

## 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 2005 federal class action filed four days before a scheduled election charged that the state's absentee voting system did not comply with due process requirements; an absentee vote cast in 2004 was not counted because of an erroneous conclusion that the ballot signature did not match the registration signature. The district judge initially heard a motion for emergency relief on election day, but set the matter for hearing two days later when defendants could participate after the plaintiff's attorney acknowledged difficulties arising from his filing the case so close to an election. Because the plaintiff voted in person on election day, the district judge denied him immediate relief at the second hearing. After certifying both plaintiff and defendant classes, the district judge determined that state procedures violated due process.

*Subject:* Absentee and early voting. *Topics:* Absentee ballots; signature matching; laches; class action.

A Lake County voter filed a class action complaint on April 1, 2005, four days before a scheduled election, charging that Illinois's absentee voting system did not comply with the Fourth Amendment's due process requirements.<sup>1</sup> 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.<sup>2</sup> The plaintiff filed a motion for an emergency injunction on April 4.<sup>3</sup>

Judge David H. Coar heard the plaintiff's motion on election day.<sup>4</sup> 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.<sup>5</sup> The attorney agreed that his motion could be heard two days later when the defendants would be available to attend.<sup>6</sup>

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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, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Mar. 13, 2006), D.E. 87, 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.

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

The case proceeded, and Judge Coar certified both plaintiff and defendant classes on March 7, 2006.<sup>9</sup> On March 13, Judge Coar determined that Illinois's procedures violated due process.<sup>10</sup> He ordered the parties to "submit proposed procedures for providing timely notice and pre-deprivation hearing to absentee voters whose ballots have been rejected."<sup>11</sup>

Judge Coar decided on October 10 that July 3 amendments to Illinois's election code did not moot the case.<sup>12</sup> 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.<sup>13</sup> The court of appeals, however, decided that litigation on the pre-amendment statute had been mooted by the amendments.<sup>14</sup>

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.<sup>15</sup>

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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, 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.

12. Opinion, *Zessar*, No. 1:05-cv-1917 (N.D. Ill. Oct. 10, 2006), D.E. 124, 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, 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).