



MEMORANDUM

TO: Karen Messer, Ruta Prasauskas, Angela Schnepf, Jason Speaks
FROM: Hinshaw and Culbertson, LLP
DATE: February 1, 2021
RE: Review of IL HB 3360 and Prejudgment Interest Laws

INTRODUCTION

On January 13, 2021, the Illinois General Assembly passed House Bill 3360 as amended by Senate Amendment 1. This bill provides for sweeping prejudgment interest collection in all actions brought to recover for personal injury or wrongful death which results in a verdict for the plaintiff.

Under current Illinois law, personal injury plaintiffs are not entitled to collect prejudgment interest. Therefore, implementation of automatic nine percent prejudgment interest collection on all verdicts, which would begin to accrue at the time the alleged tortfeasor had notice of the injury, has significant financial implications for defendants.

Prejudgment interest is not a novel concept – most states have a mechanism that allows plaintiffs to claim and collect interest that accrued prior to the verdict. However, some states impose prejudgment interest collection as a penalty against defendants who failed to accept reasonable offers to settle. Additionally, other states exclude certain types of damages from the interest calculations all together. This memorandum will first review the legislation as passed by the Illinois General Assembly, and will follow with a brief review of other state law as an exemplar of alternative mechanisms used to implement prejudgment interest awards.

IL HB 3360

Overview

HB 3360, if signed by Governor Pritzker, will amend the language of 735 ILCS 5/2-1303 to add language allowing for recovery of prejudgment interest in actions brought to recover for personal injury or property damage. Currently, Illinois plaintiffs may only collect interest on their awards that accrues after judgment is entered. Therefore, this change is significant.

Prejudgment interest would be implemented at a **nine percent rate** and **would accrue starting on the date that the defendant has notice of the injury from the incident itself or the date defendant receives written notice**. Should the complained of injury have occurred prior to the effective date of the bill, even if the action has already been filed, prejudgment interest would begin to accrue as of the effective date of the bill. Importantly, the prejudgment interest would be assessed on **all damages** set forth in the complaint.

Should the verdict be for the plaintiff, there is no mechanism for the defendant to prevent the imposition of prejudgment interest on the award. However, there is an exception for local

public entities, who will not be liable for prejudgment interest in actions brought against them. Additionally, the trial court may apportion prejudgment interest based on its own discretion between the plaintiff and any agency or department of the state.

Criticisms

The most controversial aspects of HB 3360 are three-fold – (1) interest will accrue as of the date of injury (2) award is automatic and (3) interest will be assessed on all damages, whether actual or future, economic or non-economic. One of the main reasons that prejudgment interest has not been allowed for personal injury suits up until this point is because the extent of liability in personal injury cases is often unclear. Therefore, the assessment of interest on all damages creates a volatile, and potentially financially coercive, system for personal injury defendants, who are often businesses and medical providers.

The Illinois Defense Counsel, clearly in opposition to this measure, also asserts that the timing of this measure is inappropriate given the current crises, both civilly and economically. Their representatives note that the bill will harm businesses, medical practices, and the entire insurance industry.¹

Critics of the bill note that pre-judgment interest laws can result in over-compensation for the plaintiff and make a defendant liable for delays they did not cause. Especially of note is the fact that there is no mechanism for defendants to avoid the imposition of prejudgment interest should settlement negotiations fail. Opponents note that the proposal fails to consider reasonable time delays of litigation, most notably the need for an attorney to investigate to understand the value and impact of a claim. The running interest clock puts pressure on defendants to move more quickly than may be feasible, or pursue a quick settlement with minimal information.

REVIEW OF STATE PREJUDGMENT INTEREST LAW

California

California law provides for a penalty-mechanism of collection of prejudgment interest. Codified in the California Code of Civil procedure § 3291, the right to collect prejudgment interest in tort cases is triggered by the plaintiff making an offer to compromise pursuant to Cal. Civ. Code § 998. A plaintiff who has made an offer to compromise may recover prejudgment interest if the defendant does not timely accept their offer, and the plaintiff eventually receives a more favorable verdict. According to the statute, the interest begins to accrue from the date of the offer to compromise. The interest accrues at a rate of ten percent.²

The statute does not apply to public entities or public employees acting within the scope of their employment.

