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LEGAL REFORM INCHES ALONG IN ILLINOIS

By

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If progress in the civil justice reform fight is measured in miles, Illinois has advanced a few feet in the past few years. Not nearly far enough, but at least the movement is in the right direction.

For years Illinois has been viewed as one of America's worst legal environments. Since the American Tort Reform Association (ATRA) began describing hostile legal jurisdictions as "Judicial Hellholes[®]," Illinois has had a disproportionate share of the honors. Currently, three of the six Judicial Hellholes[®] are in Illinois.

Similarly, since the U.S. Chamber of Commerce commissioned Harris International to conduct an annual survey of the worst legal environments, Illinois has been near the bottom, and seeming to get closer to the bottom each year.

But wait ... the 2006 Harris Poll showed slight improvement for Illinois – up to 45th from 46th the year prior.

And even the latest ATRA report had a slightly different Illinois flavor. The jurisdiction that makes us forget the "Bridges of Madison County," but remember the "Judges of Madison County," is no longer at the top of the list.

Not that anyone in Madison County, Illinois, is rejoicing just yet. The county is still one of the worst six on the "hellholes" list, but there truly are signs of progress and there truly is uneasiness among the ranks of the forces that have ruled the judiciary in Madison County and its smaller siblings.

It requires a brief look at how and why Illinois, and especially Madison County, evolved (regressed?) to the level that attracted such national attention, and scorn.

The American Enterprise Institute's William Tucker described Madison County as "once the most industrialized counties in Illinois." Immediately across the Mississippi River from St. Louis, Madison and St. Clair Counties were junction points for railroads, barges and highways – truly a Gateway to the west. The area was developed with steel mills, freight yards and oil refineries. And that environment led to a litigation environment: suits against railroads, against industry, against corporations.

Tucker reported that, "by 1915, 80 percent of the nation's railroad claims, involving accidents that occurred from Georgia to Oregon, were being resolved in Madison County."

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As the years passed, the nature of litigation changed – but never the high volume. In 2001, a study by the Manhattan Institute reported that more class action lawsuits per capita were filed in Madison County than any other county in the United States. Three years ago, it was estimated that one-third of the asbestos-related lawsuits filed in the United States were filed in Madison County, according to the *St. Louis Post-Dispatch*.

With such a welcoming environment, it was no wonder that plaintiffs’ lawyers looked for new targets. And perhaps there was an element of greed among the successful plaintiffs’ attorneys that led them to look outside the world of business and industry.

Whatever the reason, they began going after the medical community – doctors and hospitals – with the same aggressive approach they used on business and industrial defendants for decades.

Illinois was declared one of the “crisis states” by the American Medical Association because of its litigation environment several years ago. Lawsuits against doctors and hospitals were having a serious impact. Sometimes the impact was quite visible: the OB-GYN who delivered the daughter of Illinois Governor Rod Blagojevich announced that she was leaving her practice because of the high cost of malpractice insurance – a cost attributed by many to excessive litigation.

The problem was statewide but, not surprisingly, it seemed most serious in Madison and St. Clair Counties. A study by the Illinois Civil Justice League published in 2004 showed that almost half the physicians in the two counties had been sued for medical malpractice during the previous four years. Eighty percent of the defendants were dismissed from the lawsuits, but that’s hardly a relief when the cost of attorneys, time away from patients, and personal and professional anguish are considered. As malpractice insurance costs increased, some doctors did what others were thinking: they moved, or cut back their practice, or retired.

Always known as a plaintiff-friendly region, the Madison-St. Clair area was becoming known as the area of Illinois that was driving doctors away and forcing hospitals to scale back or eliminate services (one hospital in Red Bud just south of St. Clair County closed its OB-GYN wing).

The frustration, even anger, that doctors and patients were experiencing was well timed within the political calendar. The emotions were reaching a peak just about the time that citizens of Southern Illinois were due to vote for a new Supreme Court justice. Since the lawsuit problem throughout Illinois was perceived as a problem of the courts, the focus of the frustration and anger centered on the Supreme Court election.

