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The right to trial by jury and concerns about Illinois' new six-person jury law

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In Illinois, the six-person civil jury law creates an anomaly whereby the smallest claims may be tried by a jury of 12, yet the largest claims are not.

Supreme Court Rule 285 provides that upon a jury demand, a small claim "shall be [tried by] 6 jurors unless either party demands 12." As a result, the smallest claims may be heard by a larger, more diverse body of jurors, while parties to the largest claims are afforded none of the same benefits and protections.

Effective June 1 of this year, Illinois law provides that "[a]ll [civil] jury cases shall be tried by a jury of 6." 735 ILCS 5/2-1105(b). The amendment, signed into law by former Gov. Patrick J. Quinn in a lame-duck session, is fundamentally at odds with the right to trial by jury in Article I, Section 13 of the Bill of Rights to the 1970 Illinois Constitution, which states "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate."

The issue — which will lead to a constitutional challenge — is whether the "inviolate" right "as heretofore enjoyed" includes the right to a 12-person jury in civil actions.

The history of the Illinois Constitutional Convention is the best evidence that the six-person jury law is unconstitutional. Delegates debated and voted against granting the legislature the power to decrease jury size, and in doing so, retained the constitutional guarantee that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate."

As retired Cook County circuit judge Dennis M. Dohm wrote inhis Jan. 21 Daily Law Bulletin column, "The Record Reflects It: Six-Person Civil Jury Law Is Unconstitutional," a close reading of the record of proceedings of the 6th Illinois Constitutional Convention is necessary to evaluate the constitutionality of the recent amendment.

The record details the floor debates which led to the vote against authorizing the legislature to decrease civil jury size. 3 Record of Proceedings, 6th Illinois Constitutional Convention 1427-34 (hereinafter cited as Record); 4 Record at 3637-41.

One delegate in favor of granting the legislature the authority to alter jury size 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 12 but not less than six ... ." 3 Record at 1430. Another delegate in favor of the amendment 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 12 or non-unanimous verdicts], and the purpose of this amendment is to give the legislature the desired flexibility." Id. at 1432.

The delegates who lost the debate recognized what the legislature later has not — that without a constitutional amendment, the 1970 Constitution restricts the legislature's power to alter jury size. In summarizing the final vote to the delegation president, one delegate stated, "So far as the Constitution is concerned, the jury must be one of 12 members in criminal or civil cases unless the parties otherwise agree." 5 Record at 4241.

The constitutionality of the amendment turns on what specifically comprises the "inviolate" right to a trial by jury "as heretofore enjoyed." As one delegate to the Constitutional Convention explained, courts interpret "the right of trial by jury as heretofore enjoyed" as "meaning the institution of jury trial with all of its characteristics as in effect at the time the constitution was adopted ... ." 3 Record at 1429.

Indeed, the Illinois Supreme Court has stated that " 'it is the common law right to jury trial as enjoyed at the time of the adoption of the 1970 constitution to which 'heretofore enjoyed' refers." *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 215 (1988) (citing *People v. Lobb*, 17 Ill. 2d 287, 298 (1959) ("The right of trial by jury as it existed at common law is the right to have the facts in controversy determined .. .by the unanimous verdict of 12 impartial jurors who possess the qualifications and are selected in the manner prescribed by law.")).

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Based upon a historic review, the six-person civil jury trial law may not survive a constitutional challenge if the intent of the framers of the 1970 Constitution prevails.

Public policy favors a more diverse jury

Even setting aside the issue of constitutionality, Illinois has an interest in providing litigants the opportunity to try their case before a diverse jury representative of the community at large. Under the new law, small-claims litigants may receive this benefit, while litigants to the largest claims have lost this right.

While the effect of jury size remains the subject of debate and study, empirical evidence suggests that a larger jury conveys many benefits.

The 7th Circuit American Jury Project studied and assessed the benefit of the American Bar Association's jury principles. In reaching its conclusion, the study cited evidence that juries of 12 "conduct more effective deliberations and achieve more accurate results ... [and] increase representativeness." 7th Circuit American Jury Project: Final Report 29 (2008).

Half of the judges polled for the study reported an increase in diversity when more jurors were impaneled, and three-fourths of judges and nearly two-thirds of attorneys reported that a larger jury did not reduce efficiency. Id. at 31. In fact, the study cited empirical evidence that suggested juries of 12 deliberated more efficiently. Id. at 29.

Most judges and attorneys also felt that the fairness of a trial was largely unaffected by the number of jurors impaneled. Id. at 30. Even so, the study recommended a 12-person jury whenever practicable, citing that it proved beneficial and resulted in little reported inefficiency and achieved more accurate results. Id. at 29, 31.

The potential benefits of allowing litigants to pay for larger juries, including increased juror diversity and a more representative jury pool, are clear. These benefits fall in line with the guarantee of the 1970 constitution and prevent the inconsistent application of jury law that Illinois now faces between large and small claims.

Even if the six-person civil jury trial amendment could survive a constitutional challenge, it is bad public policy for the people of Illinois.