In the

United States Court of Appeals

For the Seventh Circuit

No. 22-2203

THIRTEEN INVESTMENT COMPANY, INC.,

Plaintiff-Appellant,

v.

FOREMOST INSURANCE COMPANY
GRAND RAPIDS MICHIGAN,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:19-cv-04630 — **Harry D. Leinenweber**, *Judge*.

ARGUED APRIL 5, 2023 — DECIDED MAY 2, 2023

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Thirteen Investment Company, Inc. sued Foremost Insurance Company to pay for a fire loss covered under an insurance policy. But Foremost had already delivered the settlement checks to Thirteen's public insurance adjuster, Paramount Restoration Group, Inc., which unilaterally endorsed the checks and kept the proceeds. Under Illinois

law, this satisfied Foremost's policy obligations. So, we affirm the district court's grant of summary judgment for Foremost.

I.

Thirteen's building suffered fire damages covered by Foremost's policy. Thirteen then retained Paramount as its public adjuster and general contractor for repairs. Under their agreement, Thirteen hired Paramount "to be [Thirteen's] agent and representative to assist in the preparation, presentation, negotiation, adjustment, and settlement" of the fire loss. Thirteen also "direct[ed] any insurance companies to include Paramount … on all payments on" the fire loss claim. Paramount negotiated the fire loss, and Foremost delivered two settlement checks to Paramount. The checks named Thirteen, its mortgagee,[1] and Paramount as co-payees. Paramount then endorsed the names of all co-payees, cashed the checks, and kept the proceeds. Paramount performed some repair work on the building before Thirteen fired it as general contractor.

Thirteen sued Foremost in state court, seeking a declaratory judgment that the insurer had breached its policy by not paying the claim. Foremost removed this case to federal court and denied this allegation. The district court granted summary judgment for Foremost because when Paramount received and cashed the checks, that discharged the insurer's performance obligation under the policy. Thirteen timely appeals.

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[1] Thirteen's mortgagee, BSI Financial Services, was named a co-payee on the $150,601.33 check for the building but not the $5,288.50 check for building contents.

II.

Thirteen offers three reasons for reversal. First, it contends that Foremost waived payment as an affirmative defense by failing to plead it in its answer. Second, Thirteen argues that, under controlling Illinois law, Foremost's policy obligation for the loss was not discharged when it delivered the checks to Paramount, which cashed the checks. Third, Thirteen alleges that Foremost agreed to make claim payments to Thirteen in installments after Foremost had inspected repair work performed.

A.

Framing payment here as an affirmative defense, Thirteen argues that Foremost's answer failed to include the defense, so it is waived. Indeed, payment is a listed affirmative defense in Federal Rule of Civil Procedure 8(c), which requires a party to state an affirmative defense in a responsive pleading. But payment is not always an affirmative defense. A defense is affirmative: (1) "if the defendant bears the burden of proof" under relevant law or (2) "if it [does] not controvert the plaintiff's proof." *Winforge, Inc. v. Coachmen Indus., Inc.*, 691 F.3d 856, 872 (7th Cir. 2012) (alteration in original) (quoting *Brunswick Leasing Corp. v. Wis. Cent., Ltd.*, 136 F.3d 521, 530 (7th Cir. 1998)). As plaintiff, Thirteen bears the burden of establishing non-payment and breach of contract. So, we focus on the second approach.

"An affirmative defense 'limits or excuses a defendant's liability even if the plaintiff establishes a *prima facie* case.'" *Bell v. Taylor*, 827 F.3d 699, 704–05 (7th Cir. 2016) (quoting *Tober v. Graco Children's Prods., Inc.*, 431 F.3d 572, 579 n.9 (7th Cir. 2005)). "In other words, an affirmative defense is '[a]

defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's ... claim, even if all the allegations in the complaint are true.'" *Id.* at 705 (quoting *Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014)). Whether Foremost's payment is an affirmative defense thus depends on whether it runs contrary to Thirteen's pleadings.

Thirteen's complaint states in relevant part:

> 21. Foremost has not reached agreement with the Plaintiff on the amount of loss and has not paid any portion of the claim.
>
> 22. Foremost's failure to pay is a breach of contract.

