



FLORIDA LEGISLATURE CONSIDERS BILLS ALLOWING PREJUDGMENT INTEREST FOR ECONOMIC AND NON-ECONOMIC DAMAGES

April 11, 2017

Under English common law, prejudgment interest was permitted for damages that were readily ascertainable in amount, or “liquidated damages,” but not for those damages that were difficult to quantify, or “unliquidated.” Only limited changes to that general rule have ever been adopted by Florida courts. However, the Florida Legislature is presently considering two separate bills which would allow prejudgment interest to be awarded to plaintiffs in various contexts in civil actions.

The Senate’s version of the bill, SB 334, allows prejudgment interest to be awarded only for economic damages. SB 334 (amended from its original form, which also allowed prejudgment interest for non-economic damages and attorneys’ fees) passed through the Senate Rules Committee by a vote of 10-1. The bill is now awaiting a vote by the full Senate. A similar bill, House Bill 459 (HB 459), allows for prejudgment interest on economic and noneconomic damages; attorneys’ fees; and costs; and is moving forward in the lower chamber with one more committee to consider it before it can be voted on by the full House.

Judgment interest is set by Florida’s Chief Financial Officer each quarter based on the Federal Reserve Bank’s discount rate, per §55.03, Fla. Stat. Judgment interest currently stands at 5.05%. See <http://www.myfloridacfo.com/Division/AA/Vendors/>.

If signed into law, these measures would establish that prejudgment interest begins to run on the date the expense was paid or the economic benefit was lost, and in the case of non-economic damages, on the date of the pre-suit demand or the filing of the lawsuit. Attorneys’ fees and costs would bear interest from the date the entitlement to fees or costs was fixed. Either bill, if passed, would be effective beginning July 1, 2017. Judgment interest would attach to all pending or new claims, with interest beginning on July 1, 2017, for all damages then existing.

Either of these bills, if passed, stand to significantly increase the size of judgments paid in the State of Florida. While this may be said to encourage settlement, it will also raise the costs of resolving cases through settlement as well, as plaintiffs will include this expanded pre-judgment interest as another element in their ever-increasing settlement demands.

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David C. Bibb



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ORLANDO, FL



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1 A bill to be entitled
 2 An act relating to prejudgment interest; creating s.
 3 55.035, F.S.; requiring a court to include interest in
 4 a final judgment in an action from which a plaintiff
 5 recovers economic or noneconomic damages; specifying
 6 the dates from which interest accrues; requiring a
 7 court to include interest on attorney fees and costs
 8 in the final judgment, if recovered; specifying the
 9 rate at which interest accrues; providing for
 10 applicability; providing an effective date.

11
 12 Be It Enacted by the Legislature of the State of Florida:

13
 14 Section 1. Section 55.035, Florida Statutes, is created to
 15 read:

16 55.035 Prejudgment interest.—

17 (1) In any action in which a plaintiff recovers economic
 18 or noneconomic damages, the court shall include interest on each
 19 component of damages in the final judgment.

20 (a) For economic damages, interest accrues from the date
 21 of the loss of an economic benefit to the plaintiff.

22 (b) For noneconomic damages, interest accrues from the
 23 date the defendant received notice of a claim from the
 24 plaintiff.

25 (2) If the plaintiff recovers attorney fees or costs, the

26 | court shall include in the final judgment interest on such fees
27 | or costs beginning on the date the entitlement to attorney fees
28 | is fixed through agreement, arbitration award, or court
29 | determination.

30 | (3) The rate of interest applicable to this section is the
31 | rate established pursuant to s. 55.03.

32 | Section 2. This act does not affect the accrual of
33 | prejudgment interest before the effective date of this act, if
34 | otherwise authorized by statute or common law.

35 | Section 3. This act shall take effect July 1, 2017, and
36 | shall apply to causes of action that accrue on or after that
37 | date.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 334

INTRODUCER: Senator Steube

SUBJECT: Prejudgment Interest

DATE: February 20, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 334 expands the causes of action for which a prevailing plaintiff may recover prejudgment interest. Under current law, a person generally may not recover prejudgment interest on damages in personal injury and wrongful death actions. Under the bill, a court must include prejudgment interest in a final judgment awarding damages in any civil action, including personal injury and wrongful death claims. As a result, the bill applies prejudgment interest to damage awards for items such as medical bills, loss of past wages, funeral expenses, physical pain and suffering, mental anguish, and the loss of enjoyment of life.

Interest accrues on economic damages from the date of the loss of the economic benefit. Similarly, if noneconomic damages are awarded, the court must include prejudgment interest on each component of damages from the date that the plaintiff made a claim.

