

1 **(735 ILCS 5/2-1303.1 new) Prejudgment interest**

2
3 § 2-1303.1 (a) If a party seeks money damages in an action at law or in
4 arbitration, prejudgment interest must be awarded from the date the
5 party from whom money damages are sought is given written notice of
6 the claim for money damages or the action or arbitration is filed,
7 whichever is earlier, until the award or judgment is entered. Actions at
8 law include counter-claims, third-party actions, and claims for
9 contribution. The written notice of the claim for money damages must
10 reference this Section and be sent by certified mail, return receipt
11 requested.

12
13 (b) The prejudgment interest rate will be calculated by the Comptroller
14 using a rate equal to the average one-year constant maturity United
15 States Treasury bill rate of the preceding calendar year before the cause
16 of action is filed plus two percentage points. The Comptroller must
17 calculate this rate and publish it on his or her official website by January
18 10th of every year.

19
20 (c) Any defendant may avoid paying prejudgment interest by making a
21 written offer of settlement to plaintiff at any time after that defendant has
22 entered an answer or other responsive pleading to a complaint, petition,
23 or demand for arbitration but no later than 120 days after entering an
24 answer or other responsive pleading. If the plaintiff does not accept that
25 offer of settlement in writing within 30 days of his or her receipt of it, and
26 the plaintiff's award or judgment against that defendant is less than or
27 equal to that offer of settlement, no prejudgment interest may be
28 awarded against that defendant. The parties may agree in writing to
29 extend the 120-day period for defendant to make a written offer of
30 settlement.

31
32 (d) This Section does not apply to any of these situations:

33
34 (1) A unit of local government, as defined Section 1 of Article VII of
35 the Constitution, a school district, a community college district,
36 or any other governmental entity may not receive or be awarded
37 prejudgment interest as a litigant.

38
39 (2) Actions in small claims.

40
41 (3) Claims for punitive damages.

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43 (4) If the cause of action and its legal dispute are subject to a
44 written contract or agreement between the litigants in which
45 prejudgment interest is governed by the contract or agreement.
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(5) If the cause of action and its legal dispute are governed by a more specific statute.

Section 99. This Act takes effect on Jan. 1, 2010 and applies to all actions accrued on or after that date. (Source: P.A. 85-907.)



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Position Statement In Opposition to ISBA Prejudgment Interest Proposal

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The Illinois Association of Defense Trial Counsel (IDC) opposes the proposal of the ISBA Board of Governors for legislation requiring the payment of prejudgment interest to successful plaintiffs in nearly all Illinois tort cases. IDC respectfully submits that the proposed bill and its underlying policy considerations are fundamentally flawed for multiple reasons including the following:

Violation of Right to Due Process – The proposal would assess prejudgment interest against a defendant if it does not make an adequate “offer of settlement” within a specific time frame, but fails to require plaintiff to provide defendant with timely information so defendant can reasonably assess liability and damages. The imposition of mandatory prejudgment interest payments without any prohibition on prejudgment interest for future or non-economic damages further violates the Due Process Clause and highlights the arbitrary nature of the proposal.

Windfall Recovery for Plaintiffs – Plaintiffs would be overcompensated under the proposed bill because it fails to account for the reality that many plaintiffs are not out-of-pocket for most expenses. Most medical bills and lost wages are covered by insurance and Illinois plaintiffs already receive a windfall in that they may recover the full amount of medical bills that have been discounted by a health care provider. Under the Collateral Source Rule, a plaintiff may recover twice for a single injury - once from the defendant and once from the collateral source. The proposed legislation would provide a further windfall to plaintiffs.

Fails to Account for Joint and Several Liability - The proposal fails to address the assessment of prejudgment interest in cases with multiple defendants. Given joint and several liability, a minimally culpable defendant who makes a reasonable offer could still be responsible for paying the full amount of a judgment and prejudgment interest. Such a result is patently unfair to the compliant defendant and represents an all-too-likely consequence of a prejudgment interest mandate.

Would Impede Early Resolution of Cases - The proposal gives a defendant only 120 days to make an offer of settlement after filing its responsive pleading in order to avoid payment of prejudgment interest. This gives a defendant no time to assess the value of the case as many cases are still in the pleading stage after 120 days. Once the prescribed time period passes, a defendant has no incentive to resolve a case because failed settlement negotiations at some later stage of the litigation will not shield that defendant from the payment of prejudgment interest. No penalty is imposed on a plaintiff who fails to accept a reasonable offer and then fails to obtain a judgment more favorable than the offer.

