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The Kilbride Court After 2 Years: Pragmatic And Collegial

Reviewing the videotape of every civil oral argument at the Illinois Supreme Court, as I do for my firm's blog *The Appellate Strategist*, I can't help but be impressed by the collegiality of the Illinois Supreme Court. At many courts of last resort, counsel is never entirely sure whether some of the more pointed questions are intended for counsel him- or herself, or instead directed at one of the other justices, either as an attempt to persuade or to challenge. None of that is evident watching the Illinois Supreme Court's arguments.



Kirk Jenkins

To be sure, the court is nearly always a "hot bench," as appellate lawyers say; questions can come from any, and sometimes from all, directions. But the court's questions always show a deep grasp of the record and a concern not merely for the implications of the legal rule at issue for future cases, but for doing justice in the case before the court. And in the court's opinions, the occasional sharply worded dissent stands out all the more for how unusual it is in the court's jurisprudence.

The Kilbride court began in Illinois a little more than two years ago, when Chief Justice Thomas L. Kilbride succeeded Chief Justice Thomas R. Fitzgerald, and Justice Mary Jane Theis joined the court, taking the retiring chief justice's seat. In the 26 months since, the court has decided 80 civil cases (disregarding attorney disciplinary and juvenile matters).

In reviewing those cases, one statistic leaps out, confirming the impression of a highly unified court: 67.5 percent of the court's civil decisions have been unanimous. Significant dissent is rare: 12.5 percent of the court's decisions have had one dissenter, 12.5 percent have had two, and only 7.5 percent have involved a 4-3 split. But this overall measurement masks trends in the court's terms; for 2012, only 56.4 percent of the court's decisions have been unanimous. Before the court decided nine of its last 12 civil cases of 2012 unanimously, the court had decided only 48.1 percent of its 2012 civil cases without dissent. During that same uncharacteristically contentious period, 37 percent of the court's decisions featured two or three dissenters.

Perhaps the most frequently cited statistic among U.S. Supreme Court watchers is the reversal rates for the Federal Circuits. Indeed, those statistics have become something of a political football, with some senators arguing that the Ninth Circuit's reversal rate suggests an ideological conflict between the Ninth Circuit and the Supreme Court. So what are the reversal rates in Illinois?

The overall numbers are not surprising. Most appellate lawyers know that appellate courts of last resort typically do not review lower courts' decisions in order to affirm. The Illinois Supreme Court is no different; over the past two years, the court has reversed in 66.2 percent of its civil cases.

But trends emerge when we consider the individual districts. Nearly half of the Kilbride court's civil docket — 43.8 percent — has come from Chicago's First District. The First hasn't fared well; five of the six divisions have a reversal rate of 60 percent or more, topping out with an 85.7 percent reversal rate in Division Two. The First District has had a particularly rough 2012, with a 76.5 percent reversal rate. The Fifth District, which includes Madison and St. Clair counties, both sharply criticized as pro-plaintiff environments for tort cases in recent years by the American Tort Reform Foundation, has seen 80 percent of its civil decisions reversed by the Supreme Court. Two other districts are

similar: two-thirds of the decisions reviewed from the Second and Third districts have been reversed.

But the anomaly comes from the Fourth District, which centers on the state capital of Springfield. The court has heard eight civil cases from the Fourth District, four involving government parties. In six of those eight cases (including three government wins) the Supreme Court has affirmed: an impressive 75 percent affirmance rate.

To learn more about the justices' inclinations, we calculate the average votes gained by each appellate court's opinions before the Supreme Court. The First and Second Divisions of the First Districts have fared badly, with their opinions gathering an average of only 1.4 votes — including seven unanimous reversals (usually regarded as the ultimate indignity except at the Kilbride court, which has reversed unanimously in 43.8 percent of its civil cases). The Fifth and Sixth divisions of the First District have done significantly better, with their opinions gaining an average of 3.5 and 2.1 votes, respectively, although the Fifth Division's figure is skewed — its four cases have seen two unanimous affirmances and two unanimous reversals. The Fourth District, with its 75 percent affirmance rate, gets an average of 3.4 votes per decision.

Discerning swing votes in a court so often in complete agreement is difficult, but interesting patterns do emerge. Justice Robert R. Thomas, for example, has voted with the majority in 94.8 percent of all the Kilbride court's civil cases. Justices Rita B. Garman and Anne M. Burke are on the winning side nearly as often, voting with the majority 93.8 percent of the time. Justices Lloyd A. Karmeier and Mary Jane Theis are right behind, voting with the majority 93.6 percent and 93.3 percent of the time. Only Chief Justice Kilbride lags behind, voting with the majority "just" 80 percent of the time.

When we limit the sample to non-unanimous cases, our conclusions are further confirmed. Justice Thomas has voted with the majority in 83.3 percent of all non-unanimous civil decisions. Justices Garman, Burke and Karmeier have voted with the majority in an identical 80.8 percent of all cases. Close behind is Justice Theis, with 79.2 percent agreement with the majority. Most often finding themselves in the minority of divided Courts are Justice Charles E. Freeman, who votes with the majority in only 63 percent of all non-unanimous civil cases, and Chief Justice Kilbride, who does so only 42.3 percent of the time.

Justice Thomas' influence shows up again when we analyze the composition of the court's occasional closely divided decisions. To date, the Kilbride court has handed down 16 decisions with two or three justices dissenting. Justice Karmeier has voted with the majority in 12 of those 16 decisions — 75 percent. Justices Thomas, Garman and Burke have voted with the majority 68.8 percent of the time, and Justice Theis in 62.5 percent of the cases. On the other hand, Chief Justice Kilbride and Justice Freeman have joined the majority in only 50 percent of those closely divided decisions. This data suggests the outline of a voting block on the court, with a solid core of Justices Thomas, Garman and Karmeier, with Justice Burke and Justice Theis serving as the swing votes in close cases.