If a plaintiff recovers attorney fees or costs, the court must include prejudgment interest in the final judgment calculated from the first day of the month immediately following the month when the fees or costs were paid.

The rate of interest that applies to awards of prejudgment interest is the rate set by the Chief Financial Officer pursuant to statute. The rate is currently 4.97 percent per annum.

The bill applies to pending cases and new cases begun after July 1, 2017. However, in pending and new cases, the interest may not begin to accrue before July 1, 2017, regardless of when the plaintiff's losses were incurred, the claim was made, or fees or costs were paid.

II. Present Situation:

Civil justice is guided by the principle that an injured person should be compensated and restored to the same position that he or she was in before the injury occurred. This compensation is awarded to a plaintiff in the form of damages. Over the centuries, several forms of damages have

evolved with varying degrees of acceptance. Prejudgment interest is one form of damages that was once rejected in most American jurisdictions but has now gained acceptance in a growing number of states.^{1,2}

Prejudgment Interest

Prejudgment interest is the interest on a judgment which is calculated from the date of the injury or loss until a final judgment is entered for the plaintiff. In contrast, post-judgment interest is interest on a judgment which is calculated from the date of the final judgment until the plaintiff collects the award from the defendant. Prejudgment interest is an additional award that compensates a plaintiff for the loss of the use of his or her money from the time the claim accrues until the final judgment.³ Post-judgment interest is designed to encourage the prompt payment of damages and to compensate for the inability to use the award while an unsuccessful appeal is resolved.

Under English common law, prejudgment interest was permitted for claims that were “liquidated” but not for claims that were “unliquidated.” A liquidated claim is a claim for an amount that can be determined or measured back to a fixed point in time. It is not speculative or intangible. An unliquidated claim, in contrast, is one that is based on intangible factors and is generally disputed until a jury determines the amount. In personal injury law, examples of unliquidated damages include damages for pain and suffering, mental anguish, loss of enjoyment of life, and permanent injury.

In assessing prejudgment interest, a claim becomes liquidated when a verdict has the effect of fixing damages as of a prior date.⁴

Florida law generally prohibits the award of prejudgment interest for plaintiffs in personal injury⁵ and wrongful death claims, but does allow it in some tort areas.⁶ The theory for denying prejudgment interest is that damages in personal injury cases are too speculative to liquidate

¹ Historically, many religious groups believed that charging interest was immoral and a form of usury prohibited by religious law. Therefore, interest was awarded sparingly and in a limited number of cases, but only at the discretion of the jury. By the 1800s, this prohibition began to recede and American courts awarded interest on a small group of claims, but only when the amount of the claim was certain and when it was payable on a specific date. See Aric Jarrett, *Comment: Full Compensation, Not Overcompensation: Rethinking Prejudgment Interest Offsets in Washington*, 30 SEATTLE U. L. REV. 703, 707 (Spring, 2007).

² Email from Heather Morton, Program Principal, National Conference of State Legislatures (Feb. 9, 2017) (on file with the Senate Committee on Judiciary) and Florida Justice Association, *Prejudgment Interest in Tort Cases, A Question of Fairness and Efficacy*, 12 (Feb. 2017) (on file with the Senate Committee on Judiciary). The reports are not in complete agreement, perhaps because different research methodologies or search terms were employed. Both surveys agreed that Alabama, Arizona, Arkansas, Florida, and Kansas do not currently have statutes permitting prejudgment interest. The surveys agreed on some specific states that do allow prejudgment interest. Beyond that point, the surveys often disagreed as to which additional states do not permit prejudgment interest. Perhaps some states do not explicitly provide for pre-judgment interest by statute but may permit limited forms of pre-judgment interest awards through case law.

³ 44B AM. JUR. 2D INTEREST AND USURY s. 39 (2016).

⁴ *Argonaut Insurance Company, et al., v. May Plumbing Company, et al.*, 474 So. 2d 212 (Fla. 1985).

⁵ *Parker v. Brinson Construction Company and Florida Industrial Commission*, 78 So. 2d 873 (Fla. 1955).

