Illinois Legislature Passes Bill Setting Prejudgment Interest Rate at Nine Percent in Tort Cases

By Daniel Schwartz

I. Substantive Background and Analysis of HB 3360

Current Illinois law precludes recovery of prejudgment interest unless authorized by statute or written agreement. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 255 (2006). The agreement between the parties must also allow damages to be readily determined prior to the judgment. *Adams v. American International Group, Inc.*, 339 Ill. App. 3d 669, 674 (1st Dist. 2003). If both requirements are satisfied, the prejudgment interest rate is assessed at five percent of the monetary award. 815 ILCS 205/2. But in personal injury and wrongful death actions, compensatory damages are rarely determinable before trial because the extent of the plaintiff's injury and the defendant's liability, if any, are unclear. Further, no statute authorizes the recovery of prejudgment interest these types of tort actions. Personal injury and wrongful claimants in Illinois, therefore, have not generally obtained prejudgment interest awards.

However, fundamental changes to the law governing prejudgment interest could soon take effect. HB 3360, which passed both houses of the Illinois legislature on January 13, 2021, and now awaits Governor Pritzker's signature, would amend section 2-1303 of the Illinois Code of Civil Procedure by adding subsections (c) through (f). Of the proposed changes to current prejudgment interest laws, subsection (c) would be the most impactful.

A. First Sentence of Subsection (c)

> *In all actions brought to recover damages for personal injury or wrongful death resulting from or occasioned by the conduct of any other person or entity, whether by negligence, willful and wanton misconduct, intentional conduct, or strict liability of the other person or entity, the plaintiff shall recover prejudgment interest on all damages set forth in the judgment.*

It is axiomatic that the first sentence in subsection (c) would nullify Illinois' longstanding common law rule barring recovery of prejudgment interest in personal injury and wrongful death suits. This alone should sound the alarm for defendants, defense attorneys, and insurance carriers, as case values could

rise to account for prejudgment interest awards, giving plaintiffs' attorneys additional leverage during settlement negotiations and ultimately increasing the cost of coverage. Another concerning aspect of the first sentence is that the legislature seemingly ignored the foundational differences between economic and non-economic damages. Unlike economic damages, which are tangible and subject to precise calculation, non-economic damages are speculative, discretionary, and cannot be objectively quantified, especially where the plaintiff's pain and suffering levels fluctuate throughout the litigation. The degree of pain and suffering is even more speculative post-judgment because future non-economic damages, by their very nature, cannot be objectively determined.

Further, allowing prejudgment interest to accrue on future damages is antithetical to the purpose of prejudgment interest, which is to ensure plaintiffs are compensated for the cost of lost opportunities. These costs are based on inflation and the time value of money (*i.e.* the concept that the ability to invest or utilize money today is more valuable than the opportunity to earn more of it in the future). In the words of tort scholar Judge Learned Hand, "[A] dollar to-day is worth more than a dollar next year." *Procter & Gamble Di-rib. Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924). In the tort context, Judge Hand means, but for their injury, plaintiffs would have made pecuniary gains from investments and other expenditures.

By way of example, if $100,000 is awarded to the plaintiff for past medical expenses, it makes sense to assess interest on this award because in theory, the plaintiff would have previously spent $100,000 in ways to enhance her overall wealth rather than on medical treatment. It follows that an award of $100,000 without interest would not make the plaintiff whole because it fails to account for the financial gains she would have made from that amount. But if the plaintiff is also awarded $100,000 for future medical expenses, she now has the money to cover the cost of prospective medical treatment. Accordingly, she is no longer in a position where she must forgo wealth-enhancing opportunities to pay for medical treatment because she was compensated $100,000 prior to those expenses accruing. HB 3360 therefore turns Judge Hand's logic on its head by allowing plaintiffs to receive compensation for financial opportunities of which they were never deprived.

Finally, because the language in the first sentence of HB 3360 allows plaintiffs to recover prejudgment interest on *all* damages, defendants would have to pay for the interest assessed on expenses paid by third parties, such as health insurers. Requiring defendants to pay interest on costs plaintiffs never even incurred is inequitable, unjustifiable, and diametrically opposed to the objective of prejudgment interest.

B. Second Sentence of Subsection (c)

Prejudgment interest shall begin to accrue on the date the defendant has notice of the injury from the incident itself or a written notice.

Perhaps more problematic for defendants, defense counsel, and insurance carriers is the second sentence in subsection (c), which addresses *when* prejudgment interest starts accruing. While a number of jurisdictions allow plaintiffs to recover prejudgment interest awards in personal injury actions, the accrual start time proposed in subsection (c) is significantly earlier than the start time in other states' statutes. In Missouri, for example, the date the defendant rejects a formal demand letter triggers the accrual of prejudgment interest. *See e.g.* Mo. Ann. Stat. § 408.040(3). Another example is Michigan where the plaintiff must file a complaint before interest can accrue. *See e.g.* Mich. Comp. Laws Ann. § 600.6013(7). Under HB 3360, because prejudgment interest would start accruing once the defendant receives notice of the alleged injury, plaintiffs may begin to immediately notify defendants of their injury, then wait to commence their cause of action until the applicable statute of limitations is almost expired. Plaintiffs could theoretically stall long enough to collect prejudgment interest for two years (*i.e.* the time limit for filing personal injury claims in Illinois), during which time defense attorneys must sit on their hands, unable to engage in meaningful discovery while paying interest on potentially mitigable damages.

