (e) and (h) of section 6.17 of the Hospital Licensing Act violated the separation of powers clause of the Illinois Constitution and that subsections (d) and (e) also violated a patient's right to privacy in *Burger v. Lutheran General Hospital*.[20] Subsections (d) and (e) of the Act authorized intrahospital commu-

11 *Id*. at 376.
12 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 bee 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.
13 *Best*, 179 Ill. 2d at 391.
14 *Id*. at 393.
15 *Id*. at 406.
16 *Id* at 415.
17 *Id*. at 474.
18 *Id*. at 478-479.
19 196 Ill. 2d 50.
20 198 Ill. 2d 21 (2001).



nications of a patient's medical information, including communications with the hospital's legal counsel, and subsection (h) provided that any person who, in good faith, acts in accordance with the Act, shall not be subject to any liability or discipline for those acts. The plaintiff, Burger, was suing the defendant hospital, which treated her leg injury, for medical malpractice. Burger argued that the Act violated the separation of power clause by infringing on the judiciary's power to regulate discovery and impose sanctions on lawyers for ex parte contacts. She also argued that Act violated her right to privacy by allowing her treating physician to share information with third parties. The court, however, distinguished this case from *Best* and held that the Act was constitutional.

The Illinois Supreme Court articulated many principles of judicial conservatism in *Best*. Its actions simply did not follow its rhetoric. The court in *Best*, also espoused certain principles of judicial activism, especially when discussing the origins of public policy. What is unclear, is whether the Illinois Supreme Court has moved closer to the conservative end of the ideological spectrum or whether the right cases have just not come along which will allow the Illinois Supreme Court's "true" ideology to be shown. Below we discuss the four categories listed at this beginning of this article to shed some additional light on the Illinois Supreme Court's ideology.

What does the court view as the proper role of the judiciary?

Like most states, the Illinois Constitution establishes three branches of government – the legislative, executive and judicial branches.[21] Each branch plays a unique and vital role in government. "The Legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."[22] Article VI of the Illinois Constitution of 1970 vests the Illinois courts with their power.[23] The judicial branch has a general obligation to maintain the separate powers of the three branches.[24] "Avoiding the concentration of governmental powers in the same person or political body was seen by the founding fathers as essential to freedom and liberty."[25]

In *Jorgensen v. Blagojevich*, the Illinois Supreme Court upheld a circuit court decision holding that the Illinois Governor exceed its constitutional authority by prohibiting cost of living increases in the judges salaries. The court discussed, at length, its view of its role and relationship with the other branches of government:

> While the three branches of government enjoy equal status under the constitution, their ability to withstand incursions from their coordinate branches differs significantly. The judicial branch is the most vulnerable. It has no treasury. It possess no power to impose or collect taxes. It commands no militia. To sustain itself financially and to implement its decisions, it is dependent on the legislative and executive branches.[26]

The court went on to quote Alexander Hamilton's Federalist, No. 78:

> The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. This simply view of the matter suggests several important

21 ILL. CONST. (1970) art. II, § 1.
22 *Id.*
23 ILL. CONST. (1970) art. VI, § 1.
24 The Illinois Supreme Court, in Best, acknowledged that "the legislature may, in some instances, share concurrent power with this court to prescribe procedural rules governing discovery." *Best*, 179 Ill.2d at 439.
25 *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 299 (Ill. 2004).
26 *Jorgensen*, 211 Ill. 2d at 300.

> consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.[27]

A court subject to judicial restraint is always mindful of its restricted role in society, whereas an activist court is constantly encroaching on the executive and legislative branches. As part of that obligation, there are two important duties that can be revealing of a philosophy of judicial activism or judicial restraint. The first is to use judicial power to prevent either the legislative or executive branches from encroaching on the domain of the judiciary. Both activist and non-activist courts may perform this duty vigorously. The second, is to use judicial restraint to not encroach on the domain of the other two branches. Activist courts will not be as concerned with upholding this duty as non-activist courts.