Foremost denied both allegations in its answer. So, payment here is not an affirmative defense because it is not asserted as a defense that limits or excuses Foremost's liability, even if Thirteen's pleadings are true. Therefore, Foremost did not have to plead payment separately in its answer. The denials of Thirteen's allegations were sufficient to preserve this defense.

B.

The merits hinge on a question of Illinois law[2] that has not yet been addressed by the state's supreme court: Does a contract obligor's delivery of a check to a joint co-payee, who then unilaterally cashes the check, discharge the obligor's performance in the amount of the check? We review the district court's grant of summary judgment de novo. *Pierner-Lytge v.*

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[2] Thirteen is a citizen of Illinois, and Foremost is a citizen of Michigan. The fire loss occurred in Illinois. Diversity jurisdiction exists here under 28 U.S.C. § 1332(a)(1).

Hobbs, 60 F.4th 1039, 1043 (7th Cir. 2023). When faced with unresolved issues of state law, we must predict how the relevant highest state court would rule. *Sanchelima Int'l, Inc. v. Walker Stainless Equip. Co., LLC*, 920 F.3d 1141, 1145 (7th Cir. 2019). And we can use "decisions of the state's intermediate appellate courts for guidance as necessary," *Straits Fin. LLC v. Ten Sleep Cattle Co.*, 900 F.3d 359, 369 (7th Cir. 2018), "tak[ing] into account trends in a state's intermediate appellate decisions," *Cmty. Bank of Trenton v. Schnuck Markets, Inc.*, 887 F.3d 803, 811–12 (7th Cir. 2018).

Paramount was Thirteen's designated public adjuster, its agent for claim negotiation, and a joint co-payee. Thirteen, by agreement, retained Paramount "to be [its] agent and representative to assist in the preparation, presentation, negotiation, adjustment, and settlement" of the fire loss. Thirteen even "direct[ed] any insurance companies to include Paramount … on all payments on" the fire loss claim.[3] *Id.* Paramount thus acted within the scope of its express, actual authority when it negotiated, settled, and received the checks for the claim. *See generally Curto v. Illini Manors, Inc.*, 940 N.E.2d 229, 233 (Ill. App. Ct. 2010).

Nothing in the policy says the checks were to be sent to Thirteen. But more importantly, Foremost's delivery to Paramount was, by law, delivery to Thirteen. *Kelly v. Parker*, 54 N.E. 615, 619 (Ill. 1899) ("A delivery to an agent is a delivery to the principal … ."). In fact, Illinois law contemplates that a

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[3] Illinois law contemplates but does not require that a public adjuster be named as a co-payee on insurance claim payments. 215 ILL. COMP. STAT. 5/1575(b) ("The contract may specify that the public adjuster shall be named as a co-payee on an insurer's payment of a claim.").

public adjuster not only negotiates claims but also "receives, accepts, or holds … funds on behalf of an insured toward the settlement of a claim for a loss … in a non-interest bearing escrow or trust account." 215 ILL. COMP. STAT. 5/1580. All this is to say that Paramount received the settlement checks on behalf of Thirteen.

What, then, is the legal effect of Paramount unilaterally cashing the checks? As to the obligation of a drawer and obligor under a contract (here, Foremost), Illinois's version of the Uniform Commercial Code says: "If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained." 810 ILL. COMP. STAT. 5/3-414(c). "'Acceptance' means the drawee's [(here, Foremost's bank)] signed agreement to pay a draft as presented." 810 ILL. COMP. STAT. 5/3-409(a). Similarly, 810 ILL. COMP. STAT. 5/3-310(b)(1) says if a check is taken for an obligation, "[p]ayment or certification of the check results in discharge of the obligation to the extent of the amount of the check." Paramount was Thirteen's agent and joint co-payee, authorized to receive the checks. So under Illinois's statutes, Foremost's performance obligation regarding the fire loss was discharged when the checks endorsed by Paramount were accepted by Foremost's bank.

Illinois caselaw on this legal question is sparse, but two appellate court decisions confirm our reading of Illinois law. In *Affiliated Health Group, Ltd. v. Devon Bank*, 58 N.E.3d 772, 774–75 (Ill. App. Ct. 2016), plaintiff doctors alleged that their employees embezzled health insurance checks issued for services the doctors provided. Like here, the doctors sued the insurers. *Id.* at 775. The question on appeal was whether the

defendant insurers' obligations to the plaintiffs were discharged by their employees' cashing the checks. *Id.* at 776–77.

