BY MICHAEL ADLER

Navigating Illinois' New Prejudgment Interest Statute

A user's guide for plaintiff and defense attorneys.

THIS YEAR SAW ONE OF THE MOST SIGNIFICANT PIECES OF TORT REFORM ENACTED in Illinois history. On May 28, 2021, Gov. J.B. Pritzker signed into law a 6 percent prejudgment interest rate on all personal injury and wrongful death cases. Illinois joins 46 other states with some form of prejudgment interest. An important feature of the Illinois law is a setoff provision, which is designed to encourage early assessment of resolution and settlement negotiations. Whether you represent plaintiffs or defendants, this setoff portion of the law may have the most impact on your practice.

All civil defense and plaintiffs' attorneys need to be familiar with the statute and be aware of how the law will impact their practice in order to advise their clients appropriately.

Does 735 ILCS 5/2-1303(c) apply to my case?

The 6 percent prejudgment interest rate will apply to all actions brought to recover damages for personal injury or wrongful death.[1] The law applies to your case whether the action is brought under a theory of negligence, willful and wanton misconduct, intentional tort, or strict liability.[2] The statute does not apply to contractual claims.[3]

The 6 percent prejudgment interest applies to all damages.[4] This includes economic damages, such as medical expenses, lost wages, and noneconomic damages like pain and suffering and loss of society. The only exceptions are punitive damages, sanctions, statutory attorney fees, and statutory costs.[5] This would mean that a judgment against a nursing home on a claim brought under the Nursing Home Care Act (NHCA) would have to pay an additional 6 percent interest on all damages except for the plaintiff's attorney fees, which are recoverable under the fee-shifting provision of the NHCA.

The statute exempts state and municipal defendants from prejudgment interest.[6] If you file suit against or represent a city, township, municipal fire department, school district, or any other governmental entity, the 6 percent prejudgment interest will not be applicable.

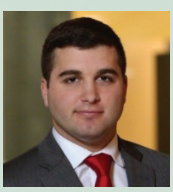
When does the interest begin?

For all cases filed before July 1, 2021, prejudgment interest began to accrue on July 1, 2021.[7]

For all future cases, interest will begin on the date of filing.[8] The interest does not begin from the date of the alleged injury. The interest also does not begin from the date of service on the defendant or even the date the defendant files an appearance.

The prejudgment interest will only accrue for a maximum of five years.[9] The time between voluntary dismissal and refiling will be tolled.[10]

For plaintiffs, this rule may incentivize filing a case earlier than normal. It is not uncommon in some personal-injury cases to attempt to resolve the matter directly with an insurance analyst or in-house counsel for the hospital before filing suit. Presuit resolution still



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1. 735 ILCS 5/2-1303(c).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

ISBA RESOURCES >>

- ISBA Free On-Demand CLE, Successful Settlement: Mediation Techniques and Ethical Issues (recorded Feb. 2022), law.isba.org/3rYdMhy.
- Jason G. Schutte, *A Primer on Illinois' Prejudgment Interest*, The Policy (Oct. 2021), law.isba.org/3rWr6ui.
- Thomas M. Connelly, *Discovery Deposition: Preparation & Execution*, YLDNews (Oct. 2021), law.isba.org/3rZ9s1F.

TAKEAWAYS >>

• While prejudgment interest applies to economic and noneconomic damages, the following are exceptions: punitive damages, sanctions, statutory attorney fees, and statutory costs. State and municipal defendants are also exempt from prejudgment interest.

• While prejudgment interest takes effect when a suit is filed, a setoff provision is designed to encourage all parties to seek an early resolution and/or settlement.

• For defendants, the setoff provision means starting discovery as soon as possible. Plaintiffs should be prepared to respond to a settlement offer within the first year.

THE SETOFF INCENTIVIZES DEFENDANTS TO MAKE EARLY, WELL-INFORMED, AND HIGHER SETTLEMENT DEMANDS. DO NOT FORGET THAT THE OFFER NEEDS TO BE IN WRITING.

has value in many circumstances, but you need to stress the prejudgment-interest law when negotiating presuit. If presuit resolution is not realistic, or if it is taking unreasonably long, it may be better to file suit earlier.

For defendants, this rule may incentivize accepting service on your client's behalf. A common 103(b) service situation is that the plaintiff properly serves the corporate defendant but does not properly obtain personal service on the individual defendant who works at the corporation. The individual defendant's attorney may be aware of the action but will wait to file an appearance until proper service is made and then file a motion to dismiss pursuant to 103(b). Defense counsel should advise their client that they may still be potentially liable for 6 percent interest from the time of filing, even if proper service is delayed.

For both sides, this rule incentivizes initiating discovery as soon as possible. Defendants will want to issue and answer written discovery as soon as possible, even if there are potential dispositive motions. While you may prefer to wait to engage in any discovery until all parties are at issue, it may be in your client's best interest to save time and complete written discovery while the parties are engaging in pleading-stage motion practice. Plaintiffs will want written discovery completed expeditiously, too. Plaintiffs will benefit from promptly providing opposing counsel with a detailed list of damages and medical bills to facilitate well-informed, early-settlement offers (concerning the 12-month settlement-offer setoff see below).

