WALKER WILCOX

Client Alert

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Illinois Governor Vetoes First Attempt at Bill that Would Allow Prejudgment Interest in All Personal Injury Cases: Legislature Passes New Bill For Governor's Consideration

Introduction

This is an update to our client alert from February 2021 regarding the proposed prejudgment interest bill in Illinois for all personal injury cases.

On March 25, 2021, Governor Pritzker vetoed HB 3360, which allowed plaintiffs to recover prejudgment interest at a rate of 9% per annum on *all* damages related to personal injuries or wrongful death. In a letter explaining the decision to veto, the governor stated that he believed that the bill was too burdensome on hospitals and healthcare providers since most Illinois hospitals are self-insured. The governor expressed two main concerns with provisions in the bill: (1) that the proposed 9% interest rate is higher than the rate in states with similar bills, and so high beyond market conditions that it could significantly impact hospitals and health care providers; and (2) that the proposed bill allowed for interest to be calculated on non-economic damages like pain and suffering and loss of normal life, which also differed from states with similar bills that only allow interest on quantifiable compensatory damages (*e.g.* medical bills).

However, the governor's veto letter also expressed a willingness to approve prejudgment interest legislation if problems with the current bill are addressed, and if the bill provides more robust protections for health care providers. On the same day as the veto, the Illinois House and Senate passed SB 72, which addresses some, but not all, of the governor's concerns.

Differences Between the New Bill and the Previous Bill

To address the governor's first concern, the new bill's proposed interest rate would be 6% per annum (instead of 9%). To address the second concern, the new bill proposes that plaintiffs can recover prejudgment interest on all damages resulting from personal injuries and wrongful death, *except* for punitive damages, sanctions, statutory attorney's fees, and statutory costs delineated in the court's judgment.

There are also additional changes, some of which are favorable to potential defendants. First, prejudgment interest would begin to accrue on the date an action is filed, rather than when the

defendant receives notice of the injury. This would limit the amount of time that a plaintiff is entitled to prejudgment interest. To further limit exposure to prejudgment interest, the new bill imposes a limit on the accrual of prejudgment interest to no longer than five years.

The new bill also tolls prejudgment interest from the time a plaintiff voluntarily dismisses an action until the time of any refiling. This change was likely introduced to address the concern from opponents of the bill that plaintiffs would purposely delay lawsuits in order to take advantage of the accrual of prejudgment interest. It should be noted that the new proposed bill does not account for any kind of delay by the plaintiff other than voluntary dismissal. Thus, prejudgment interest would presumably continue to accrue if there is any other type of delay, even if the delay is caused by the plaintiff. Other examples of plaintiff delay could include untimely service, adding a new party or new claim late in the litigation, refusing to start discovery while motions on the pleadings are pending, or filing a medical malpractice lawsuit without the required Section 2-622 expert consultant report, and taking advantage of the 90-day extension to file such a report.

Lastly, the new bill's language includes a formula to be used in determining prejudgment interest, which functions similarly to how an offer of judgment works with respect to attorneys' fees under the federal rules of civil procedure. If the court's ultimate judgment is greater than the last written settlement offer made by the defendant, and if that offer is not accepted (or is rejected) by the plaintiff within ninety days after the date of the offer, prejudgment interest will be added to the judgement at a rate of 6%. That 6% per year is calculated off of the figure you get by subtracting the amount of the highest written settlement offer from the amount of the judgment (excluding punitive damages, sanctions, statutory attorney's fees, and statutory costs). On the other hand, if the court's judgment is equal to or less than the highest written settlement offer, and it is not accepted by the plaintiff within ninety days after the date of the offer, no prejudgment interest will be added to the judgment. Finally, the prejudgment interest rule will not apply to the state, local government units, school and community college districts, or any other government entity.

Statements from Proponents of the Bill

Proponents believe that this legislation will ensure speedier settlements and discourage delay tactics by defendants. The Illinois Senate President, Senator Don Harmon, stated that the bill will encourage settlements, which Senator Harmon believes are needed since plaintiffs often face loss of income while putting their own funds into a case while waiting to get to trial and verdict. Similarly, the Illinois Trial Lawyers Association believes that the bill will streamline or avoid prolonged legal disputes, which they argue large corporate defendants will often wage to wear plaintiffs down and discourage injury claims.

Statements from Opponents of the Bill

Although SB 72 provides some significant changes from HB 3360, including addressing Governor Pritzker's request to craft a bill that is similar to states with already-enacted prejudgment interest laws, it does not address all of the governor's concerns. For example, the bill still does not provide many safeguards for self-insured hospitals and health care providers who would be responsible for paying prejudgment interest. Thus, litigation costs would still increase dramatically for manufacturers, hospitals, and healthcare providers that have been on

the front lines during the pandemic. The President of the Illinois State Medical Society, Robert Wanton, said in a statement that this legislation has the potential to drive up the cost of medical liability insurance, force doctors away from Illinois, and increase the cost of health care.

As drafted, the bill would also allow prejudgment interest to accrue on non-economic damages (*e.g.* pain and suffering and loss of normal life) and on future damages. This was something that Governor Pritzker explicitly asked the legislature to address, stating in his veto letter that states with similar prejudgment interest laws excluded such damages from calculation. The Governor's likely rational is to avoid allowing prejudgment interest on amounts that are not fixed or which cannot readily be determined, particularly when the law will affect individuals that, in the governor's words, "have dedicated their lives over the past year to combating a deadly virus [and] are in need of support, I cannot in good conscience sign a bill that would place these individuals and entities in further financial distress." Although the new bill does exclude prejudgment interest on some amounts (punitive damages, sanctions, and statutory fees and costs), it also ignores the governor's instructions, and would allow prejudgment interest on these non-excluded categories of damages, which could result in incredibly high judgments.

Although the bill does not address all of Governor Pritzker's concerns, he is still expected to sign this version. If passed, even with the changes from the old bill, we expect that the new law will substantially increase damages awarded in medical liability cases. Illinois is already a challenging and expensive place for physicians to practice, and physicians who are able may decide that they no longer want to work in Illinois and take their business elsewhere. Insurance premiums would likely increase for doctors who choose to stay, given that the risk of higher verdicts, even with the new changes to the bill, could significantly increase potential exposure.

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