The Illinois appellate court held "that because the drafts were accepted by the banks, the Insurers' obligation to pay for the medical services performed by [the plaintiffs] was discharged pursuant to section 3-414(c)." *Id.* at 777. The court rejected the plaintiffs' argument that the checks were effectively dishonored under 810 ILL. COMP. STAT. 5/3-502(d)(1) because of embezzlement and held that payment by the drawee banks discharged the insurers' obligations. *Id.* at 777–78. Likewise, the court rejected a theory of recovery against the insurers under 810 ILL. COMP. STAT. 5/3-309(a) for enforcement of a lost, destroyed, or stolen instrument. *Id.* at 778. This was because the plaintiffs could not satisfy the third requirement of § 3-309(a): "the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." 810 ILL. COMP. STAT. 5/3-309(a)(iii).

As in *Affiliated Health Group*, the drawee here, Foremost's bank, disbursed the settlement funds to Paramount, discharging Foremost's performance obligation on the claim. The checks were not dishonored, lost, destroyed, or stolen; copies of them are in the record. And we know that Paramount is amenable to service because the parties deposed Paramount's owner. Thirteen thus may not recover from Foremost under § 3–309 or on a theory that the checks were dishonored under § 5/3–502.

Similar to here, in *Parkway Bank & Trust Co. v. State Farm Fire & Casualty Co.*, 990 N.E.2d 1202, 1203 (Ill. App. Ct. 2013),

a co-payee sued an insurer for fire loss proceeds. The insurer responded it had already disbursed the settlement checks to a third-party contractor who was also a co-payee. *Id.* at 1203, 1205. The insureds had authorized the contractor to receive claim proceeds. *Id.* at 1204–05. Upon receiving the checks, the contractor forged the plaintiff's endorsement, and the bank disbursed the amount to the contractor. *Id.* at 1205.

The Illinois appellate court held that once the check was paid, the obligation was discharged to the amount of the check. *Id.* at 1206 (citing 810 ILL. COMP. STAT. 5/3-310(b)(1)). It did not matter that the contractor was a joint, rather than alternative, co-payee not entitled to unilaterally enforce the check. *Id.* The obligor's performance was discharged, and the co-payee's remedy was to sue the payor bank for conversion under 810 ILL. COMP. STAT. 5/3-420 or the drawer (insurer) under 810 ILL. COMP. STAT. 5/3-309 for enforcement of a lost, destroyed, or stolen instrument. *Id.* The co-payee plaintiff could not "merely ignore the instrument and sue the drawer on the underlying contract." *Id.* (quoting 810 ILL. COMP. STAT. ANN. 5/3-310, cmt. 4). We explained earlier that the requirements for § 5/3-309 are not met here, so Thirteen's remedies are limited to suing Paramount or the bank.

Thirteen's arguments to the contrary are all based on either cheapest-cost-avoider policy or non-Illinois caselaw. Putting to the side that we are not the final arbiters of Illinois's commercial code or its policy preferences, it is open to debate who here would be the cheapest cost avoider. At least where the co-payee that cashed the check is an agent of an aggrieved principal, the Restatement allocates the risk to the principal.[4]

[4] *See* RESTATEMENT (SECOND) OF AGENCY § 178 (1958) ("If an agent who is authorized to receive a check payable to the principal as conditional

But policy debates give way to Illinois's apparent statutory preferences, revealed through its licensing and regulatory regime for public adjusters. *See generally* 215 ILL. COMP. STAT. 5/art. XLV. Public adjusters must be bonded to provide recovery "on behalf of any person to whom the public adjuster has been found to be legally liable as the result of erroneous acts, failure to act, fraudulent acts, or unfair practices in his or her capacity as a public adjuster." 215 ILL. COMP. STAT. 5/1560(a)(1)(B), (2)(B). They "may not agree to any loss settlement without the insured's knowledge and consent." 215 ILL. COMP. STAT. 5/1590(k). And failure to comply with statutorily defined standards can result in a civil penalty as well as consequences for a public adjuster's license. 215 ILL. COMP. STAT. 5/1555(a)(15). The Illinois Director of Insurance also has "the authority to enforce the provisions of and impose any penalty or remedy" for violations of Article XLV. § 5/1555(e).