How is the interest calculated and applied?

After a judgment is entered for the plaintiff, the judge will calculate and award the additional 6 percent interest posttrial.[11] From there, the statuary 9 percent posttrial interest will apply.[12]

The interest is calculated in simple, not compound, interest.[13] As part of your negotiation strategy, it may be helpful to calculate the potential interest of a hypothetical verdict for a mediator or opposing counsel. Brush up on your math skills before your mediations.

But it was not my fault

There is no equitable analysis in the application of prejudgment interest.[14] It does not matter whether the plaintiff canceled depositions, or the defendant needed extensions on producing their answer. It is a "no-fault" statute.

The 12-month settlement-offer setoff

If the defendant makes a settlement offer and the plaintiff rejects the offer, the defendant may be entitled to a setoff on the prejudgment interest.[15] If the verdict is lower than the defendant's highest settlement offer, the defendant will not owe 6 percent prejudgment interest.[16]

If the judgment is greater than the amount of the defendant's highest settlement offer, the interest added to the amount of the verdict will only be 6 percent of the difference between the judgment and the highest written settlement offer.[17]

For the setoff to apply, the settlement offer must meet a few requirements:

1) the offer must be in writing;

2) the offer must be made within the first 12 months of filing (or by July 1, 2022, for cases filed before July 1, 2021); and

3) the plaintiff either directly rejects the offer or refuses to accept the offer within 90 days.[18]

For defendants, the setoff unfortunately means you may have to start those case reports much earlier. For clients who have 12-month reporting requirements, you may want to suggest earlier reporting deadlines. You will need to advise your insurance analyst of the setoff provision and have a detailed assessment on damages and liability within the first year of the case. This may require initiating and completing written discovery and issuing subpoenas for records as soon as possible so that you can provide your client with an accurate, realistic damages estimate. If it is not your practice already, you will need to make sure you have the case reviewed by an expert within the first few months of getting the case.

The setoff incentivizes defendants to make early, well-informed, and higher settlement demands. Do not forget that the offer needs to be in writing. You can continue to engage in informal discussions and verbal settlement negotiations, but by the 12-month mark, be sure to have made a formal written offer to preserve your setoff.

For plaintiffs, the law does not require you to make a settlement demand within 12 months, but you should be prepared to respond to a settlement offer within the first year. Help opposing counsel help you. As stated above, opposing counsel will need to provide a detailed assessment of liability and damages to their insurance analyst, and then the insurance analyst will need to provide a detailed case assessment to their superiors within the first 12 months. This can require many levels of slow, bureaucratic red tape. The more information you can get to opposing counsel, and the sooner you can get it to them, the more likely you will receive reasonable settlement offers. Prepare your list of damages and bills early and update it as you go. You may want to order all the bills and records—even if treatment is not completed—so that you can get the defendant the most up-to-date

11. *Id.*
12. *Id.* § 5/2-1303(a).
13. *Id.* § 5/2-1303(c).
14. *See id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

information. Do not expect an offer of the policy maximum, but the generous setoff provision should induce more realistic settlement negotiations at the early stages of litigation.

Conclusion

Defendants have raised challenges to the statute in several counties. These challenges have been rejected except in Cook County. In *Hyland v. Advocate Health and Hospital Corp* (2017 L 3541), a Cook County judge found the statute unconstitutionally impeded on juries' role to determine damages and arbitrarily applied to only certain civil litigants. Following the decision, the Law Division of the Cook County Circuit Court issued a general order stating that all motions 1) staying application of the Act, 2) tolling the requirements of the Act, 3) declaring the Act unconstitutional, or 4) applying the ruling in *Hyland* to any case prior to trial are entered and continued until the Illinois Appellate Court and Illinois Supreme Court have made a final ruling. In Cook County cases that proceed to trial prior to a final ruling by the Illinois Appellate Court, the issue must be determined by the trial judge and the trial judge's decision will be subject to the ordinary appellate process.

To preserve these constitutional objections, many defendants are filing affirmative defenses pending final determination by appellate courts. To preserve the setoff if the statute is ultimately upheld, many defendants are still making written offers within the one-year deadline.

Whenever a new change to our practice is implemented, there are concerns from all sides about how the new rule will ruin our practices. There is no need to fear the new prejudgment interest rule if you are informed and able to inform your clients. The law contains pros and cons, shields and swords for all litigants. Some of our older practices may need to be updated, but we will all adapt to prejudgment interest. Make sure you are an early adopter of these changes and that your partners and clients look to you as experts on this new law. IBJ

AS PART OF YOUR NEGOTIATION STRATEGY, IT MAY BE HELPFUL TO CALCULATE THE POTENTIAL INTEREST OF A HYPOTHETICAL VERDICT FOR A MEDIATOR OR OPPOSING COUNSEL. BRUSH UP ON YOUR MATH SKILLS BEFORE YOUR MEDIATIONS.