Encouraging plaintiffs to engage in dilatory procedural tactics at the expense of defendants, their attorneys, and their insurance carriers is not the only issue with HB 3360. While defendants needlessly await service of process, defense attorneys may find it more difficult to estimate the value of cases and determine their client's scope of liability. Given the likelihood that case values will go up if HB 3360 is enacted, insurance carriers could begin pressuring defendants to hurriedly settle cases, even at the beginning of discovery. In turn, defense attorneys would have insufficient time to ascertain a fair settlement amount or learn facts justifying a dismissal. Although added settlement pressure and, *ipso facto*, earlier settlements, could negate at least some of the prejudgment interest costs, they could also create tension between insurance carriers, policyholders, and defense counsel. On top of that, insurance carriers could soon begin urging defense attorneys to settle cases more quickly due to protracted COVID-related case delays. If HB 3360 becomes law, insurance carriers might start applying settlement pressure even sooner – if they haven't already begun.

C. Third Sentence of Subsection (c)

In entering judgment for the plaintiff in the action, the court shall add to the amount of the judgment interest on the amount calculated at the rate of 9% per annum.

HB 3360 would fix the prejudgment interest rate at nine percent each year following a settlement or court-awarded judgment. This exorbitant rate would allow personal injury plaintiffs to receive more post-judgment compensation from interest assessed on indeterminable damages than money they would have earned but for their injury. Presumably, the Illinois General Assembly of previous sessions eschewed the idea of plaintiffs walking away from cases with a windfall. Hence Illinois' current prejudgment interest rate is five percent under § 2-1303(b) and assessed only on damages that can be readily determined. Further, with the exception of Colorado (*See* Colo. Rev. Stat. § 13-21-101; *Rodriguez v. Schutt*, 914 P.2d 921, 925 (Colo. 1996)), HB 3360 would make Illinois' nine percent rate in personal injury and wrongful death suits higher than the rate in every other jurisdiction.[1] Additionally, state statutes allowing personal injury and wrongful death claimants to recover prejudgment interest generally set forth maximum rates and authorize courts to determine the appropriate percentage. These rules help ensure plaintiffs are made whole and defendants are not paying more than they should. Illinois courts currently have such discretion to assess interest when justified by equitable considerations but would lose it entirely if HB 3360 became law. *See In re Estate of Wernick,* 127 Ill. 2d 61, 87-88 (1989). Evidence suggests that disallowing courts from exercising discretion when determining interest rates would heighten the risk that plaintiffs receive excess compensation. According to the Illinois Insurance Association, assessing a nine percent interest rate on Illinois' top ten largest verdicts in 2019 would have increased total interest payments in these cases from $51,000,000 to nearly $96,000,000.

II. Procedural Background and Analysis of HB 3360

As if the substantive aspects were not troubling enough, the process by which the General Assembly passed HB 3360 was highly irregular and unequivocally rushed. Introduced on February 15,

[1] The rate in New York is also nine percent but only in wrongful death actions. N.Y. C.P.L.R. § 5004; N.Y. E.P.T.L. § 5.4.3. In Arizona, the rate is the lesser of ten percent per year or one percent plus the prime rate (as published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered). Ariz. Rev. Stat. § 44-1201.

2019, as a bill to amend the Mortgage Foreclosure Article of the Code of Civil Procedure, HB 3360 passed the House and was referred to the Assignments Committee in the Senate on April 4, 2019. After lying idle for nearly two years in the Senate, the bill suddenly appeared on the Senate calendar for a second reading on January 10, 2021. The following day, Senate President Don Harmon introduced a floor amendment to remove the mortgage foreclosure provisions and add subsections (c) through (f) to section 2-1303. After a third reading that same day, the Senate passed the revised version of HB 3360 and sent Senator Harmon's amendment to the House for a vote. Within hours, the House duly approved the amendment before the General Assembly sent HB 3360 as amended to Governor Pritzker.

Illinois lawmakers are not supposed to pass legislation in this fashion. Pursuant to General Assembly procedural rules, when one of the chambers passes an amended bill that was previously passed by its counterpart chamber, the amended version must return to the committee of origin for consideration. If approved, the full chamber must scrutinize and conduct open floor hearings on the amended bill. Interested parties, such as lobbyists, public interest groups, and individual citizens, must be also given an opportunity to express support or opposition under the Open Meeting Act. Only after this deliberative process concludes can the amended bill pass both chambers.

HB 3360 followed a different trajectory. The version of HB 3360 passed by the House on April 4, 2019, was completely different from the amended version that passed the Senate on January 11, 2021. Therefore, HB 3360 (with Senator Harmon's amendment) should have been presented to the committee of origin (the House Civil Judiciary Committee) for consideration. This never happened, according to the General Assembly website. Further, the House passed Senator Harmon's amendment to HB 3360 the same day he filed it even though the amendment fundamentally changed the original bill's text and subject matter. If House lawmakers had mulled over the changes to HB 3360 in accordance with procedural rules, and if the General Assembly had given the public enough time to opine on the proposed changes in accordance with the Open Meeting Act, the bill may not have passed both chambers in such a short time, especially given the profound impact of the proposed law.

Perhaps lawmakers were trying to slip legislation through the cracks because of the lame-duck session. Perhaps lawmakers were swayed by plaintiffs' firms and the Illinois Trial Lawyers Association, which have collectively donated more than $370,000, alone, to the campaign finance committee of Senator Harmon. Although we may never know the exact reason for the legislature's precipitancy in passing HB 3360, we do know one thing: If enacted, it will have far-reaching consequences for defendants, insurance carriers, and defense attorneys. So too will HB 3360 hurt small businesses and safety net hospitals, many of which have closed permanently and are finding it more difficult to obtain

insurance coverage because of COVID's economic fallout. With any luck, Governor Pritzker will veto the bill.