In *Best*, the Illinois Supreme Court vigorously defended its authority and autonomy, but in a supremely activist way. "The judicial article of the constitution vests this court with supervisory and rule-making authority over the judicial system of Illinois. It is the constitutional duty of this court to preserve the integrity and independence of the judiciary and to protect the judicial power from encroachment by the other branches of government."[28] The court went on to state, "To the extent that a statute unduly interferes with the exercise of inherently judicial functions or powers, the statute cannot prevail."[29]

In deciding that the provisions of the 1995 Amendments requiring disclosure of plaintiffs' medical information to all parties was unconstitutional, the court held that these provisions violated the separation of powers by infringing on judicial authority to limit discovery requests and to impose sanctions for discovery violations. This protective attitude toward the *judiciary's* own power, but not the legislature's or the executive's, was highlighted again in *Jorgensen.* In *Jorgensen,* the Supreme Court issued a writ of mandamus ordering the governor of Illinois to cause the state to pay a vested cost of living increase to Illinois judges, including, of course, the justices of the Illinois Supreme Court. The living increase had vested statutorily, and the Illinois Constitution prohibits reducing a judge's compensation. The court had an easy time deciding that the governor's action in refusing the cost of living increase (which he defended on the ground that his reduction veto removed the cost of living increases that had not yet taken effect) violated the separation of powers. The opinion bears all the hallmarks of judicial restraint; the context, however, (the justices' own pay) makes it hard to judge the sincerity of the court's outlook.

The court showed some deference to the executive in *People* ex rel. *Madigan v. Snyder,* 208 Ill. 2d 457 (2004). In *Snyder,* the Illinois Attorney General filed a writ of *mandamus* ordering the Director of Corrections and the wardens of Pontiac and Menard Correctional Centers to prevent the recording of certain commutation orders entered by former Governor George H. Ryan. Near the end of his term as governor, Governor Ryan granted "blanket clemency" for all inmates who were sentenced to death. He issued orders commuting the death sentences to life imprisonment, a maximum of life imprisonment, or 40 years.

The court first held that while the legislature could regulate the procedure for applying for executive clemency, the legislature did not have the power to regulate the Governor's authority to grant clemency.[30] The court next turned to the distinction between the judicial and executive branches. The Attorney General alleged that the Governor was improperly delegating his clemency powers to the judiciary by commuting the death sentences to a maximum term, and thus leaving the resentencing of the inmates to the judiciary. The court rejected the Attorney General's argument because the Governor's constitutional clemency powers "allow him to completely or partially absolve a defendant of the consequences of his crime, and to suspend or commute any sentence imposed by the judiciary."[31] While the opinion again suggests a high commitment to the principle of judicial restraint, it was decided in the context of an accepted view among Illinois courts that capital sentences in Illinois were suspect, based on the overturning of several high-profile capital convictions. In other words, it is difficult to determine whether the court was being deferential in *Snyder,* or merely agreed with the governor's action.

27 *Id.* at 301.
28 *Best,* 179 Ill. 2d at 438 (internal citations omitted).
29 *Id.* at 440.
30 *Snyder,* 208 Ill.2d at 466.
31 *Id.* at 479-480.

What rules of statutory and constitutional interpretation does the court employ?

A doctrine of judicial restraint attempts to discern the original intent of both constitutions and statutes. The Illinois Constitution was comprehensively amended in 1970. Because of the relatively recent amendment to the Constitution, there is plenty of detailed legislative history for the court to rely in discerning the meaning of the constitutional provisions. In *Best*, the court went to great lengths to discuss the legislative history of the 1970 Constitution.[32] With respect to statutory interpretation, the Illinois Supreme Court stated, "The cardinal rule of interpreting statutes, to which all other cannons and rules are subordinate, is to ascertain and give effect to the intent of the legislature."[33] In People v. Hanna, 207 Ill.2d 486 (2003), the Illinois Supreme Court stated, "The most reliable indicator of legislative intent is found in the language of the statute itself and that language should be given its plan, ordinary and popularly understood meaning."[34] The court in *Hanna* went on to state, "However, where a plain or literal reading of a statute produces absurd results, the literal reading should yield."[35] "The process of statutory interpretation should not be divorced from a consideration of the real-world activity that the statute is intended to regulate."[36]