¹ Karlinsky, Marc. CHICAGO DAILY LAW BULLETIN, *Bill adds 9% prejudgment interest to injury suits*. Jan. 13, 2021.

² Cal. Civ. Code § 3291

Colorado

Colorado allows personal injury plaintiffs to recover prejudgment interest at a rate of nine percent, accruing from the date of injury. Further, the interest compounds annually.³

Delaware

Delaware law provides for collection of prejudgment interest in tort actions seeking compensatory damages for bodily injury, death, or property damage. The interest accrues from the date of the injury. The collection is triggered by plaintiff's offer of a written settlement demand which remained open for a minimum thirty days. The plaintiff is entitled to collection of prejudgment interest should the defendant reject the offer and the plaintiff obtain a more favorable verdict.⁴

Indiana

Indiana's statutory provision for collection of prejudgment interest in personal injury cases, excluding claims for medical malpractice, is codified at IC 34-51-4-1. The provision allows for the collection of prejudgment interest in the court's discretion. Also in the courts discretion are the interest rate and period of accrual, which may not exceed 48 months.⁵ Moreover, the court must exclude from the accrual window any period of delay that the court determines was caused by the party seeking the award of prejudgment interest.⁶ Significantly, Indiana excludes punitive damages from its calculation of the prejudgment interest award.⁷

This statute is triggered when the plaintiff makes a qualified settlement offer within one year of filing the claim and the offer is less than or equal to one and one-third of the judgment.⁸ Similarly, the defendant may avoid prejudgment interest awards if the defendant makes a qualified offer within nine months of the time at which the claim is filed, and the offer was at least two-thirds of the judgment awarded.⁹ Claims brought against the state or any political subdivision are not subject to prejudgment interest awards.¹⁰

Massachusetts

Massachusetts law provides for broad imposition of prejudgment interest in personal injury cases. The law provides that in any action in which a verdict is rendered for the plaintiff in

³ CO Rev. Stat §13-21-101

⁴ Del. Code Ann. Tit. 6, § 2301(d)

⁵ IC 34-51-4-8

⁶ IC 34-51-4-8(b)

⁷ IC 34-51-4-3

⁸ IC 34-51-4-6

⁹ IC 34-41-4-5

¹⁰ IC 34-51-4-4

a personal injury matter, the court must add interest at a rate of 12% annually accruing from the date of commencement of the action.¹¹

Michigan

Michigan law provides for recovery of prejudgment interest in tort actions under certain circumstances. A plaintiff may recover prejudgment interest where the plaintiff made a “bona fide, reasonable written offer” which the defendant rejects – if the verdict is subsequently rendered for the plaintiff, the plaintiff is entitled to collection of prejudgment interest. The court will order that the interest accrue from the date of the rejection of the offer.¹²

Similarly, if a bona fide, reasonable offer of settlement is made by defendant and rejected by plaintiff, and the verdict is subsequently rendered for the plaintiff, the court shall order that interest is not allowed beyond the date of the written offer of settlement.¹³

If the party against whom the judgment is rendered fails to make a reasonable written offer in a settlement action, the court must order that the interest be calculated from the date of the filing of the complaint through the date of satisfaction of the judgment.¹⁴

Missouri

Missouri state law allows for collection of prejudgment interest in tort claims if the claimant has made a demand for payment to the liable party’s insurer and the amount of the judgment exceeds the demand for payment or offer of settlement. The date of accrual is set as the earlier of ninety days after the demand or offer was received, or from the date the demand or offer was rejected without counter offer. The interest rate is equal to the intended Federal Funds Rate plus three percent.¹⁵

New Jersey

New Jersey court rules allow for recovery of prejudgment interest in tort claims. Interest accrues at a rate of twelve percent from the later of the date of the institution of the action or from a date 6 months after the cause of action arises. Prejudgment interest calculations do not include recovery for future economic losses.¹⁶

