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New version of prejudgment interest bill is not progress

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Just because a proposal is subsequently modified to be better, does not make the modified proposal good simply because it is better than the abomination it modified.

Such is the case with House Amendment 2 to Senate Bill 72 as the saga of the ill-considered and procedurally vacuous HB3360 continues. Passed at 3 a.m. at the end of a lame duck session HB3360 was an attempted parting gift to the plaintiffs' bar from a disgraced and now retired House speaker. As the possibility that the governor may veto HB3360 has become apparent, the plaintiffs' bar and their allies in the General Assembly have now, in a feat of parliamentary gymnastics fit for Simone Biles, twice amended a probate bill dealing with electronic wills that passed unanimously in the Senate to save prejudgment interest.

HA2 to SB72, which is a standalone bill in anticipation of the veto of HB3360 and will be considered today at 2 p.m. before the Senate Executive Committee and the full Senate if passed as expected, would modestly, but unsatisfactorily, curtail the deleterious effect of the original proposal. As written in this space on Jan. 20 and Feb. 17, HB3360 would impose 9% per annum prejudgment interest on all personal injury and wrongful death actions to run, without limitation, from the date of the injury or notice to the defendant.

The current proposal, that the Senate will not be able to further amend, would do the following:

1.Set the rate of prejudgment interest at 6% per annum and provide that prejudgment interest does not apply to punitive damages, sanctions, statutory attorneys' fees, statutory costs and the amount of the highest timely written offer.

2.Cut off interest at five years in all events.

3.Toll the running of interest in the event of a voluntary dismissal.

4.Include a mechanism for settlement offers that if a defendant does better at trial than an offer made within a certain time prior to trial, prejudgment interest is eliminated altogether.

5.Provide that interest would only run from the date of the filing of the complaint and then only against that portion of the award above the amount of the highest offer.

6.Carve out public entities from being subject to prejudgment interest.

HA2 to SB72 is better than HB3360, but only in view of how awful HB3360 was.

Specifically, the interest rate remains entirely arbitrary and not reflective of current economic reality. If there is to be prejudgment interest in tort cases, then it should be tied to the treasury bill as has been proposed in New York.

Prejudgment interest should not apply to future damages, as those damages are reduced to present value and are not certain to be incurred. The classic purpose of prejudgment interest was to compensate the injured party for the loss of the value of the money. The incongruity in awarding prejudgment interest to future damages is mind warping. Prejudgment interest should also not apply to non-economic damages or to medical bills that were satisfied for less than what was billed. The former has no relation to the purpose of prejudgment interest, and the latter yields a windfall.

The limitation on interest to five years would limit interest to no more than 30% on the parts of the award subject to prejudgment interest, but that will only encourage plaintiffs to extend litigation to maximize the recovery, when the goal should be to incentivize all parties to resolve cases.

The tolling of interest in the event of voluntary dismissal is a good and necessary change, but does nothing about delays in litigation. The failure of plaintiffs to timely answer written discovery, appear for deposition, and disclose experts should likewise be tolled, to say nothing of delays caused in getting depositions of independent witnesses. This latter concern, which is often the fault of no party, should not result in what amounts to a punitive award against the defendant.

The mechanism to include a settlement offer provision is welcome, but insufficient as it is only a one-way street. Even before HB3360 was proposed on Jan. 6, it was proposed in this space to adopt a two-way system of attorneys' fees tied to settlement offers similar to that utilized in Florida. To encourage settlement, incentives should run in both directions.

The change to run from the date of filing and not the date of accident is, again, better, but interest should only run from the date that liability is fixed. This not only would comport with the purpose of prejudgment interest, but would encourage plaintiffs to try to get a judgment on liability early in a case which would tend toward resolution.

Finally, the carve out for public entities only illustrates the impropriety of the entire scheme. If this is about getting cases resolved, as has been claimed, then there is no reason that certain plaintiffs should be harmed simply because they allege they were injured by a government entity and private defendants be penalized because they happen not to be government. And what is the justice in assessing prejudgment interest against some defendants in a case, but not others.

The machinations attempting to improve a bill that was bereft of procedural and constitutional legitimacy from the outset can be solved by the Senate rejecting HA2 to SB72 and the governor vetoing HB3360 and HA2 to SB72 if it passes. Instead of trying to improve an ultimately unimprovable bill, a discussion can then be had about implementing procedures that are fair to all litigants and that incentivize just resolutions of civil cases.
