

# Cray • Huber

## **Illinois Coverage Basics**

### *The Current State of the Illinois Supreme Court and What it Means for Illinois Coverage Law in the Future*

The Illinois Supreme Court has an extraordinarily important role in determining Illinois' third party liability coverage law. The Illinois Legislature has largely left the task of defining what the State's coverage law should be to the Illinois Supreme Court. Although Illinois does have an Insurance Code, the Legislature has traditionally refrained from enacting laws to define Illinois' third party liability coverage law. Further, as the highest court of review in the state system, the Illinois Supreme Court has the power to affirm or overrule coverage decisions made by any trial court or appellate court in Illinois.

Familiar examples of the Illinois Supreme Court's power to create new rules of third party liability coverage law include Illinois' unique court-made rules governing estoppel, targeted tenders, duty to defend trigger, the inapplicability of attorney-client privilege in coverage actions, the late notice defense and common law extracontractual remedies, to name only a few.

In short, the Illinois Supreme Court not only determines what Illinois' rules of third party liability coverage law will be; it also has the power to enforce those rules as the ultimate appellate authority in the State. To understand the dynamics of Illinois coverage law, you need to understand the Illinois Supreme Court.

#### **How the Illinois Supreme Court Works**

The Illinois Supreme Court consists of seven Supreme Court Justices, who are chosen by Illinois voters in partisan elections. Each of the State's five appellate districts is allocated one seat on the Illinois Supreme Court, except for the First Appellate District, which is allocated three of the seven seats. This is significant, because the First Appellate District is defined by the same geographical boundaries as Cook County. Although Illinois is divided into 102 counties, one of those counties -- Cook County -- holds three of the seats on the Court. The City of Chicago contains the majority of the voters within Cook County; consequently, the voters of the City of Chicago have the electoral power to determine who occupies three of the seven seats on the Illinois Supreme Court.

The Justices of the Illinois Supreme Court are elected to 10-year terms. After an initial 10-year term, a Supreme Court Justice may run for reelection unopposed in a special retention election. If a Justice receives at least 60% of the vote in the unopposed retention election, he or she is entitled to serve a subsequent 10-year term. There is no limit to the number of terms that a Justice may serve, and no Illinois Supreme Court Justice has ever failed to garner the 60% retention vote that is required to stay on the Court. So, in practical effect, a Justice who is

elected to the Court can serve as long as he or she wants to stay on the Court. In 2010, the terms of four of the seven Justices expired; only one of those four chose not to seek another term (due to illness); and the three who did seek retention were all retained.

The Illinois Supreme Court possesses virtually unlimited discretion to decide which cases it will hear and which it will not hear. Typically, the Court decides approximately 50 civil cases each year, only a small fraction of which involve any insurance issues, much less third party coverage issues. If the Court does not wish to make changes in its prior rulings, it can simply decline to hear any new cases that address the issue. On the other hand, if the Court wishes to change a prior ruling, it can agree to hear a new case that raises the issue and publish an opinion that rewrites the law. *See, e.g., Pekin Insurance Company v. Wilson*, 237 Ill.2d 446, 930 N.E.2d 1011 (2010) (changing duty to defend standard); *West American Insurance Co. v. Yorkville National Bank*, 239 Ill.2d 177, \_\_\_ N.E.2d \_\_\_ (2010) (changing law on late notice defense).

### **Current Makeup of the Illinois Supreme Court**

The demographics of the Illinois Supreme Court are currently as follows:

Political party:	4 Democrats/3 Republican
Gender:	4 Males/3 Females
Race:	6 Caucasian/1 African-American

With one exception, all the current Illinois Supreme Court Justices served on the intermediate Appellate Court before joining the Supreme Court. Of those now sitting on the Illinois Supreme Court, one has served on the Supreme Court for twenty years, two have served for ten years, one for nine years, one for six years, one for four years, and one (Mary Jane Theis) was appointed in December 2010. The oldest members of the Court are Justice Charles Freeman (born 1933) and Justice Lloyd Karmeier (born 1940).

### **Observations**

The Illinois Supreme Court, independently and exclusively, creates and enforces the rules of third party liability coverage law in Illinois. The membership of the Court changes slowly, but with only one exception, no member of the current Court has served on the Court for more than 10 years. In spite of the evolving demographics and levels of judicial experience on the Court, the decisions of the Court on third party coverage issues have generally favored the interests of policyholders. That is unlikely to change. In fact, since so few of the Justices personally participated in some of the Court's most important coverage decisions of the past, it is foreseeable that the Court will continue to revisit its early coverage rulings. There is no reason to believe that this process will be favorable to insurers (*see, e.g., Wilson and Yorkville, supra*).

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This newsletter provides information on recent legal developments. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. If you have questions, please feel free to contact Jim Horstman (312.332.8494; jkh@crayhuber.com).