In *Lee v. John Deer Insurance Company*, 208 Ill.2d 38 (2003), the plaintiff, a widow of a truck driver killed in an auto collision, sought a declaratory judgment against the insurer of the decedent's employer, John Deere, to determine the amount of underinsured-motorist coverage under the employer's policy. The court upheld the trial court's decision that because the insurance application did not conform to a statute that required insurance applications to provide a space for the applicant to indicate acceptance or rejection of additional uninsured-motorist coverage, and because the insured was not an "applicant," at the time he rejected the additional coverage, but had already been issued a policy, the attempted rejection of additional uninsured coverage by the applicant was ineffective. The court then interpreted another statute prohibiting insurers from issuing policies with *under*insured coverage in an amount less than uninsured coverage where uninsured coverage exceeded the statutory minimum to require the insurance company to provide *under*insured motorist coverage as well. The court claimed to rely on the plain language of two statutes at issue in this case to arrive at its conclusion.[37]

In fact, the court took an activist approach to statutory interpretation that was highly detrimental to the defendant. The facts demonstrated that the plaintiff had not selected additional underinsured motorist cov-

32 *See Best*, 179 Ill.2d at 390-93.
33 *Adams v. Northern Illinois Gas Company*, 211 Ill.2d 32, 64 (2004).
34 *Hanna*, 207 Ill.2d at 497-98 (holding that the results of a breath analysis machine were not invalid for failure to maintain the test instruments in accordance with the standards adopted by the National Highway Traffic Safety Administration).
35 *Id.* at 498.
36 *Id.* at 502 (internal quotations and citation omitted).
37 *See Lee*, 208 Ill.2d at 51.

erage, and there was evidence that at some point after being issued a temporary "binder," he had rejected *un*insured coverage in writing. Nothing in any Illinois statute states that a person's rejection of *under*insured motorist coverage becomes ineffective simply because he did not receive a form on which he could indicate his rejection; that only happens with respect to *un*insured coverage. The court reasoned that because the rejection of *un*insured coverage was ineffective (thereby boosting coverage from the $20,000 statutory minimum to the $1 million bodily limits), and because another statute prohibited insurers from issuing *under*insured coverage in amounts less than the additional *un*insured coverage provided by the policy, the underinsured coverage had to be boosted to the uninsured amount. Where, however, no statute rendered the plaintiff's rejection of *under*insured coverage ineffective, or presumed assent to higher coverage amounts from his silence, the court could have relied on standard principles of contract interpretation to decide that the parties had not had a meeting of the minds on the underinsurance question, and therefore no coverage was required.

Even as to the finding that the rejection of *un*insured motorist coverage was ineffective, the court reached past ordinary contract principles to achieve a result. The court found that the insurance company's issuance of a policy with the proviso that it would become ineffective were plaintiff not to return the uninsured motorist form by a certain date meant that the plaintiff was no longer an "applicant," but an insured, and was therefore incapable of rejecting the additional coverage (under the statute, only "applicants" could reject the additional coverage). The ruling ignores the fact that failure to comply with the condition precedent of returning the form (or put another way, the arising of a condition subsequent of not having the form returned) would have defeated coverage altogether, even for the time period between issuance of the policy and the expiration of the return date, rendering the plaintiff uninsured for that time. In this light, to view the plaintiff as having been transformed from "applicant" to "insured" by the time he complied with the requirement to return the form seems like an extreme attempt to foist liability on the insurer despite the contract. This is the essence of judicial activism.

In *Lee*, the court did pay minor deference to the notion that the legislature determines public policy. The defendant and the National Association of Independent Insurers who filed an amicus brief in support of the defendant argued that "practicality" considerations required a different conclusion. They argued that it was common practice in the insurance industry to secure a quote via a insurance broker and to have the broker submit the application, unsigned, to the insurer on the insured's behalf. The defendant and its amici further argued that if the trial court's decision was upheld, applicants could no longer quickly obtain coverage, as might be necessary in many situations. In response to the defendant and amici's concerns, the Illinois Supreme Court stated, "This is an argument better addressed to the legislature."[38]

When should *stare decisis* bind the court, and when should precedent be overturned?