Never had a Supreme Court election in Illinois generated so much attention. Never had a judicial election of any level in the United States generated so much money.

When it was over, almost \$10 million later, Circuit Judge Lloyd Karmeier would take the Supreme Court seat that had been held trial lawyer-influenced factions for almost 35 years.

While the 2004 Illinois Supreme Court election was not the top story on any late night newscast outside of Illinois (and St. Louis), it was watched and noted by court room aficionados, tort reform advocates, and campaign spending junkies.

It *was* a significant election.

Even President Bush acknowledged it by visiting Madison County shortly after the election to focus attention on the need for medical malpractice reform. He didn’t talk about the election, other than to congratulate Justice Karmeier, but he made it clear that reform was necessary.

In keeping with its traditions, however, Madison County was not going to let an election go by without a lawsuit. Shortly after the votes were counted, defeated Judge Gordon Maag filed a defamation of character suit against several of the organizations that had supported Lloyd Karmeier. That litigation (in both the state and federal courts) is still alive.

Apart from President Bush's visit, one of the first visible signs of the impact of the 2004 election was not within the Court itself – but in the unlikely arena of the Illinois General Assembly. Although still controlled by hostile forces, at least on civil justice reform issues, the legislature passed a modest but nonetheless positive medical liability reform bill, the core of which was establishment of a \$500,000 “cap” on non-economic damages in medical malpractice suits. Somewhat reluctantly, Governor Blagojevich signed the bill in August.

The new law has not yet been tested with a court challenge so there is still uncertainty as to how effective it will be, assuming it survives a constitutional challenge. Previous legislative enactments of “caps” have been ruled unconstitutional in Illinois so there is some hesitance by players on both sides of the issue to assume the new law is set in concrete.

But there was no uncertainty as to why the Illinois General Assembly enacted, and the Governor signed, the legislation. Legislators who had opposed most forms of civil justice reform in Illinois saw the impact doctors and hospitals had on the Supreme Court election in Southern Illinois and they decided it was safer to side with the doctors and hospitals – and patients – than with their long-time allies, the trial lawyers. In fact, even several Southern Illinois members of the Illinois Trial Lawyers Association voted in favor of the medical liability reform bill, rather than risk losing their seats if the highly motivated voters stayed on the warpath.

Since the 2004 election, the Supreme Court itself has showed modest if not significant change. Three high profile cases were working their way through the court process prior to the 2004 election and the outcome in each was likely different than it would have been if the Supreme Court election had gone the other way.

Two of the cases involved State Farm Insurance Company. In August 2005, by a 4-2 vote, the Supreme Court struck down a billion-dollar Southern Illinois verdict against State Farm, finding that the Williamson County circuit court erred in certifying a nationwide class in the case *Avery v. State Farm*. One local newspaper wrote that the decision “tore to tatters not only the Fifth District Court of Appeals, but also the trial judge and the plaintiff’s attorneys.” Just three months later, a unanimous Supreme Court reversed lower court rulings in *Gridley v. State Farm* and dismissed a case based on *forum non conveniens*. Finding that “the circuit court abused its discretion,” the Supreme Court ruled against the Louisiana plaintiffs who brought their class action in an Illinois court. On December 15, the Court overturned a Madison County judge’s \$10 billion ruling against Philip Morris in *Price v. Philip Morris*.

Two of the cases – *Avery* and *Gridley* – came through the Fifth District Appellate Court, with Judge Gordon Maag authoring both decisions. And although the Appellate Court as presently constituted did not have any role in the cases, the outcome of appeals might have been different had the cases been presented for appeal after the Supreme Court election.

In Illinois, vacancies on the lower courts are filled by Supreme Court appointment and the Court traditionally defers to the Justice elected from the district with the vacancy. Justice Karmeier had two Appellate Court vacancies to fill – one of which was the seat vacated by his election opponent, Gordon Maag, who not only lost the Supreme Court race but also was voted off the Appellate Court.

