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PREJUDGMENT INTEREST IN PERSONAL INJURY CLAIMS: A PROPOSAL FOR THE ILLINOIS GENERAL ASSEMBLY

THE ILLUSTRATIVE CASE: *SMITH V. FAST*¹

On January 1, 1980, Mr. Smith ("Smith"), a resident of Lake County, Illinois, was struck by a car while he was crossing the street at the intersection of Jackson and Dearborn Streets, in Cook County, Illinois. The car driven by Mr. Fast ("Fast"), a resident of Jefferson County in Southern Illinois, was travelling in excess of 55 miles per hour.² As a result of the accident, Mr. Smith suffered two broken legs. An ambulance transported Smith to Cook County Hospital where he was admitted for emergency treatment.

On February 1, 1980, Smith's attorney, Mr. Slick ("Slick"), gave written notice of the accident to Thrifty Insurance ("Thrifty"), Fast's insurance company. In the notice, Smith, through Slick, made a settlement demand in the amount of \$550,000. Smith sought \$50,000 in compensatory damages for medical expenses, lost wages and pain and suffering and \$500,000 in punitive damages for Fast's alleged willful, wanton, and reckless behavior. Two weeks later, Thrifty rejected Smith's demand and made a counter-offer in the amount of \$5,000. Negotiations between Smith and Thrifty continued, resulting in Thrifty increasing its settlement offer to \$10,000.

On January 1, 1981, Smith filed suit against Fast in Cook County.³ Soon thereafter, the parties began the discovery process.⁴

1. "The Illustrative Case," *Smith v. Fast*, is completely fictitious and has been created to illustrate the application of a prejudgment interest statute to a personal injury action. In addition, the use of damage figures in "The Illustrative Case" will provide a tangible view of the effect that a prejudgment interest statute would have on the parties in a personal injury action.

2. The posted speed limit on Dearborn Street was 25 miles per hour.

3. Smith originally preferred not to file suit in Cook County because he realized that it could take years for the case to get to trial and, if he was victorious, to collect his damages. See *infra* note 19 for data on the Cook County court system backlog. However, according to ILL. REV. STAT. ch. 110, para. 2-101 (1989), "every action must be commenced in the county of residence of any defendant" or "in the county in which the . . . cause of action arose." Therefore, Smith's only alternative was to file suit in Jefferson County, Fast's place of residence. Smith chose not to file in Jefferson County for the following two reasons. First, it would be a burden for him to travel to Southern Illinois. Second, he was afraid of local prejudice in favor of Fast which might interfere with his obtaining a fair trial.

Smith's venue problem is not unique. As court backlogs continue to increase in Illinois, an increase in forum shopping may result. Plaintiffs realize that court congestion means delay. In order for injured plaintiffs to recover

During discovery, Fast admitted that he had been drinking, but claimed that he was not intoxicated. Fast claimed that he had a green light and that Smith was crossing the street against the pedestrian light. Smith claimed that the traffic light at the intersection was green and that the pedestrian sign indicated "walk."

Additionally, Smith found a witness who would testify that Fast was travelling well over the speed limit immediately prior to striking Smith. Settlement negotiations continued throughout discovery, but to no avail. Fast maintained that Smith was wholly or partially at fault because Fast had the green light. Eventually, a jury trial was set for January 1, 1987. After trial, the court entered judgment in favor of Smith in the amount of \$600,000.

INTRODUCTION

The basic tenet of tort law is to compensate those who have been injured due to the wrongful acts of others by awarding damages.⁵ The goal is to make an injured party "whole."⁶ However, because of the delay between the date of a plaintiff's injury and the court's judgment, a plaintiff loses the "use of money" he would have had absent the defendant's negligence. Thus, a tort victim is not fully compensated and the "goal"⁷ of our tort system is not met. In response to this shortcoming, the notion of awarding prejudgment interest⁸ during the delay between injury and court judgment

their damages as soon as possible, they may "shop around" for a county where delay is at a minimum. Allowing prejudgment interest in Illinois would help eliminate forum shopping because the injured plaintiff would be able to recover interest on his judgment during that delay irrespective of what the venue was.

4. The discovery process in this case was fairly standard for a personal injury case. Both parties answered written interrogatories and produced documents relevant to the accident. Included in those documents were police reports, medical bills, wage loss verification, doctor's reports, and records of other expenses. Both parties deposed each other. In addition, Fast deposed Smith's witness to the accident.