New York

New York law provides for recovery of nine percent prejudgment interest in tort claims accruing from the date of the verdict, report, or decision through the date of entry of final

¹¹ Mass. Gen. Laws ch. 231, §6B

¹² Mich. Comp. Laws § 600.6013(13)

¹³ Mich. Comp. Laws § 600.6013(9)

¹⁴ Mich. Comp. Laws § 600.6013(10)

¹⁵ Mo. Rev. Stat. § 408.040

¹⁶ N.J. Ct. R. 4:42-11

judgment.¹⁷ Entrance of a stipulation of defendant’s liability does not qualify as a “verdict, report, or decision” as defined by the statute. As a result, unless the stipulation explicitly provides otherwise, interest does not accrue after a such a determination.¹⁸

North Carolina

North Carolina allows for limited recovery of prejudgment interest in non-contract actions. The law states that prejudgment interest may be awarded on “any portion of a money judgment designated by the fact finder as compensatory damages.” The interest accrues at a rate of eight percent from the date the action is commenced.¹⁹

Oklahoma

Oklahoma allows for collection of prejudgment interest in personal injury claims. Prejudgment interest begins to accrue twenty-four months after the commencement of the suit through the earlier of the date the verdict is accepted by the trial court as expressly stated in the judgment, or the date the judgment is filed with the court clerk. The interest accrues at a rate based off of the U.S. Treasury Bill rate. This provision is not enforced against the state or its political subdivisions.²⁰

Pennsylvania

Pennsylvania law allows recovery of prejudgment interest as delay damages. Plaintiff may request damages for delay against liable defendants, which are calculated as interest on the award accruing from one year after the date of service of process until the date of the award, verdict, or decision. The interest rate is based off of the prime rate as listed in the Wall Street Journal plus one year. The defendant may combat a prejudgment interest claim with evidence of plaintiff’s own delay, or by making a written settlement offer within a specified time frame prior to the verdict.²¹

Texas

Texas law provides that judgments in wrongful death, personal injury, or property damages cases earn prejudgment interest. The interest begins to accrue on the earlier of the 180th day after defendant’s notice of the claim or the date the suit is filed and ends on the date that precedes that date the judgment is rendered. Prejudgment interest calculations may not include an award of future damages. The rate is calculated based off of the prime rate as published by the Federal Reserve Bank of New York and may not be less than five percent or greater than fifteen percent.

¹⁷ NY CPLR § 5002

¹⁸ See *Mahoney v. Brockbank*, 35 N.Y.S 3d 459 (2d Dep’t 2016)

¹⁹ N.C. Gen. Stat. §§ 24-1, 24-5

²⁰ 12 OK Stat § 12-727.1(E)

²¹ Pa. R.C.P. 238

Notably, if a settlement offer is made and the judgment is equal to or less than that amount, interest will not accrue during the period that the settlement offer may have been accepted. Similarly, if the judgment is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement offer during the period that the offer may be accepted.²²

Wisconsin

Wisconsin law provides for collection of prejudgment interest as a penalty for failure to accept a reasonable settlement offer. If there is an offer of settlement by a party which is not accepted, and the party goes on to receive a judgment greater than or equal to the offered amount, the party is entitled to prejudgment interest at a rate of the prime rate plus one percent. The interest will begin to accrue from the date of the settlement offer.²³

CONCLUSION

While the majority of states do have law on the books that allows for collection of prejudgment interest in some capacity, this review tends to demonstrate that the bill recently passed by the Illinois General Assembly would provide for one of the most unbridled methods of prejudgment interest collection in personal injury cases in the country. With no method for the defendant to avoid imposition of prejudgment interest on the verdict and no limitation on the types of damages included in the calculation of prejudgment interest, this legislation is undoubtedly hostile towards personal injury defendants.

²² Tex. Civ. Prac. & Rem. Code Ann. § 304.003

²³ Wis. Stat. § 807.01