Karmeier chose two new appeals court judges, which immediately influenced the ideological balance of the seven-member Appellate Court. Since the Appellate Court operates in three-judge panels, it is now possible for a party in an appeal – on either side – to have an appellate panel with a majority of judges more likely to be understanding of or sympathetic to business or health care interests.

And the Appellate Court has shown signs of its new balance.

Perhaps the most surprising impact of the 2004 Election has been in the heart of the judicial problem – in the Madison County courthouse.

Three of the elected judges who serve Madison and Bond counties are up for retention in 2004, the normal process in which elected judges are given another term. Trial court judges (or circuit court judges, as they are called in Illinois) serve a six-year term and then can seek retention. They run unchallenged – perhaps it

sounds easy – but they must get a favorable vote of 60% of those voting.

After Gordon Maag was unable to get 60%, local judges grew nervous. One judge in St. Clair County chose not to seek retention – and the 60% requirement – and instead opted to run in a contested election for his own seat. While an unorthodox and controversial procedure, it allows him to win with only one vote more than his opponent.

The three judges serving Madison and Bond counties chose to seek retention and, sensing the unhappiness of the voters with the judicial system, have set about enacting “reforms” to prove that they are in touch with the voters. In fact, even though the three judges have served as part of the Madison County system for the past six years and have not expressed any public desire for “reform,” they are seeking retention as the “reform” candidates and already have enacted some new court procedures that they are calling “reforms.”

Some are beneficial, others are less certain. A mandatory arbitration program is being developed for smaller civil cases and a new policy on opening sealed case files has been enacted.

A “reform” that is clearly designed to appeal to critics of Madison County as a hostile venue would restrict out-of-state attorneys from practicing in Madison County. While that may have some appeal to those who criticize the Madison County system for allowing out-of-state plaintiff attorneys to bring their litigation to Illinois, the impact on out-of-state defense lawyers who want to represent their company in Madison County is not certain.

The judges seeking retention also tout the fact that class action lawsuits have almost disappeared in Madison County, and that there has been “a dramatic reduction in asbestos claims filed.” In each instance, the cause of the change has been far more complicated than the action of neo-reform judges.

In many respects, the 2006 election, at least in Southern Illinois, is a reprise of 2004. The same forces are aligned on one side against the same forces on the other side. No one knows if the same bank rolls will be with either of them.

There are some significant differences, however. The plaintiffs’ lawyers in Southern Illinois know they are no longer invincible and they also know a bright spotlight has been shining on them and it’s not always a favorable look. They have selected as their candidate a judge who is not from the Madison-St. Clair arena.

And this year, a new Illinois spotlight is shining in the northern part of the state, in Cook County (Chicago) where the situation is as bad as or worse than it is in Madison County. Cook County is so big, civil justice issues frequently get lost in the shuffle. But maybe not for long as the legitimate “reform” movement begins to broaden its focus and looks north. A study of statewide civil case filings released ten months ago showed a wide disparity of per capita filings in Cook County, suggesting an immense imbalance in venue between Cook and Illinois’ other 101 counties.

And, as reform continues in Southern Illinois, changes in the makeup of the Supreme Court promise to further change the personality of the high court. This summer, longtime Supreme Court Justice Mary Ann McMorrow retired and was replaced by Cook County Appellate Justice Anne Burke, who has shown to be rather moderate on civil justice issues. Justice Burke, who is the wife of powerful Chicago Alderman Ed Burke, will stand for election in 2008.

Trial lawyers and labor unions struck the first blow almost six years ago by staging a half-million-dollar October surprise to elect Thomas Kilbride to the Supreme Court, creating a wider partisan and ideological imbalance on the high court. Voters will get their first opportunity to rate Justice Kilbride’s performance in 2010, when he comes up for a retention vote. It’s an important reminder of the powerful legacy left by a ten-year term of an Illinois Supreme Court justice.