5. RESTATEMENT (SECOND) OF TORTS § 901(a) (1979). See also *Myers v. Arnold*, 403 N.E.2d 316, 321 (Ill. 1980) (acknowledging that the purpose of tort law is to restore the injured plaintiff to the position he occupied prior to the tort). See generally CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES (1935) for additional information regarding the fundamental goals of tort law.

6. RESTATEMENT (SECOND) OF TORTS § 901(a) (1979).

7. *Id.*

8. Prejudgment interest is the interest on a judgment calculated from the time of the plaintiff's injury to the date final judgment is rendered. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.5 (1973). Prejudgment interest is often referred to as an element of "damages" rather than "interest." *Id.*

Prejudgment interest has many variations. The most common manner in which it functions is that if a plaintiff makes a settlement offer which the defendant does not accept within a specified period of time, and the plaintiff obtains a more favorable judgment at trial, the judgment bears interest from a statutorily pre-determined date (usually either the date the complaint was filed or the date of the injury) until the judgment is satisfied. See, e.g., CAL. CIV.

arose.

However, Illinois courts have consistently held there is no right to prejudgment interest absent a statutory provision or express agreement between the parties.⁹ The Illinois General Assembly currently has two bills pending before it¹⁰ which would allow a

CODE PROC. (West 1984) § 3291; MINN. STAT. ANN. § 549.09 (1988). See *infra* note 64 for a complete list of states which currently have statutes which allow recovery of prejudgment interest.

9. Northern Trust Co. v. County of Cook, 481 N.E.2d 957, 962 (Ill. 1985) (vacating portion of judgment awarding prejudgment interest and stating, "It is clear that Illinois statutes do not authorize prejudgment interest in tort cases." (emphasis added)). See also Gardner v. Geraghty, 423 N.E.2d 1321, 1324 (Ill. 1981) ("[a]bsent any statutory authority, the recovery of prejudgment interest in this state cannot be sustained . . .").

10. House Bill 1385 and Senate Bill 1100 are currently pending before the Illinois General Assembly. On April 3, 1991, sponsor Michael Madigan introduced House Bill 1385. This bill seeks to amend ILL. REV. STAT. ch. 110, para. 2-1303 (1989) to provide that "judgments recovered in any court in actions filed after the effective date of this amendatory Act shall draw interest from the effective date the complaint is filed to the date the judgment is satisfied. The interest shall be determined in the manner prescribed in subsection (a)." H.B. 1385, 87th Leg., 1st Sess., 1991. See *infra* notes 112-115 and accompanying text for a discussion of other instances when interest may begin to accrue.

On April 5, 1991, the bill was referred to the House Judiciary I Committee. H.B. 1385, 87th Leg., 1st Sess., 1991. It was reported on favorably as amended on April 25, 1991 by a vote of 6-2-1. *Id.* The Committee's amendment provided that if a bona fide offer is made thirty days prior to the commencement of the trial and if the plaintiff fails to obtain a judgment which is greater than the defendant's offer, then the plaintiff will forfeit the prejudgment interest. *Prejudgment Interest: Hearing on H.B. 1385 Before the House Judiciary I Committee*, 87th Legis., 1st Sess. (1991). On May 24, 1991, amended House Bill 1385 was sent to interim study. *Id.*

On April 12, 1991, Senator Phil Rock introduced S.B. 1100 to the Senate floor. S.B. 1100, 87th Leg., 1st Sess., 1991. This bill was worded exactly the same as House Bill 1385 was on April 3, 1991. *Id.* On April 15, 1991, the bill was sent to the Senate Committee on Judiciary I. There is currently no other information available on it because the hearing has not been transcribed as of the date of this Note.

In 1983, the General Assembly proposed a prejudgment interest statute similar to H.B. 1385. H.B. 713, 83rd Leg., 1st Sess., 1983; and S.B. 87, 83rd Leg., 1st Sess., 1983. One basic difference between the 1983 bills and the current bills is that the earlier bills called for interest to run from the accrual of the cause of action, rather than the date the complaint was filed. Another difference between the 1983 bills and the current bills is that the 1983 bills would also have repealed ILL. REV. STAT. ch. 110, para. 12-109 (1989) (providing that a plaintiff in a malicious prosecution action arising out of a medical malpractice case need not plead or prove special injuries) and ILL. REV. STAT. ch. 17, para. 6402 (1989) (providing for interest on money withheld by an unreasonable and vexatious delay of payment.). *Id.*