Precedent and the doctrine of *stare decisis* are the cornerstones of our jurisprudence. Reliance upon precedent gives us the predictability needed to judge the legality of our actions and potential legislation. The Illinois Supreme Court has described this doctrine as follows:

> The doctrine of stare decisis is the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. Stare decisis permits society to presume that fundamental principles are established in the law rather than in the proclivities of individuals. The doctrine thereby contributes to the integrity of our constitutional system of government both in appearance and in fact. Stare decisis is not an inexorable command. However, a court will detour from the straight path of stare decisis only for articulable reasons, and only when the court must bring its decision into agreement with experience and newly ascertained facts.[39]

The Illinois Supreme Court in *Illinois v. Mitchell*, 189 Ill.2d 312 (2000), overruled two of its previous decisions. The court recognized that "no reasonable observer of this court's jurisprudence could argue that the law in this area has been developing in a principled and intelligible fashion."[40] Therefore, the court concluded that this was an appropriate situation to abandoned the doctrine of *stare decisis.*

The case in *Mitchell* centered around an Illinois statute that provided that a criminal defendant who is receiving psychotropic drugs or other medications is entitled to a hearing on the issue of his fitness to stand

38 *Id.* at 52.
39 *Chicago Bar Ass'n v. Illinios State Board of Elections,* 161 Ill. 2d 502, 510 (1994).
40 *Mitchell,* 189 Ill.2d at 338.

trial.[41] The defendant, Mitchell, was sentenced to death for the stabbing murder of two people and was seeking post-conviction relief based on his failure to undergo a section 104-21(a) fitness hearing. First, the court overruled its decision in *People v. Nitz,* 173 Ill. 2d 151 (1996) and held that a fitness hearing as provided for in section 104-21(a) was a statutory right, and, therefore, the trial court's failure to invoke such a hearing on a defendant's behalf was not a due process violation. Second, the court overruled *People v. Brandon,* 192 Ill. 2d 450 (1994), and held that to prevail on an ineffective assistance of counsel claim, "a defendant must show a reasonable probability that, if a section 104-21(a) fitness hearing would have been held, he would have been found unfit to stand trial."[42]

In reaching its decision to overrule precedent and abandon *stare decisis* the court stated "[w]e are not unmindful of the import of today's decision."[43] It went on to state,

> Our most important duty as justices of the Illinois Supreme Court, to which all other considerations are subordinate, is to reach the correct decision under the law. Our jurisprudence in this area has been erratic and confused, and it all stems from an erroneous statutory interpretation five years ago. Stare decisis should not preclude us from admitting our mistake, interpreting the statute correctly, and bringing some stability and reason to this area of the law. As Justice Frankfurter once observed, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[44]

How does the court use "public policy" arguments in deciding a case?

The Illinois Supreme Court has recently stated, "This court may not establish a public policy which is contrary to the public policy that the legislature had determined is appropriate for the State of Illinois."[45] In Best, the public policy established by the legislature was clear, and therefore the Court had to find some other public policy to "trump" the public policy established in the 1995 Amendments in order for the Court to arrive at the decision it clearly wanted to reach.

In *Best*, the Illinois Supreme Court, quoting *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581 (1986), stated "Public policy is found in a State's constitution and statutes, and where those are silent, in the decisions of the judiciary."[46] This quotation plainly infers that the Illinois Supreme Court believes it has the discretion to create public policy. This is a trait seen in activist courts.