⁶ *Alvarado v. Rice*, 614 So. 2d 498, 500 (Fla. 1993). The Court held that a claimant in a personal injury action is entitled to prejudgment interest on past medical expenses when a trial court finds that the claimant had made actual, out-of-pocket payments on the medical bills at a date before the entry of judgment.

before a final judgment is rendered. An exception to that rule occurs when a plaintiff can establish that he or she suffered the loss of a vested property right, such as a negligently destroyed building.⁷ Prejudgment interest has historically been allowed in this state for actions based on contract and the interest accrues from the date the debt is due.⁸

Two theories of prejudgment interest have developed over time. Under the “loss theory,” prejudgment interest is not awarded to penalize the losing party but to compensate the claimant for losing the use of the money between the date he or she was entitled to it and the date of the judgment.⁹ The Florida Supreme Court follows this theory wherein the loss, itself, is the wrongful deprivation. The second theory, which is not followed in Florida, is the “penalty theory” where prejudgment interest is awarded to penalize the defendant.¹⁰

Proponents who seek prejudgment interest assert that it promotes fairness by allowing a plaintiff to be fully compensated for his or her injury, including the time span that litigation took place, particularly if the litigation is protracted. Opponents assert that prejudgment interest provides over-compensation and encourages premature settlements.

Economic Damages

Economic damages are damages that can be computed from records or documents. They generally include past and future medical bills, loss of past wages and future earning capacity, funeral expenses, and damage to someone’s personal or real property.¹¹

Noneconomic Damages

Non-economic damages are the subjective intangible items that cannot be measured with certainty. Those items generally include physical pain and suffering, mental anguish, and the loss of enjoyment of life. Unlike economic damages, which are defined in chapter 768, pertaining to negligence, noneconomic damages are not defined there.¹²

Attorney Fees

The Florida Bar regulates fees that an attorney may charge and collect.¹³ In addition to setting out factors that should be considered when determining what a reasonable fee is, the bar’s Rules of Professional Conduct also establish the particulars that must be contained in a contingency fee agreement as well as the percentages that may be charged. Contingency fee agreements are generally used in personal injury cases. If the plaintiff prevails, the plaintiff’s attorney receives a

⁷ *Amerace Corporation v. Stallings*, 823 So. 2d 110 (Fla. 2002).

⁸ *Lumbermens Mut. Casualty Co. v. Percefull*, 653 So. 2d 389 (Fla. 1995).

⁹ *Kearney v. Kearney*, 129 So. 3d 381, 391 (Fla. 1st DCA 2013) rehearing denied January 17, 2014.

¹⁰ *Bosem v. Musa Holdings, Inc.* 46 So. 3d 42, 45 (Fla. 2010).

¹¹ See s. 768.81(1)(b), F.S., for a more detailed list of economic damages.

¹² Noneconomic damages are defined in ch. 766, Medical Malpractice and Related Matters, as “nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses to the extent the claimant is entitled to recover such damages under general law, . . .” Section 766.202, F.S.

¹³ Rules Regulating the Florida Bar, Rules of Professional Conduct, Rule 4-1.5.

predetermined percentage of the fees plus litigation costs, but if the plaintiff loses, the attorney does not recover fees and costs.

Costs

If a plaintiff prevails in an action, he or she is entitled to recover some of the costs involved in the litigation. Pursuant to the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, the burden of proof is on the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case when the action was taken. The guidelines are advisory only, and the taxation of costs decision is within the broad discretion of the court.¹⁴

III. Effect of Proposed Changes:

The bill significantly expands the causes of actions for which a prevailing plaintiff may recover prejudgment interest. Current law generally prohibits the award of prejudgment interest for damages in personal injury and wrongful death claims. This bill permits the recovery of prejudgment interest for damages in any civil action, including personal injury and wrongful death claims. This bill also permits a prevailing plaintiff to recover prejudgment interest for economic or noneconomic damages, attorney fees, or costs and a court is required to include the amount of interest in the final judgment.

Interest for Economic and Noneconomic Damages

The bill requires a court, in its final order in which a plaintiff recovers economic or noneconomic damages, to include prejudgment interest on each component of damages. When awarding interest for economic damages, the interest accrues from the date of the loss of the economic benefit. When awarding interest for noneconomic damages, the interest accrues from the date of the plaintiff's claim.

Interest on Attorney Fees or Costs

When a plaintiff recovers attorney fees or costs, the court must also include the interest on the fees or costs in its final judgment. The interest is computed from the first day of the month immediately after the month in which the fees or costs were paid.¹⁵

¹⁴ Fla. R. Civ. P. Taxation of Costs. The costs that should be taxed generally include costs associated with certain depositions, documents and exhibits, expert witnesses, witnesses, court reporting costs other than for depositions, and reasonable charges incurred for requiring special magistrates, guardians ad litem, and attorneys ad litem. Litigation costs that may be taxed as costs include mediation fees and expenses, reasonable travel expenses, and electronic discovery expenses. Litigation costs that should not be taxed as costs include the cost of long distance telephone calls with witnesses, any expenses relating to consulting but non-testifying experts, cost incurred in connection with any matter which was not reasonably calculated to lead to the discovery of admissible evidence, the travel time of attorneys and experts, travel expenses of attorneys, and the cost of privilege review of documents, including electronically stored information. See the guidelines for more specific criteria, available at [https://www.floridabar.org/TFB/TFBResources.nsf/0/10C69DF6FF15185085256B29004BF823/\\$FILE/Civil.pdf](https://www.floridabar.org/TFB/TFBResources.nsf/0/10C69DF6FF15185085256B29004BF823/$FILE/Civil.pdf) at 347-349.