However, House Bill 713 and its counterpart, Senate Bill 87, failed to pass. It is not clear why these bills failed, especially in light of the fact that at the same time, a number of other states' prejudgment interest statutes were passed. See *infra* note 64 for a list of states which have a prejudgment interest statute. The Illinois insurance lobby probably contributed to the bills' failure. *Prejudgment Interest: Hearing on H.B. 713 Before the House Judiciary I Committee*, 83rd Legis., 1st Sess. (1983) [hereinafter 1983 *Hearings*]. Members of the insurance industry threatened that if a prejudgment interest statute were enacted,

plaintiff to recover prejudgment interest in personal injury¹¹ actions. In recent years, the availability of prejudgment interest in personal injury actions has been questioned repeatedly throughout the country. This issue has been especially controversial in Illinois¹² in recent years and, is the subject of heated debates in the Illinois General Assembly, the legal community, and the insurance industry.

Proponents of prejudgment interest argue that without prejudgment interest, personal injury victims are not whole. In order to make a victim whole, compensation should be allowed from the time of injury until final judgment is entered in the plaintiff's favor.¹³ Proponents believe that personal injury defendants¹⁴ prefer to delay efforts to settle out of court in order to earn interest on the plaintiff's potential damage award.¹⁵ By so doing, a defendant can reduce his losses by accumulating the interest earned during this period of delay.¹⁶ Proponents of prejudgment interest base their arguments on three major premises: 1) the idea of "fairness" to the plaintiff,¹⁷ 2) the theory that the defendant is unjustly en-

insurance premiums would necessarily rise in order to offset any "loss" that the industry would suffer. *Id.* Furthermore, at committee hearings, only a few speakers were present to support prejudgment interest in contrast to the large number of those who opposed the statute. *Id.* It seems that the sheer quantity, rather than quality, of speeches at these committee hearings had a great impact on preventing the passage of House Bill 713 and Senate Bill 87 in 1983.

11. The term personal injury, as used in this Note, includes wrongful death claims, medical malpractice claims, and products liability claims.

12. To gain an appreciation of the conflicting views on the idea of prejudgment interest in Illinois, especially in light of House Bill 713 and Senate Bill 87, compare, e.g., Thomas F. Londrigan, *The Case for Prejudgment Interest*, 72 ILL. B.J. 62 (1983) with Lawrence R. Smith, *The Case Against Prejudgment Interest*, 72 ILL. B.J. 63 (1983).

13. For a more detailed discussion of why personal injury victims should be fully compensated from the time of injury until final judgment, see *infra* notes 77-78 and accompanying text.

14. A majority of tortious injuries and deaths in today's society are caused by a corporation that may be self-insured or by an individual that is covered by insurance. Francis H. Monek, *Court Delay: Some Causes and Remedies*, 27 TRIAL LAW. GUIDE 153, 157 (1983).

15. Generally, when an insurance company is notified that a claim will be made against the policy of one of its insureds, the company appoints legal counsel of its choice to handle the case. Although the law is clear that attorneys for the defense represent the insured, not the insurer, the insurance company still must approve any settlement before payment is remitted. Rogers v. Robson, Masters, Ryan, Brummund & Belom, 392 N.E.2d 1365 (Ill. 1979). As a result, insurance companies frequently attempt to delay settlement by refusing to approve reasonable demands from a plaintiff. By delaying settlement and trial, corporations and insurance companies are able to invest a plaintiff's money at high-yielding interest rates. Monek, *supra* note 14, at 157. By doing so, when a judgment is finally entered in favor of a plaintiff, the insurers are able to minimize their losses. *Id.*

16. See Monek, *supra* note 14, at 157.

17. See, e.g., Londrigan, *supra* note 12, at 64; James D. Wilson, et al., *Prejudgment Interest in Personal Injury, Wrongful Death and Other Actions*, 30

riched by the retention of the money,¹⁸ and 3) the fact that prejudgment interest will serve to ease the burden on already over-crowded court systems.¹⁹

Opponents of prejudgment interest, on the other hand, argue that injured plaintiffs do not have a right to collect interest on a claim until the validity of that claim is finally adjudicated in court.²⁰ Opponents further argue that prejudgment interest overcompensates plaintiffs while penalizing defendants.²¹ They also assert that prejudgment interest statutes are unconstitutional,²² and that the net effect of such statutes will ultimately burden the public with higher insurance rates.²³ Moreover, the

TRIAL LAW. GUIDE 105, 109 (1986). See *infra* notes 77-89 and accompanying text for a discussion of the "fairness" argument.

