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Pre-judgment interest bill will yield debacle

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Criminal defense attorneys have long, and rightly, pointed out that there is a "trial penalty" against those criminal defendants who, when faced with a plea offer substantially less than the prison time they would face as a mandatory minimum if they exercise their constitutional right to trial, are essentially forced to forgo their right to have the government prove their guilt to a jury beyond a reasonable doubt.

If signed by the governor, HB 3360, as amended, would essentially impose a litigation penalty on civil defendants who exercise their no less valuable state constitutional right to litigate a case through trial by making defendants responsible for pre-judgment interest at 9% per annum which accrues from "the date the defendant has notice of the injury from the incident itself or a written notice" (whatever that means). Article I, sec. 13, of the Illinois Constitution guarantees an "inviolate" right to a jury trial that is no less of import, and should be burdened no greater, than the Sixth Amendment right to a jury trial afforded to criminal defendants. Enumerated rights especially, do not come in favored and disfavored varieties as they are enumerated to protect those not in power against those in power.

In addition to these and a number of other constitutional infirmities with the bill, the practical effect of this legislation and the ripple effect it will have in the civil justice system and in the broader economy must be considered. Henry Hazlitt wrote in his masterwork "Economics in One Lesson" that "the persistent tendency of men to see only the immediate effects of a given policy, or its effects on a special group, and to neglect to inquire what the long-run effects of that policy will be not only on that special group but on all groups. It is the fallacy of overlooking secondary consequences."

As the bill will impose interest on past injuries and previously filed actions to run from the later of the effective date of the bill or notice of injury to the defendant, insurers could not have sufficiently underwritten policies to prepare this additional expense and reserve on current claims. This will likely require all insurers to raise rates, which will likely cause fewer people to have insurance, particularly automobile insurance, and may cause many smaller insurers, that operate on very thin margins, to become insolvent. This will cause stress on larger insurers, who will likely have more uninsured motorist claims in particular, and cause still more premium increases. And it will likely continue to snowball. There are other effects that are likely, but these seem the most obvious and will harm everyone in the state.

Further, it has been claimed that this legislation is necessary to preclude defendants and insurers from delaying payment of claims. Numerous suggestions have been made in this space over the last many months to loosen the logjam of cases created by the court shutdown following the pandemic. Those suggestions would not favor one side over the other as neither side caused the current situation. The fundamental fallacy of HB 3360 as amended is that it presumes the plaintiff is entitled to the entirety of award from the date of the injury without having proved liability and in cases where liability, causation, damages, or all three may be contested.

It also fails to account for the incentive this bill now places on the plaintiff to not want to settle their case. Rather than encouraging settlement, this bill discourages the plaintiff to settle because there are few better

investments than 9% per annum interest. In the current environment, interest at 9% per annum, is usurious. This is especially so when the plaintiff can wait two years to file their suit, another five months to serve it before running afoul of Rule 103(b), and thus by the time the defendant's answer is due 30 months after the alleged injury, 22.5% interest will have accrued. This does not account for construction cases in which the statute of limitations is four years. The bill also does not account for delay in litigation when the plaintiff fails to timely answer discovery, fails to appear or continues their deposition, seeks an extension of time to disclose experts or respond to a motion, and most egregiously, there is no account for situations in which the plaintiff voluntarily dismisses their case and refiles within one year under 735 ILCS 5/13-217 and the whole process starts again.

Finally, it has been claimed that 46 states have some form of pre-judgment interest and while that may be true, none have anything approaching the draconian measure about to be imposed on Illinois. Other states have limitations on aspects on prejudgment interest awards such as requiring a showing of liability before interest accrues, *Love v. State of New York*, 583 N.E.2d 1296 (1991); not applying to future damages, Minn. Stat. Sec. 549.09(b)(1); only being available when the parties have made qualified settlement offers, Ind. Code Sec. 34-51-4-5 or Ind. Code. Sec. 34-51-4-6; and are discretionary, not mandatory, Haw. Rev. Stat. Sec. 636-16. If Illinois is jumping off the pre-judgment interest bridge like other states previously have, the one Illinoisans are being asked to jump off is higher and the water colder.

Passed at 3 a.m. less than 48 hours after introduction, the constitutional, economic, practical, and fairness issues with HB3360 as amended, will wreak a debacle on Illinois and should not be enacted.