The court, in *Best,* went into extensive detail regarding how the disclosure of medical information provision unconstitutionally infringed on the right to privacy of the plaintiff. The court stated that the Illinois Constitution includes two separate provisions that expressly refer to a citizen's expectations of privacy — Sections 12 and 6. Section 12 of the Illinois Constitution's Bill of Rights titled "Right to Remedy and Justice" states, "Every person shall find a certain remedy in the laws for all injuries and wrong which he receives to his person, privacy, property or reputation."[47] And Section 6 of the Illinois Constitution's Bill of rights titled "Searches, Seizures, Privacy and Interceptions" states, "The people shall have the right to be secure in their persons, house, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."[48] The court had previously held that while state action must be present to violate Section 6, Section 12 applies even in the absence of state action. The court acknowledged that the scope of section 12, however, is not clear.

The Illinois Supreme Court, again turned to the *Petrillo* decision to justify its public policy applications in *Best*. In *Best*, the court stated that in *Petrillo*, "[t]he court noted that certain conduct could be against public policy even in the absence of an express constitutional or statutory prohibition because public policy could be inferred from such sources as statutes or constitutions."[49] The court did not elaborate on how it could "infer" public policy from statute or constitutions, but given its earlier quote in *Best* that judicial opinions can form the basis for public policy, one can assume that the inference can be quite weak.

41 Ill. REV. STAT. 1989, ch. 38, par. 104-21(a).
42 *Mitchell,* 189 Ill. 2d at 334.
43 *Id.* at 338.
44 *Id.*
45 *State Farm Mutual Automobile Ins. Co. v. Smith,* 197 Ill.2d 369, 376 (2001) (holding that an "automobile business exclusion" in an automobile liability insurance policy was void because it violated the public policy of Illinois as expressed in the Illinois Vehicle Code).
46 *Best,* 179 Ill.2d at 456.
47 ILL. CONST. (1970) art. I, § 12.
48 ILL. CONST. (1970) art. I, § 6.
49 *Best,* 179 Ill.2d at 453.

The court in *Best* went on to describe the origins of the public policy interest of patient/physician confidentiality by again discussing the *Petrillo* decision:

> Noting that public policy forbids "that conduct which tends to harm an established and beneficial interest of society the existence of which is necessary for the good of the public," the [*Petrillo*] court held that "modern public policy strongly favors the confidential and fiduciary relationship existing between a patient and his physician." The court stated its belief that this public policy was reflected in at least two separate indicia: (1) the code of ethics adopted by the medical profession, upon which the public necessarily relies as a protection of the confidential relationship existing between a patient and his physician; and (2) the fiduciary relationship which exists between a physician and his patient, which is widely recognized in court opinions.[50]

Even if a strong public policy for protecting against *ex parte* conferences between the plaintiff's doctors and the opposing side exists, the court acknowledged that public policy, alone, does not provide a constitutional basis for invalidating legislation. This makes one wonder why the court went through this exercise at all. The court, without making any further links, went on to infer that "section 12 provides a constitutional source for the protection of the patient's privacy interest in medical information that are not related to the subject matter of the plaintiff's lawsuit."[51] In essence, the court went through a lengthy discussion of Petrillo, only to end up no closer to determining whether a constitutional guarantee of privacy from automatic forced disclosure of a plaintiff's medical records exists. The court's rhetoric in Best was a clear attempt to veil from the reader what the court was really doing —- creating public policy.

Conclusions

The Illinois Supreme Court is a court that bears the hallmarks of judicial activism, amidst occasional tendencies toward restraint. Cases like *Best* and *Lee* illustrate its tendency overall to adopt the mantra of judicial restraint, while actively rejecting the public policy findings of the legislature or creatively interpreting the clear language of statutes. While the reasons the court does this are unclear, the result generally seems to be plaintiff-oriented. Where the court has shown restraint, it has generally been in the separation of powers context where either the prerogatives of the judiciary were deemed to be at stake,[52] or where the judiciary generally agreed that the exercise of executive or legislative power had reached the right result.[53] The future direction of the court's judicial philosophy remains murky, pending changes, if any, in the composition of the court following the 2004 elections.

50 *Id.* at 456 (internal citations omitted).
51 *Id.* at 458.
52 *See, e.g., Jorgensen v. Blagojevich.*
53 *See, e.g., People ex rel. Madigan v. Snyder.*