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House Bill 3360 threatens defendants' procedural rights

By Donald P. Eckler
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. Eckler also is the co-host of the Podium and Panel podcast with Daniel Cotter. His views are his own and not those of his firm or its clients.

In a tacit, but clear, confirmation that there are fundamental and incurable flaws in remote jury trials, the Illinois Supreme Court in MR 30370, issued Feb. 11, forbade criminal matters to proceed to a remote jury trial even when the defendant has consented to such a trial.

It is obviously necessary to ensure the propriety of the procedure to arrive at the imposition of the highest punishment the state can impose: deprivation of liberty. As seen last week in this space, it is hard enough to properly obtain a unanimous verdict when criminal or civil jury trials are in person, never mind if they are conducted remotely.

Under Art. I, Sec. 13 of the Illinois Constitution the parties to a civil matter have no less a right to insist on a jury trial, but that right while "inviolate" is only guaranteed as "heretofore enjoyed." Accordingly, parties in a civil matter may consent to a less than unanimous jury or even to a remote jury trial, as will occur in Lake County this week. That said, the Illinois Supreme Court should make clear that it will only allow civil jury trials to proceed remotely where the parties have agreed.

The right of a defendant to a 12-person civil jury trial has been long guaranteed in Illinois, but it took the Supreme Court's decision in *Kakos v. Butler*, 2016 IL 120377, to ensure that right and to reverse the last ill-considered and hastily passed legislation to threaten that right. As articulated in this space on Jan. 20, House Bill 3360 as amended will burden the right to a jury trial to such a degree that it will essentially create a "trial penalty" akin to that imposed on criminal defendants facing mandatory minimums.

But in a truly insidious fashion, HB3360, as amended will also burden other rights guaranteed to defendants in civil matters. Among those are the right to challenge personal jurisdiction, venue, forum non conveniens, and diligence of service, as well as to exercise the right of removal of a case to federal court. As set forth in this space on Nov. 4, 2020, these rights have been expanding somewhat of late. One of the many consequences of this bill would be that if a defendant seeks to enforce any of these rights they will have to think twice because even if successful, any advantage of enforcing the right may be lost by the interest incurred during the litigation, including the appeal, of the issue.

This is not some transient concern of ephemeral rights that defendants are improperly claiming. Rather, these are long held common law protections, the instantiations of which spring from both the federal and Illinois constitutions. Personal jurisdiction is guaranteed by the due process clause of 14th Amendment with a concomitant guarantee in the Illinois Constitution. *Rollins v. Ellwood*, 141 Ill.2d 244 (1990). The right to proper venue was codified by the Illinois General Assembly in 735 ILCS 5/2-104. The common law doctrine of forum non conveniens is instantiated in Supreme Court Rule 187 pursuant to the court's authority under Art. VI, Sec. 16 of the Illinois Constitution (which is the same grant of authority that court claimed in issuing MR30370). Likewise, and pursuant to the same authority, the court has promulgated Supreme Court 103(b) to ensure that

plaintiffs are diligent in serving defendants so as to not improperly extend the statute of limitations. Finally, pursuant to its authority under Art. III, Sec. 2 of the U.S. Constitution, Congress created diversity jurisdiction and the ability of defendants to remove cases to federal court in a variety of circumstances.

In the last general assembly, there was a proposal discussed here on March 12, 2020, to legislatively (and arguably unconstitutionally) eliminate intrastate forum non conveniens. HB3360, as amended is a backdoor attempt to effectively eliminate challenges to intrastate forum non conveniens by imposing a burden so high on defendants exercising that right. The same distortions to the civil justice system of concentrating cases in Cook, St. Clair and Madison County and straining judicial budgets that would have occurred had that bill passed, will likely occur should HB3360 as amended be enacted.

As articulated by Frédéric Bastiat in his essay "That Which is Seen, and That Which is Not Seen" the unseen effects of a policy are often where the danger in a policy lies:

"Between a good and a bad economist this constitutes the whole difference — the one takes account of the visible effect; the other takes account both of the effects which are seen, and also of those which it is necessary to foresee. Now this difference is enormous, for it almost always happens that when the immediate consequence is favourable, the ultimate consequences are fatal, and the converse. Hence it follows that the bad economist pursues a small present good, which will be followed by a great evil to come, while the true economist pursues a great good to come — at the risk of a small present evil."

Just as with the bad economist who does not see the long-term effects of a policy, so too much policymaking with regard to the civil justice system must consider the broader impacts of legislation and the implications for threats to fundamental rights.

Just as the integrity of trials of criminal defendants should be preserved as the Supreme Court did last week, so too should the rights of defendants in civil matters be preserved. HB3360 as amended constitutes yet another assault on those rights and should be vetoed.