“Written Notice” is Vague and Ambiguous - Nowhere in the proposal is there a definition of the “written notice” which would trigger the accrual of prejudgment interest. Who is required to give the written notice? The plaintiff? Another party? What constitutes “written notice”? Actual service of a complaint? What happens in cases of improper service?

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PURPOSE

The ISBA Board of Governors has approved a proposal for legislation that would require the payment of prejudgment interest to successful plaintiffs in nearly all Illinois tort cases. The ISBA Assembly is expected to consider and vote on the proposal at its meeting on December 13, 2008. The proposed bill and its underlying policy considerations may be well-intended, but they are fundamentally flawed. This statement is intended to highlight objections of the Illinois Association of Defense Trial Counsel (IDC) to the proposal approved by the ISBA Board of Governors.

BACKGROUND

The Illinois Association of Defense Trial Counsel is a voluntary organization of independent lawyers, whose expertise includes substantial tort practice, primarily on behalf of defendants. The IDC is a not-for-profit organization with over 900 members, practicing throughout the State of Illinois. A large percentage of IDC members are also members of ISBA, and several IDC members serve on the ISBA Assembly. The IDC and its members believe that they have a constructive role to play in the development of our system of justice and that its members and the clients they represent may be greatly affected by proposed legislation requiring the payment of prejudgment interest in Illinois tort cases.

Illinois common law has long-held that prejudgment interest is awarded only if it is authorized by contract or statute.¹ Illinois courts have traditionally adhered to this principle and have stated that any change in this area must be made by the legislature.² Attempts have been made in the past to substantively change the law on prejudgment interest in Illinois; however, those attempts have failed.³ With Illinois citizens and employers already reeling from the growing economic crisis, this is a particularly inappropriate time for another attempt at a measure which would hit Illinois citizens and employers square in the pocketbook.

STATEMENT OPPOSING PREJUDGMENT INTEREST PROPOSAL

As drafted, the proposal approved by the Board of Governors awards a plaintiff prejudgment interest when “the party from whom money damages are sought” fails to make an adequate “offer of settlement” within 120 days of responding to the plaintiff’s complaint.⁴ Should prejudgment interest be assessed against a non-compliant adversary, interest accrues from “the date the party to whom money damages are sought is given written notice of the claim for money damages or the action or

¹*Sammis v. Clark*, 13 Ill. 544, 546 (1852).

²*Geohegan v. Union El R.R. Co.*, 266 Ill. 482, 497 (1915).

³For example, the Illinois Trial Lawyers Association submitted Senate Bill 0087 to the Illinois Legislature in 1983. This proposed bill sought, among other things, to impose prejudgment interest on all recoverable elements of damages at a compounded interest rate. Senate Bill 0087 did not pass.

⁴Proposed (735 ILCS 5/2-1303.1 new) Prejudgment interest, Sections (a) and (c).

arbitration is filed, whichever is earlier, until the award or judgment is entered.”⁵ The assessment is avoided only when the plaintiff’s award or judgment is less than or equal to the offer of settlement.⁶ The proposed bill exempts the payment of prejudgment interest in very limited circumstances which do not adequately correct or address any of the bill’s flaws.⁷

Proposal Would Result in Violation of Right to Due Process

The proposed procedure for awarding prejudgment interest violates one of the most fundamental constitutional guarantees: the right to due process. The Fourteenth Amendment to the United States Constitution prohibits the imposition of grossly excessive or arbitrary awards against a tortfeasor without due process of the law.⁸ The reason is that [e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.⁹

Under the proposed legislation, an extra cost of litigation is placed on a defendant if it does not make the required “offer of settlement” within a specific time frame or if the plaintiff does not deem the “offer of settlement” adequate. There is nothing within the statute which specifies what the “offer of settlement” must be based upon. There is nothing dictating that the plaintiff provide a defendant with any information about the “claim for money damages” such that a defendant may make a meaningful settlement offer. It is fundamentally unfair and unconstitutional to require a defendant to guess at the amount of damages. The proposal fails to provide for a hearing of any sort where plaintiff is required to disclose the damages claimed and basis for liability, so that defendant can make a reasonable assessment of liability and damages. The proposal’s lack of specificity regarding what exactly a defendant must do to avoid paying prejudgment interest does not give a defendant fair notice of the conduct that will subject it to imposition of a potentially large monetary penalty.