¹⁵ From a practical standpoint, if a plaintiff had numerous medical visits at various facilities that stretched over an extended period of time, the process for calculating those expenses and varying interest rates could become complicated and lengthy.

The applicable rate of interest is established by the Chief Financial Officer pursuant to s. 55.03, F.S. The Chief Financial Officer is required to establish the rate of interest payable on judgments or decrees each quarter using a formula prescribed in statute. The Chief Financial Officer is then responsible for communicating that interest rate to the clerk of courts and chief judge of each judicial circuit for the upcoming quarter. The current interest rate is 4.97 percent.¹⁶ The bill specifies that interest may not accrue on prejudgment interest awarded in the final judgment.

The bill applies to pending cases and new cases begun after July 1, 2017, the effective date of the bill. However, for pending and new cases, the interest may not begin to accrue before July 1, 2017, regardless of when the plaintiff's losses were incurred, the claim was made, or fees or costs were paid.

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Plaintiffs who are successful in their claims and entitled to prejudgment interest will benefit financially from this bill by awards of receive prejudgment interest. Defendants may have an incentive to settle lawsuits to avoid the accrual of prejudgment interest.

C. Government Sector Impact:

The Office of the State Courts Administrator has not yet provided a Judicial Impact Statement for SB 334. However, in an analysis of a similar bill from 2015, the Office of the State Courts Administrator noted that the fiscal impact of the legislation could not be accurately determined due to the unavailability of data needed to establish the effects on

¹⁶ Division of Accounting and Auditing, Office of the Chief Financial Officer, *Judgment on Interest Rates*, <http://www.myfloridacfo.com/division/AA/Vendors/> (Last visited Feb. 6, 2017).

judicial time and workload resulting from the bill's provisions.¹⁷ However, it appears unlikely that the bill will result in significant workload to the court system.

VI. Technical Deficiencies:

Lines 22-23 provide that interest for noneconomic damages accrues from “the date of the claim” made by the plaintiffs. Perhaps this point in time could be more clearly defined as being the date of the injury, the date of a demand letter to the defendant, or the date of the filing of a lawsuit.

Lines 29-30 state that “Interest may not accrue on the prejudgment interest awarded in the final judgment.” If this means that no post-judgment interest may accrue on the prejudgment interest, perhaps it could be stated more specifically.

Lines 31-36 might prohibit prejudgment interest from accruing on common law claims where it is currently permitted. As such, the Legislature may wish to clarify that the bill does not restrict the availability of prejudgment interest that is currently available by statute or common law.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 55.035, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁷ Office of the State Courts Administrator, *2015 Judicial Impact Statement for SB 794* (March 31, 2015) (on file with the Senate Committee on Judiciary).

By the Committees on Rules; and Judiciary; and Senator Steube

595-03065-17

2017334c2

1 A bill to be entitled

2 An act relating to prejudgment interest; creating s.
3 55.035, F.S.; requiring a court to include interest on
4 economic damages and costs in the final judgment of a
5 negligence action as a result of a personal injury;
6 specifying the date from which interest accrues;
7 prescribing the applicable interest rate; providing
8 applicability; providing an effective date.

9
10 Be It Enacted by the Legislature of the State of Florida:

11
12 Section 1. Section 55.035, Florida Statutes, is created to
13 read:

14 55.035 Prejudgment interest.—In a negligence action in
15 which a plaintiff recovers economic damages as the result of a
16 personal injury, the court shall include in the final judgment
17 interest on each component of economic damages. Such interest
18 accrues from the date of the loss of an economic benefit or
19 payment made by the plaintiff. If the plaintiff recovers costs,
20 the court shall include in the final judgment interest on such
21 costs beginning on the first day of the month immediately
22 following the month in which costs were paid. The rate of
23 interest applicable to this section is the rate established
24 pursuant to s. 55.03.

25 Section 2. This act applies to causes of action that accrue
26 on or after July 1, 2017.

27 Section 3. This act shall take effect July 1, 2017.