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Prejudgment Interest Statute Withstands Constitutional Challenges in the Appellate Court

BY DAVID HANDLEY & JEFFREY EIPPERT

The Illinois Prejudgment Interest Statute has withstood its first round of constitutional challenges in the appellate court in *Cotton v. Coccaro*, 2023 IL App (1st) 220788 and in *First Midwest Bank v. Rossi*, 2023 IL App (4th) 22064.

In 2021, the Illinois Code of Civil Procedure was amended to add 735 ILCS 5/2-1303(c) (the "PJI statute"), providing for prejudgment interest at a 6 percent per annum rate to be awarded in all personal injury or wrongful death cases. Since the enactment of the PJI statute, it has been repeatedly challenged by defendants.

At the trial court level, the PJI statute was the subject of innumerable prejudgment affirmative defenses filings and dozens of post-judgment trial court filings. Trial courts across the state were forced to weigh-in on the constitutionality of the PJI statute, spawning mixed results.[1]

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Recognizing and Litigating Affirmative Defenses

BY CATHY A. PILKINGTON

A valid affirmative defense is a powerful litigation tool. All or part of the plaintiff's case may be brought to an abrupt end at the outset by the defense ability to recognize, sufficiently plead and litigate an affirmative defense. Likewise, the plaintiff must be on guard to anticipate the affirmative defenses that may be raised and possibly plead allegations in the complaint that will negate the affirmative defense, recognize pleading deficiencies, or successfully resist the affirmative defense by one or more procedural tools. This article reviews the relevant statutes which apply to affirmative defenses, and their application as addressed

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After two years of litigation on the PJI statute, two appellate court cases emerged: *Cotton* in the first district and *First Midwest Bank* in the fourth district. Both decisions held that the PJI statute is constitutional.

In *Cotton v. Coccaro*, the first district rejected multiple constitutional challenges to the PJI statute and affirmed the imposition of prejudgment interest entirely.[2] In the trial court, a jury returned in a $6,528,000 verdict against the defendant medical care providers for failing to diagnose the plaintiff's breast cancer.[3] Following judgment, plaintiff moved to modify the judgment amount to include prejudgment interest.[4] The trial court granted the motion and modified the original judgment amount to include the addition of prejudgment interest of $111,332.29.[5] The defendants appealed the imposition of the prejudgment interest.[6]

Appellants argued that the PJI statute violated the U.S. and Illinois Constitutions in several respects, including:

- It impairs the right to trial by jury, first by conditioning that fundamental right on the burden of a potentially much greater judgment, and second by interfering with the jury's valuation of the plaintiff's injury and the assessment of damages.
- It violates the principle of equal protection and the ban on special legislation.
- It intrudes on the constitutionally separate power of the judicial branch to administer justice according to the unique characteristics and circumstances of each case.
- It cannot be constitutionally applied to a case that accrued before the statute took effect.
- The General Assembly did not adhere to the Illinois Constitution's Three Readings Rule when it enacted the statute.

While the appellate court conceded that the PJI statute functioned as a "statutory additur," it noted that the imposition of prejudgment interest compensates the plaintiff for delay and promotes efficiency in processing legal claims.[7] Indeed, the PJI statute adopts "the historic justifications for prejudgment interest in contract cases" and applies them "with equal force to personal injury and wrongful death cases."[8]

The appellate court rejected each of the appellants constitutional arguments in turn. The PJI statute does not impair on a defendant's right to a jury trial because it does not encroach on a jury's calculation of damages, and it does not penalize a defendant who chooses to go to trial.[9] Because the statue does not infringe on the fundamental constitutional right of a jury trial, the statute is not subject to strict scrutiny review.[10]

The appellate court further reasoned:

- The PJI statute is not duplicative of a jury's award and is not violative of due process; rather, the statute preserves the economic value of an award from diminution over time.[11]
- The PJI statute does not constitute special legislation as it has a rational relation to a legitimate governmental interest in recompensating tort plaintiffs for the time value of money, incentivizing settlements, and easing crowded court dockets.[12]
- The PJI statute is not retroactive in its application and the appellants had no vested right in a particular remedy or procedure that was changed when the statute was enacted.[13]

Interestingly, the first district noted it did not possess the authority to disregard the supreme court's binding precedent on the enrolled bill doctrine and could not to find that the statute was noncompliant with Three Reading's Rule.[14] The Three Reading's Rule is a constitutional requirement that a bill be read by title on three different days in each legislative body.[15] Conflicting with the Three Reading's Rule is the enrolled bill doctrine, which presumes that a bill has met

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all procedural requirements for its passage if it has been certified.[16]

Following the first district's decision in *Cotton*, the fourth district decided *First Midwest Bank v. Rossi*.[17] The fourth district's decision in *First Midwest Bank i*s largely consistent with *Cotton* in finding the PJI statute to be constitutional. [18]

The *First Midwest Bank* opinion discusses the legislative history of the PJI statute at length, placing emphasis on the statute being passed in "blatant" violation of the constitutional requirement of the Three Reading's Rule.[19] The violation would render the statute unconstitutional if it was not for the supreme court's adoption of and precedent surrounding the enrolled bill doctrine.[20]