Requiring the insurer to bear the costs of a public adjuster's violation of statutory standards runs contrary to Illinois law, under which the public adjuster bears such consequences, whether by tort or through remedies and penalties under the licensing scheme. It would be odd if a wronged insured could pursue the insurer—who had no participation in the selection of the public adjuster/agent—for the agent's alleged wrongs. It would be stranger still if an insurer would

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payment forges the principal's endorsement to such a check, the maker is relieved of liability to the principal if the drawee bank pays the check and charges the amount to the maker."); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. (2006) (observing that U.C.C. § 3-405 (AM. L. INST. & UNIF. L. COMM'N 2002) "allocates the risk of an employee's fraudulent endorsement to the employer").

bear a drawee bank's possible negligence in disbursing funds without ascertaining proper endorsement by joint co-payees.

Thirteen seeks to impose monitoring duties upon the insurer far beyond their insurance contract. Foremost agreed to provide coverage and payment for negotiated claims. But it did not agree to take responsibility for the actions of the public adjuster Thirteen hired or to ensure the bank performed proper diligence before paying a draft.

Thirteen cites two non-Illinois cases to argue that a joint co-payee's unilateral cashing of a check does not discharge the payor's obligation. Both cases cut against Thirteen, however. In *VFS Leasing Co. v. Markel American Insurance Co.*, No. 8:21-CV-1297-TPB-JSS, 2022 WL 3924277 (M.D. Fla. Aug. 31, 2022), the district court acknowledged that various UCC states disagree on the issue. *Id.* at *3–4. And the *VFS* court specifically cited *Parkway Bank & Trust*, just discussed, as support that Illinois's version of the UCC discharges the payor's obligation in this circumstance. *Id.* at *3 n.6.

VFS did not involve an insured's co-payee agent, and the district court in that case specifically limited its ruling to "the cashing of a two-party check by one copayee who is not the agent of the other copayee." *Id.* at *3. The Texas Supreme Court case that Thirteen cites did the same. *McAllen Hosps., L.P. v. State Farm Cnty. Mut. Ins. Co. of Tex.*, 433 S.W.3d 535, 540 n.4 (Tex. 2014) ("We do not address this holding's applicability to copayees in an agency relationship, as that scenario is not presented."). Here, of course, Paramount was Thirteen's public adjuster and agent, responsible for claim negotiation and authorized to receive the settlement checks. This fact distinguishes these cases. *See Kenerson v. F.D.I.C.*, 44 F.3d 19, 23, 30–33 (1st Cir. 1995) (holding that the common law of agency

relieved a drawer-obligor of liability where the co-payee that cashed the checks was "an agent of plaintiff … authorized to receive the checks on her behalf").

Accordingly, *VFS Leasing* and *McAllen Hospitals*—even if they were entirely consistent with Illinois law—do not support Thirteen's position. More to the point, guiding Illinois cases *Affiliated Health Group* and *Parkway Bank & Trust* did not turn on—and the text of 810 ILL. COMP. STAT. 5/3-414(c) does not mention—whether the party that cashed the check was an agent of the plaintiff co-payee.

C.

Finally, Thirteen says Foremost agreed to make claim payments to Thirteen in installments after Foremost had inspected repair work performed. As discussed earlier, Foremost's delivery of the checks to Paramount constituted delivery to Thirteen, and when Paramount cashed the checks, that discharged Foremost's payment obligations under the policy. To the extent that Thirteen alleges a breach of a different agreement—whether as part of the original policy or as a modification thereof—its factual basis is thin. Thirteen points to its president's deposition testimony that a Foremost adjuster told him "that any and all payments would be made in draws after inspection was performed at the property to make sure that the work was being done." But such an agreement is not in the policy.

By its terms, the policy "is the entire agreement between [Thirteen] and [Foremost] regarding the insurance coverages expressed in it and supersedes all previous agreements regarding those coverages, either oral or written." Other than for governmental requirements mandating changes to the

policy or unilateral broadening of coverage by the insurer, "[t]he only other way this policy can be changed is … in writing." Neither a separate written agreement nor evidence of consideration for the alleged agreement is in the record. So, Thirteen cannot prevail on this theory.

III.

Bound by Illinois's statutes and guided by its appellate court decisions, we AFFIRM the district court's judgment for Foremost.