The imposition of mandatory prejudgment interest payments without any prohibition on prejudgment interest for future or non-economic damages further violates the Due Process Clause and highlights the arbitrary nature of the proposal. Future and non-economic damages (*i.e.*, pain and suffering, disfigurement, and disability) are difficult to quantify and impossible to predict. Other states, like Alaska, Michigan, and Minnesota prohibit the assessment of prejudgment interest for future and non-economic damages.¹⁰ Requiring a defendant to make an “offer of settlement” without placing any burden on plaintiffs to provide any information about his/her claim does nothing to enable a defendant to comply with the proposed statute and does not satisfy the Due Process Clause’s requirement of fair notice.

⁵*Id.*

⁶*Id.*

⁷*Id.* at Section (d).

⁸*State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

⁹*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 574 (2001).

¹⁰*Munich Re America, Post Judgment Interest, Prejudgment Interest, Punitive Damages*, (2008).

The provision for accrual of interest from the date of written notice or suit filing until entry of judgment is fundamentally unfair because it would penalize a defendant for delays attributable to the plaintiff or court system. Will a defendant be forced to oppose all continuances requested by plaintiffs for any reason because a continuance would increase the amount of the prejudgment interest? What if a defendant answers ready for trial, but the court is not available due to other trials or commitments? Under the proposal, a defendant would be forced to pay interest for such delays. The proposal fails to address the circumstance in which a case is dismissed and the plaintiff takes an appeal, the dismissal is reversed and the case is reinstated. Will the defendant have to pay interest while the matter was pending on appeal following dismissal?

The proposal also fails to account for the unique circumstances of class actions. Classes typically cannot be certified until well after 120 days. How does a defendant know how many members the class will have and what would be an appropriate offer until the class is certified?

Proposal Would Result in Windfall Recovery for Plaintiffs

The proposed bill also calls into question well-established legal principles such as the Collateral Source Rule. One of the presumed purposes behind the prejudgment interest proposal is to ensure that injured plaintiffs are “made whole.” The rationale for this argument is that an injured plaintiff has to pay medical bills and incur lost wages as the result of another’s wrongful conduct. But for the plaintiff’s injury, the plaintiff theoretically would have had these funds available for other uses, including the earning of interest.¹¹ Thus, under this rationale, prejudgment interest should be awarded to a successful plaintiff to compensate him/her for the loss of use of these funds.¹²

In reality, prejudgment interest mandates, such as the ISBA proposal, do not make injured plaintiffs whole. Instead, plaintiffs are overcompensated because overbroad prejudgment interest statutes fail to account for the fact that many plaintiffs are not out-of-pocket for most expenses. Most medical bills and lost wages are covered by insurance and Illinois plaintiffs already receive a windfall in that they may recover the full amount of medical bills that are later discounted by a health care provider.¹³

The proposed bill would permit a windfall recovery for plaintiffs who are already adequately compensated as a result of the Collateral Source Rule. The Collateral Source Rule provides that if an injured party receives compensation from a third party (the collateral source), the amount of that compensation will not be deducted from the damages that must be paid by the tortfeasor.¹⁴ Under this Rule, a plaintiff may recover twice for a single injury - once from the defendant and once from the

¹¹Smith, *Prejudgment Interest: The Case Against...*, *Illinois Bar Journal*, (October 1983).

¹²*Id.*

¹³*Arthur v. Catour*, 216 Ill.2d 72 (2005).

¹⁴Black’s Law Dictionary, 256 (8th ed. 2004).

collateral source.¹⁵ If prejudgment interest legislation is enacted, application and operation of the Collateral Source Rule must be re-examined in order to prevent a further windfall to plaintiffs.

Proposal Fails to Account for Joint and Several Liability

Another basic principle of Illinois tort law which conflicts with the proposed prejudgment interest mandate is the concept of joint and several liability. The draft approved by the Board of Governors does not contain any provision addressing the payment of prejudgment interest in the event of multiple tortfeasors. Joint and several liability is liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion.¹⁷ Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties.¹⁸ In light of this principle, a minimally culpable defendant who complies with the procedure designated in the ISBA proposal could still be responsible for paying the full amount of a judgment and prejudgment interest. Such a result is patently unfair to the compliant defendant and represents an all-too-likely consequence of a prejudgment interest mandate.