On September 27, 2023, the supreme court denied a petition for leave to appeal in the *Cotton* case. Both sides filed petitions for leave to appeal in *First Midwest Bank* but withdrew the petitions when a settlement was reached. *Cotton* and *First Midwest Bank* appear poised to be the controlling precedent on the constitutionality of the PJI statute for the time being, or at least until a conflict amongst the appellate court districts arises.■

1. For example, Judge Marcia Maras found the statute to be unconstitutional in *Hyland v. Advocate Health and Hospitals Corp., et al., No. 17 L 003541* (May 27, 2022) because the statute impaired a defendant's right to trial by jury, a fundamental constitutional right. Conversely, a number of trial courts across the state found the statute to be constitutional, imposing prejudgment interest on defendants following judgment.
2. *Cotton v. Coccaro*, 2023 IL App (1st) 220788, ¶ 70.
3. *Id.*, ¶¶ 8-9.
4. *Id.*, ¶ 9.
5. *Id.*
6. *Id.*
7. *Id.*, ¶¶ 43, 44.
8. *Id.*, ¶ 45.
9. *Id.*, ¶¶ 49-50 ("A jury has no role in awarding prejudgment interest.")
10. *Id.*, ¶ 50.
11. *Id.*, ¶¶ 55, 58.
12. *Id.*, ¶¶ 60-61.
13. *Id.*, ¶¶ 69-70.
14. *Id.*, ¶ 66; *see also Id.*, ¶ 64 (holding that the General Assembly has authority to enact the PJI statute and the enactment does not violate any separation of power).
15. *Id.*, ¶ 66.
16. *Id.*
17. *First Midwest Bank v. Rossi*, 2023 IL App (4th) 22064, ¶ 187.
18. *Id.*
19. *Id.* ¶¶ 221-41.
20 *Id.* ¶¶ 224, 241.

Recognizing and Litigating Affirmative Defenses

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in a recent appeal heard by the Illinois First District Appellate Court.

The Basic Level. The general requirements for pleading affirmative defenses in Illinois are codified at Section 5/2-613 (d) of the Code of Civil Procedure ("Code"), 735 ILCS 5/2-613(d). At the basic level, a valid affirmative defense admits the viability of the plaintiff's claim and presents new matter which bars relief. *Vroegh v. J & M Forklift*, 165 Ill.2d 523, 530 (1995). Affirmative matter asserts a bar to relief. It is not a denial, and it does not resolve the dispute. If litigated successfully, the affirmative matter is proven by competent evidence and bars relief. The facts alleged in an affirmative defense cannot rehash disputed facts alleged in the complaint but must admit the validity of the opponent's claim while asserting new matter that bars relief. *Federated Equipment and Supply Co., Inc. v. Miro Mold & Duplicating Corp.*, 166 Ill.App.3d 670, 675 (2d Dist. 1988). Denial of an element of a cause of action, without asserting any new matter, does not constitute an affirmative defense. *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶¶ 63, 64. Such affirmative defenses are subject to being stricken for failing to plead a valid affirmative defense.

The Strategic Level. On a strategic level, the decision to plead an affirmative defense at the outset of the case is a serious one that comes with known consequences and sometimes with unforeseen and unpredictable consequences. Determining what is, or is not, an affirmative defense, or distinguishing an affirmative defense from another procedural tool, is not always simple or apparent.[21] A recent case from the First District Appellate Court is illustrative.

The appeal in *Reverse Mortgage Funding v. Catchins*, 2023 IL App (1st) 221197 ("Catchins"), involved the pleading of a non-typical affirmative defense, the dispute over its validity, the motion practice that ensued, and the Appellate Court's reasoning and ultimate resolution. In *Catchins* a mortgage foreclosure was resisted based on the affirmative defense of lack of mental capacity to contract. Plaintiff Reverse Mortgage Funding (the Plaintiff") filed its initial complaint for mortgage foreclosure and sale based on mortgage contract documents signed by a Mortgagor who had since died ("Complaint"). Eventually, a decedent's estate was opened, the Plaintiff filed an amended complaint. ¶ 7.

Defendants were the independent administrator of the estate, the heirs, and putative heirs ("the Defendants"). *Id. at* ¶ 8. Defendants asserted the mortgagor's lack of mental capacity to enter the contract. The deceased mortgagor allegedly had severe dementia but was never legally judged incompetent. *Id.* at ¶¶ 13, 24.

The Defendants answered the Plaintiff's amended complaint and pled the deceased Mortgagor's lack of mental capacity as their sole affirmative defense. The Plaintiff filed a section 2-615 motion to strike the affirmative defense. The circuit court granted the section 2-615 motion and struck the affirmative defense with leave to replead. *Id.* at ¶ 9.

Before the expiration of the time for the Defendants to replead their affirmative defense, the Plaintiff moved for summary judgment. *Id.* at ¶ 10. After Plaintiff's motion for summary judgment was filed, the Defendants filed an amended affirmative defense. Plaintiff responded by filing a section 2-615 motion to dismiss the amended affirmative defense based on a provision of the Probate Act. *Id*. at ¶13.