In reviewing these 16 cases, a few substantive patterns emerge. Chief Justice Kilbride took a more plaintiff-friendly position in four closely divided tort cases (*Simpkins v. CSX Transportation*, *Doe-3 v. McLean Co.*, *Kaufman v. Schroeder* and *Moore v. Chicago Park District*), and Justice Garman did so in three, while Justices Burke, Thomas, Karmeier and Theis took the more plaintiff-friendly position in only one of the four cases. Chief Justice Kilbride and Justice Theis both adopted more employee-friendly positions in *Chicago Teachers Union v. Board of Education* and *Speed District 802 v. Warning*, and both found standing for opposition groups' challenge to an environmental delisting petition in *Sierra Club v. Illinois Pollution Control Board*. The court took a moderately relaxed attitude in two civil procedure "substance over form" cases in 2012, with Justices Burke, Freeman and Theis expressing willingness to forgive certain procedural defects under defined circumstances in both *Downtown Disposal Services v. The City of Chicago* and *Santiago v. E.W. Bliss Co.*

The court clearly makes an effort to distribute its work evenly. To date, Justice Thomas has written 14 opinions for the Kilbride court, Justice Freeman 13, Justices Burke, Garman and Theis 12 each, and Justice Karmeier 11. Not surprisingly, Chief Justice Kilbride and Justice Freeman write most frequently in dissent, with the chief justice producing eight civil dissents and Justice Freeman seven. The other justices write in dissent much less often, with Justice Garman penning four, Justices Karmeier and Theis three each, Justice Burke two and Justice Thomas only one.

When we turn to non-unanimous decisions, the outline of our proposed voting block once again

emerges. Justice Burke, one of our swing voters, has written the majority decision in six of the non-unanimous civil decisions. Justices Garman and Karmeier have written five and four apiece, respectively. Justice Burke's decisions in non-unanimous cases garner fewer average votes — 4.8 for Justice Burke to 6.4 for Justice Garman and 5.3 for Justice Karmeier — the result of Justice Burke having written the majority opinion is half of the court's 4-3 cases (Justices Garman and Karmeier, on the other hand, have written for the court in six of the 10 two-dissenter cases).

To further study the Kilbride court's dynamics, we turn to the justice-by-justice agreement rates: In what percentage of civil cases where both justices participated did they vote the same way? Over the past two years, Justice Thomas and Garman have agreed in 96.1 percent of all civil cases. Justices Thomas and Karmeier have agreed 93.3 percent of the time, and Justices Garman and Karmeier have voted together 91 percent of the time.

Justice Burke has agreed with Justice Thomas in 89.6 percent of the court's civil decisions. She has voted with Justice Garman 87.5 percent of the time, and with Justice Karmeier 89.7 percent. Justice Theis, our other proposed "swing" voter for close civil cases, is just behind Justice Burke: 88.9 percent agreement with Justice Thomas, 89.3 percent agreement with Justice Garman and 89.0 percent agreement with Justice Karmeier. Justices Theis and Burke agree 86.7 percent of the time.

Not surprisingly, given the data we considered above, Chief Justice Kilbride's agreement statistics are somewhat lower. The chief agrees with Justices Burke, Garman, Freeman, Thomas and Karmeier around three quarters of the time (73.3 percent, 78.7 percent, 72.6 percent, 80.8 percent and 75.7 percent, to be precise), and with Justice Theis only slightly more often — an 84.3 percent agreement rate.

The court's divisions stand out more clearly when we limit our sample to non-unanimous civil decisions. Once again, the core justices are relatively tightly bunched. Justice Thomas agrees with Justice Garman in 87.5 percent of such cases, and with Justice Karmeier in 79.2 percent. Justices Garman and Karmeier agree in 73.1 percent of the court's non-unanimous civil cases.

The agreement rates for Justice Burke and Justice Theis seem to reflect the path to a winning majority in close cases. Justice Burke agrees with Justice Thomas 66.7 percent of the time, and with Justice Karmeier 69.2 percent of the time in non-unanimous cases. Justice Theis' agreement rates with our core voters in closer cases are almost identical: Justice Thomas, 63.6 percent; Justice Garman, 66.7 percent; and Justice Karmeier, 66.7 percent. However, Justices Burke and Theis themselves often diverge, showing an agreement rate of only 58.3 percent in non-unanimous cases.

Once again, agreement rates for Chief Justice Kilbride and Justice Freeman are much lower. The chief agrees with Justices Garman and Thomas in only two of every five non-unanimous cases (38.5 percent and 41.7 percent, respectively), and with three of the remaining Justices significantly less often. The lone exception is Justice Theis, who has agreed with the chief justice in 54.2 percent of non-unanimous cases. Although Justice Freeman seldom votes with the chief justice in such cases — 23.1 percent agreement — he votes with Justices Garman, Thomas, Karmeier and Theis between 40 percent and 54 percent of the time.

Our analysis of the dynamics of the Kilbride court just past its second anniversary suggests several tentative lessons for counsel: (1) if you prevailed at the appellate court, the odds your decision will be reversed are roughly two in three (unless you're coming from the Fourth District); (2) the court's ultimate decision is quite likely to be unanimous; and (3) if the decision is not unanimous, the justices most likely to be in the majority are Justices Thomas, Garman, Karmeier and either Burke or Theis.

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