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Constitutional and Practical Implications of the New Six-Person Civil Jury

The twelve-person civil jury may soon become a thing of the past in Illinois—effective June 1, 2015, all civil jury cases "shall be tried by a jury of 6"; however, "[f]or all cases filed prior to [June 1, 2015], if a party has paid for a jury of 12, that party may demand a jury of 12 upon proof of payment." This provision is part of Public Act 98-1132, which then Governor Quinn signed into law as a lame duck session amendment in December 2014. Defense counsel across Illinois are voicing concerns regarding the amendment on two fronts: (1) the constitutionality of the new law and (2) the practical implications of the amendment for pending actions filed before June 1, 2015.

The Constitutionality of the Six-Person Civil Jury Law

Opponents of the amendment maintain that the six-person jury amendment is fundamentally at odds with the right to "Trial by Jury" as guaranteed by the Illinois Constitution. The Illinois Constitution states, "The right of trial by jury as heretofore enjoyed shall remain inviolate." The issue—which may become the center of a constitutional challenge—is whether the "inviolate" right "as heretofore enjoyed" includes the right to a *twelve* person jury in civil actions (unless otherwise agreed by both parties). Opponents suggest that a close reading of the Record of Proceedings of the Sixth Illinois Constitutional Convention of 1970 shows that the delegates vigorously debated and ultimately voted against authorizing civil juries of fewer than twelve.

During the Constitutional Convention, a group of delegates supported amending the constitution to grant the legislature the power to authorize civil juries of fewer than twelve, arguing that as the amendment stood (and as it was ultimately adopted and stands today) the legislature would be unable to do so. The delegates proposed adding the following language to the Constitution after the word "inviolate": "except that the General Assembly may provide in civil cases for juries of not less than six nor more than twelve and for verdicts by not less than three-fourths of the jurors." The amendment's sponsor offered that the amendment would give the legislature flexibility by "vest[ing] in the legislature the authority which the legislature presently does not have to provide for juries of less than twelve but not less than six…." A supporter noted:

> As the constitutional provision is now, it is quite inflexible. The hands of the legislature are tied. They just don't have a chance to move in this area [of providing for juries of less than twelve or non-unanimous verdicts], and the purpose of this amendment is to give the legislature the desired flexibility.

Ultimately the delegates voted against the above proposed language and approved the clause as it stands today—providing that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate," effectively, as one supporter stated, "reject[ing] any tampering with or watering down of the jury system which we have heretofore enjoyed." A delegate later summarized the final version of the provision to the delegation president as follows: "So far as the constitution is

concerned, the jury must be one of twelve members in criminal or civil cases unless the parties otherwise agree."

Not surprisingly, in light of this history, the constitutionality of the six-person civil jury amendment is certain to be challenged. However, the outcome of that challenge, like that of all lawsuits, is far from guaranteed. Unless and until a court rules otherwise, six-person civil juries will replace twelve-person juries in cases filed as of June 1, 2015.

The Practical Implications of the Six-Person Civil Jury Law

For various reasons, civil defendants often prefer to try their case before a jury of twelve. Should the new law be upheld as constitutional, six-person juries will become the reality for civil cases filed after June 1, 2015. Practitioners now have reason to fear that even pending cases may result in a six-person jury, notwithstanding that the amendment states that "[f]or all cases filed prior to [June 1, 2015], if a party has paid for a jury of 12, that party may demand a jury of twelve upon proof of payment." Courts may find that only "that party" that actually paid for a jury of twelve may demand a jury of 12 after the amendment's effective date. Typically, court clerks accept only one payment for a jury demand—even where multiple parties make jury demands. Where a defendant made a jury demand but did not pay the filing fee because a co-defendant already paid, the co-defendant may qualify as "that party" that paid, but arguably the other defendant may not. In anticipation of this arguments by plaintiffs and out of an abundance of caution, some defense attorneys who did not pay the fee are now seeking to submit payment for twelve-person juries to county clerks before the deadline. The effectiveness of these attempts remains to be seen.

Some plaintiffs may resort to gamesmanship in other ways. For example, some plaintiffs may move for voluntary dismissal of their case and refile after the effective date of the amendment to deprive a twelve-person jury even to a defendant that has paid for a twelve-person jury. The issue may arise in another way in the event that a plaintiff voluntarily dismisses the case for lack of due diligence in obtaining service on a defendant and refiles after June 1, 2015. However, it remains to be seen whether courts will allow a defendant to be deprived of a twelve-person jury upon refiling of the suit. Defense attorneys may argue that the amendment retroactively impairs a "vested" right to a twelve-person jury demand, and therefore, applies only to those claims arising, rather than lawsuits filed, after the amendment's effective date. Because the six-person jury amendment has yet to become effective, these and other issues will have to be resolved by the courts in the future. Defendants in pending lawsuits should be aware of the potential implications of the amendment and the tactics that may come into play as the date of the amendment approaches.

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