The proposed bill's failure to account for joint and several liability also illustrates how the proposal fails to accomplish another of its stated purposes: relieving court congestion by promoting early resolution of cases.¹⁹ Because the ISBA-proposed statute contains no provision for joint and several liability of defendants, the only recourse for a minimally culpable defendant forced to pay prejudgment interest is to add to the courts' already congested dockets by filing a contribution or indemnity action.

Proposal Would Impede Early Resolution of Cases

The proposed legislation has the potential to impede early resolution of cases. Under this proposed statute, there is only one way for a defendant to avoid payment of prejudgment interest (other than a finding of no liability): the defendant must make a "written offer of settlement to the plaintiff at any time after that defendant has entered an answer or other responsive pleading...but no later than 120 days after entering an answer or other responsive pleading."²⁰ This gives a defendant no time to assess the value of the case as many cases are still in the pleading stage after 120 days. A defendant is less likely to make a settlement offer when it has no information with which to assess the case. Once the prescribed time period passes, and assuming there is no agreed extension, no other "offers of settlement" may relieve a defendant of the prejudgment interest burden. A defendant has no incentive at that point to resolve a case because failed settlement negotiations at some later stage

¹⁵Hernquist, *Arthur v. Catour: An Examination of the Collateral Source Rule in Illinois*, *Loyola University Chicago Law Journal*, Vol. 38 (2006).

¹⁷Black's Law Dictionary, ____ (8th ed. 2004).

¹⁸*Id.*

¹⁹Knoll, *A Primer on Prejudgment Interest*, 75 *Tex. L. Rev.* 293, 297 (1996).

²⁰Proposed (735 ILCS 5/2-1303.1 new) Prejudgment interest, Section (c).

of the litigation will not shield that defendant from the payment of prejudgment interest in the event of a liability finding against it.

The proposal likewise fails to provide plaintiff with an incentive for accepting a reasonable settlement offer. Under the one-sided proposal, no penalty is imposed on a plaintiff who fails to accept a reasonable offer and then fails to obtain a judgment more favorable than the offer. If the ostensible objective of the bill is to encourage early settlements, there clearly should be incentives or penalties assessed on refusing to accept an offer that is later proven to be reasonable. Federal Rule 68 recognizes this principle as it relates to offers of judgment.

“Written Notice” is Vague and Ambiguous

Aside from the many general policy arguments against prejudgment interest legislation, the proposal approved by the Board of Governors has its own unique flaws. This version provides that "prejudgment interest must be awarded from the date the party from whom money damages are sought is given written notice of the claim for money damages or the action or arbitration is filed, whichever is earlier, until the award or judgment is entered."²¹ Nowhere within the ISBA proposal is there a definition of the phrase “written notice”. As currently written, the term “written notice” is vague and ambiguous. Who is required to give the written notice? The plaintiff? Another party? What constitutes "written notice"? Actual service of a complaint? What happens in cases of improper service? Under this version of the proposed statute, improper service could arguably be construed as "written notice" because the defendant may have gained actual knowledge of the claim for money damages against it, even though it is not a proper party to the case. How does the statute apply pre-litigation? If a pre-suit demand is made upon an insurer, does that constitute “written notice” to the insured? These are just some of the many questions raised by the vagueness and ambiguity surrounding the phrase “written notice” which justify rejection of the proposed legislation.

CONCLUSION

Based on the foregoing, the IDC opposes the prejudgment interest proposal approved by the ISBA Board of Governors. The proposal’s violation of basic constitutional rights and conflict with many well-established legal principles require the IDC to oppose any attempt to present or pass this legislation in any form.

Respectfully submitted,

Illinois Association of Defense Trial Counsel

²¹*Id.* at Section (a).



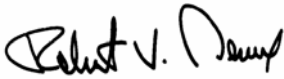
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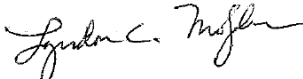
STATEMENT OF IDC PAST PRESIDENTS IN OPPOSITION TO ISBA PREJUDGMENT INTEREST PROPOSAL


The undersigned, each a Past President of the Illinois Association of Defense Trial Counsel (IDC), hereby state their opposition to the prejudgment interest proposal approved by the ISBA Board of Governors for consideration by the ISBA Assembly on December 13, 2008. In support of their opposition, the undersigned join and adopt the IDC Position Statement opposing the ISBA Prejudgment Interest Proposal.


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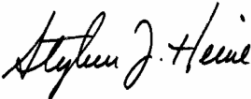
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