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The problems are only just beginning with the prejudgment interest statute

By Donald P. Eckler
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. Eckler also is the co-host of the Podium and Panel podcast with Daniel Cotter. His views are his own and not those of his firm or its clients.

During the debate on prejudgment interest the focus was on the speed and dark of night procedure that was employed, along with the draconian nature of the initial bill.

As it became apparent the governor would veto House Bill 3360, the focus turned to the still unsupportable level of interest in the subsequent proposals, the incongruity of assessing prejudgment interest on non-economic and future damages, and a host of other issues discussed in this space on Jan. 20, Feb. 17 and March 24. Now that the bill has been signed, courts and counsel will have to deal with the legion of problems of this ill-conceived and poorly worded statute.

The statute states that prejudgment interest "shall accrue on the date the action is filed" and that a defendant has 12 months from the date of filing to make an offer that would cut off prejudgment interest on that amount of any judgment in excess of the offer.

When does the interest begin to run against a defendant who is added after the initial filing? Was it really the intention of the General Assembly to have interest run against defendants not named in the original suit? That would seem unlikely as there is 12 months, unreasonably short as it is in complex cases and cases where the plaintiff is still being treated, for defendants to make an offer to settle, but again the time to make the offer only runs from the date of the "filing of the action." When is an action filed? Can an action have multiple filing dates? For the purposes of this statute, it might.

One can conceive of a situation where a defendant, in a perfectly ordinary situation with no shenanigans being attempted, is added more than one year after the suit is filed. Is it the really the case that such a defendant has no opportunity to make a settlement offer that will cut off or limit prejudgment interest? Such a result would have the opposite of the purported purpose of the statute to encourage settlement.

It can be expected that suits will be filed earlier than they would be under current circumstances such that prejudgment interest begins to run, often while the plaintiff is still in treatment, which gives the defendants no opportunity to make a meaningful settlement offer. Unlike the prompt payment statute (another statute that offered a solution in search of a problem), this statute has no opt out or modification provision available for the parties.

The economist and podcaster Russell Roberts has written that "[w]hen an economist says that incentives matter … what the economist [] means is that holding everything else constant — the amount of fame or shame, glory or humiliation — and increase the monetary reward, and people will do more of it. Lower the

monetary reward while holding those non-monetary factors constant and people will do less of it." Applying that principle, another consequence of this bill is that during the first 12 months of the suit, plaintiffs will have every incentive to delay discovery and limit information to the defendants as much as possible. Motion judges can expect a sharp increase in motions to compel as defendants will be required to get information and plaintiffs will have the opposite of an incentive to provide it.

While one of the expected aspects of gamesmanship that the defense bar pointed out was addressed in tolling prejudgment interest during the time when a case was voluntarily dismissed, the opportunities for manipulation of this statute by creative and motivated plaintiffs' counsel to increase the value of their case abound.

Turning back to procedural issues left unaddressed by the statute, what about the naming of respondents in discovery? The suit is filed, but such respondents are not parties. Does prejudgment interest run against them before they are converted to defendants? Or does the interest only run against them once they are converted and then they have 12 months within which to make an offer? That would be the logical result, but the text of the statute does not seem to provide an answer.

And the statute only speaks of defendants, not third-party defendants. What if a third-party defendant, as is their right under the Joint Tortfeasor Contribution Act, makes an offer directly to the plaintiff to settle within the 12 months, such offer is rejected, the matter proceeds to verdict, fault is apportioned to the defendants and the third-party defendant, can the third-party defendant seek to reduce the amount of prejudgment interest assessed against it?

Courts will be put in the unenviable position of trying to sort through the myriad problems with this statute. Prejudgment interest was a bad idea when proposed and it did not get much better through the legislative "process."
