

Rejecting Absentee Ballots Without Notice and an Opportunity to Be Heard

Zessar v. Helander

(*David H. Coar, N.D. Ill. 1:05-cv-1917*)

A Lake County voter filed a class action complaint on April 1, 2005, four days in advance of a scheduled election, charging that Illinois’s absentee voting system did not comply with the Fourth Amendment’s due process requirements.¹ The plaintiff’s absentee vote in the 2004 general election had not been counted because of an erroneous conclusion that his signature on the ballot did not match his voter registration signature.² The plaintiff filed a motion for an emergency injunction on April 4.³

Judge David H. Coar heard the plaintiff’s motion on election day.⁴ When asked why the case had been filed so close to an election, the plaintiff’s attorney said that he had been preparing the complaint when he realized a by-election was at hand, so he promptly filed the case.⁵ The attorney agreed that his motion could be heard two days later when the defendants would be available to attend.⁶

At the second hearing, Judge Coar denied the plaintiff emergency relief.⁷ Because he voted in person two days previously, he was not in need of emergency relief.⁸

The case proceeded, and Judge Coar certified both plaintiff and defendant classes on March 7, 2006.⁹ On March 13, Judge Coar determined that Illinois’s procedures violated due process.¹⁰ He ordered the parties to “submit proposed procedures for providing timely notice and pre-deprivation hearing to absentee voters whose ballots have been rejected.”¹¹

1. Complaint, *Zessar v. Helander*, No. 1:05-cv-1917 (N.D. Ill. Apr. 1, 2005), D.E. 1, *filed as Ex. A, Preliminary Injunction Motion*, *id.* (Apr. 4, 2005), D.E. 6; *Zessar v. Keith*, 536 F.3d 788, 790–91 (7th Cir. 2008).

2. *Zessar*, 536 F.3d at 790; *Summary Judgment Opinion* at 2, *id.* (Mar. 13, 2006), D.E. 87, *available at* 2006 WL 642646.

3. *Preliminary Injunction Motion*, *supra* note 1.

4. Transcript, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Apr. 5, 2005, filed June 3, 2005), D.E. 19 [hereinafter Apr. 5, 2005, Transcript]; *Minutes*, *id.* (Apr. 5, 2005), D.E. 8.

5. Apr. 5, 2005, Transcript, *supra* note 4, at 3–4.

6. *Id.* at 2, 4.

7. Transcript, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Apr. 7, 2005, filed June 3, 2005), D.E. 19 [hereinafter Apr. 7, 2005, Transcript]; *Minutes*, *id.* (Apr. 7, 2005), D.E. 9.

8. Apr. 7, 2005, Transcript, *supra* note 7, at 5–6, 9.

9. *Opinion*, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Mar. 7, 2006), D.E. 85, *available at* 2006 WL 573889.

10. *Summary Judgment Opinion*, *supra* note 2; *Zessar v. Keith*, 536 F.3d 788, 791 (7th Cir. 2008); *see* Abdon M. Pallasch, *Judge: Nixed Absentee Votes Due Appeal*, Chi. Sun Times, Mar. 14, 2006, at 36.

11. *Summary Judgment Opinion*, *supra* note 2, at 19; *Zessar*, 536 F.3d at 791.

Judge Coar decided on October 10 that July 3 amendments to Illinois's election code did not moot the case.¹² On June 11, 2007, Judge Coar determined that the pre-amendment statute was unconstitutional and the plaintiff was a prevailing party entitled to attorney fees on that issue.¹³ The court of appeals, however, decided that litigation on the pre-amendment statute had been mooted by the amendments.¹⁴

Illinois's election code now provides that rejecting an absentee ballot requires notice to the voter "within 2 days after the rejection but in all cases before the close of the period of counting provisional ballots" with an opportunity to be heard within 14 days of the election.¹⁵

12. *Opinion*, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Oct. 10, 2006), D.E. 124, *available at* [2006 WL 2916825](#); *Zessar*, 536 F.3d at 791.

13. *Opinion*, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. June 11, 2007), D.E. 157, *available at* [2007 WL 1703915](#); *Zessar*, 536 F.3d at 792.

14. *Zessar*, 536 F.3d 788, *cert. denied*, 556 U.S. 1268 (2009).

15. *Id.* at 792 (quoting the statute); *see* [10 ILCS 5/19-8\(g-5\)](#).