Defendants responded to the Plaintiff's motions with similar arguments but added new factual materials as to the deceased's severe dementia. *Id*. at ¶14. The circuit court struck the amended affirmative defense as invalid and entered a judgment of foreclosure and sale in favor of the Plaintiff. *Id.* at ¶17. The Plaintiff bought the property at the sale. *Id*. at ¶18. At the proceedings to confirm the sale, the circuit court again rejected Defendants' "lack of capacity" arguments and entered a final judgment confirming the sale. *Id.*

In performing its analysis of the validity of the stricken amended affirmative defense, the appellate court discussed the applicable rules of law. The appellate court discussed the nature of an affirmative defense, citing *Vroegh*, 165 Ill.2d at 530, *Id.* at ¶22, and declared that an affirmative defense is a "pleading" within sections 2-603(a) and 2-613(a) of the Code. *Id.* at ¶28. Citing *International Insurance Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 630 (1993), the appellate court reiterated well-established law that facts to establish an affirmative defense must be pled with the same degree of specificity required of a plaintiff stating a cause of action. *Id*. at ¶23.

On appeal, the Plaintiff relied on a section of the Probate Act that contained an exemption for those persons declared incompetent. However, the appellate court reviewed the allegations pled in the Defendants' amended affirmative defense, rejected the Probate Act argument, and determined that: "Illinois common law recognizes incapacity due to mental impairment as a valid defense to a contract claim." *Id.* at ¶24. The appellate court concluded the Defendants' amended affirmative defense validly pled the basic elements for common law "incapacity of mentally impaired persons to contract." *Id.* at ¶25. Thus, the appellate court ruled that the circuit court erred in striking the amended affirmative defense. *Id.* The appellate court further observed that section 2-602 of the Code, 735 ILCS 5/2-602, required the Plaintiff to file a reply to the amended affirmative defense,[22] and the Plaintiff had not replied to the Defendants' amended affirmative defense prior to the grant of summary judgment. The appellate court noted that Defendants had not presented a genuine issue of material fact, but ruled that the striking of the properly pled affirmative defense and the Plaintiff's failure to reply thereto was erroneous, and that these errors deprived the Defendants of a fair opportunity to frame their affirmative defense and resist summary judgment. *Id.* at ¶28. The circuit court's judgment striking the affirmative defense was reversed; the orders of summary judgment, foreclosure and sale were vacated along with the order confirming sale. The case was remanded the circuit court with directions. *Id.* at ¶31.

The Lessons Learned. The *Catchins* case offers multiple lessons about affirmative defenses. *First*, a valid affirmative defense pleads concise factual allegations that include the affirmative matter that will bar relief. *Second*, the Plaintiff must reply to a valid affirmative defense. 735 ILCS 5/2-602.[23] In *Catchins,* the Plaintiff's failure to file a section 2-602 reply to the affirmative defense was not harmless error and led, in part, to vacating the various orders, and reversal and remand for additional proceedings. A different, but equally undesirable outcome for failure to file a timely section 2-602 reply may be an order deeming the affirmative defense admitted. *Filliung v. Adams,* 387 Ill.App.3d 40, 56 (1st Dist. 2008). *Third,* pleading an affirmative defense assumes the burden of proving that defense. As a general matter, the defendant has no pleading burden and no burden of proof. As in *Catchins*, the burden of proving the affirmative defense of lack of capacity shifted to the Defendants. Defendants must develop and present evidence sufficient to meet the requisite burden of proof. Understanding the burden of proof for a specific affirmative defense and establishing evidence that will meet that burden is thus critical for success. *Fourth,* motion practice to strike an affirmative defense a frequent consequence of pleading an affirmative defense. Weak or flimsy affirmative defenses not supported by specific facts should be avoided. Attempts to "preserve" an affirmative defense for which few or no facts exist will be revealed by a motion to strike or in discovery. This is not the impression you want to make.

Becoming agile with affirmative defenses takes time. By understanding that an affirmative defense is a "pleading" and knowing the basic statutory requirements in Code sections 2-602, 2-603, and 2-613(a), 2-613(d), the practitioner acquires the knowledge to recognize and competently litigate an affirmative defense.■

1. In *Carmichael v. Union Pacific Railroad Co.*, 2019 IL 123853, the Illinois Supreme Court discussed and distinguished a counterclaim from an affirmative defense. *Id.* at ¶¶26-29.
2. Section 2-602 requires: "[i]f new matter by way of defense is pleaded in the answer, a reply shall be filed by the plaintiff . . . . " 735 ILCS 5/2-602.
3. An exception to this rule exists if the complaint negates the affirmative defense, then the reply is excused. *State Farm Mutual Auto Co. v. Haskins*, 215 Ill.App.3d 242, 246 (2nd Dist. 1991). An affirmative defense that suffers from pleading deficiencies is invalid, and a Section 2-615 motion to dismiss should be filed in lieu of a reply. *Id.* at ¶ 9.