18. See, e.g., Mitzi H. Martin, *Prejudgment Interest for Personal Injury Litigants: A Summons for Indiana Lawmakers*, 17 IND. L. REV. 1095, 1104 (1984); Wilson, *supra* note 17, at 109. See *infra* notes 90-98 and accompanying text for a discussion regarding unjust enrichment.

19. See, e.g., Monek, *supra* note 14, at 153; George L. Priest, *Issues in Civil Procedure: Advancing the Dialogue - A Symposium: Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989). The Cook County court system in Illinois is the largest court system in the United States. Monek, *supra* note 14, at 153. Within this system is the Law Division, which handles all personal injury claims, as well as any other lawsuit seeking money damages. As of January 1, 1990, there were 67,776 personal injury lawsuits pending in the Law Division, broken down in the following manner:

<u>Number of years since filing</u>	<u>Number pending</u>
Less than 1 year	15,974
1-2 years	16,583
2-3 years	12,426
4-6 years	21,113
7-9 years	1,564
10-13 years	116

William Grady & Charles Mount, *Personal Injury Suits Can Drag on a Decade*, CHI. TRIB., March 25, 1990, at 1. Despite the fact that the American Bar Association says that most civil lawsuits, including those for personal injury, should be resolved in two years, delays continue. *Id.*

Recent statistics indicate that in 1983, the average time for personal injury lawsuits to reach trial was 35.2 months (2.9 years). *Id.* By 1985, that time had increased to 51.9 months (4.3 years), and by 1987, it was 66.3 months (5.5 years). *Id.* As of 1988, the average time it takes a personal injury suit to reach trial in Cook County, Illinois is 73.4 months (6.1 years). *Id.* Of the 97% of cases which never reach trial, delay is still the rule rather than the exception. *Id.* In fact, the average time it takes for a lawsuit to be disposed of by dismissal, settlement, or trial was still 41.9 months (3.5 years) as of January 1, 1990. *Id.*

20. Smith, *supra* note 12, at 71.

21. See, e.g., Londrigan, *supra* note 12, at 66; Wilson, *supra* note 17, at 112.

22. *Fleming v. Baptist Gen. Convention of Okla.*, 742 P.2d 1087 (Okla. 1987) (defendant unsuccessfully argued that Oklahoma's prejudgment interest statute violates the Fifth and Fourteenth Amendments of the United States Constitution). See *infra* notes 86-89 and accompanying text for more detail on opponents' constitutional arguments against prejudgment interest.

23. See, e.g., Londrigan, *supra* note 12, at 67.

opponents claim that prejudgment interest will not prevent court delays²⁴ and suggest that other more effective methods to prevent court delays exist.²⁵

This Note will show that prejudgment interest is an appropriate type of "damage award" which can exist in complete harmony with the goals of our tort system. Part I of this Note will provide relevant background information on prejudgment interest and examine how state and federal courts apply it. Part II of this Note will set forth the primary arguments in support of, and against, prejudgment interest. In Part III, this Note will examine questions and concerns which may arise from the recognition of the recoverability of prejudgment interest in Illinois. Also, Part III will propose a model statute to the Illinois General Assembly which addresses and solves these questions and concerns.

In addition, in order to help illustrate the manner in which prejudgment interest operates, and the effect it has upon the parties to a typical personal injury lawsuit, the fictitious case created above will be referred to from time to time throughout this Note. The case will illustrate how prejudgment interest would apply and affect a typical personal injury case according to the model statute proposed in Part III of this Note.

PART I: THE BACKGROUND OF PREJUDGMENT INTEREST

The predominant underlying goal of tort law in the United States is to make an injured person "whole."²⁶ To this end, courts award damages with the idea of restoring the plaintiff to the position he was in immediately prior to his accident or injury. However, the mere award of compensatory damages²⁷ may not fairly compensate an injured plaintiff for the loss of the use of the money

24. See, e.g., Wilson, *supra* note 17, at 113.

25. Monek, *supra* note 14, at 153. For some of the opponents' suggestions to prevent court delay, see *infra* note 101.

26. RESTATEMENT (SECOND) OF TORTS § 901(a) (1979).

27. Also known as actual damages, compensatory damages are those which compensate the injured plaintiff for his "real" losses only, such as medical bills and lost wages. BLACK'S LAW DICTIONARY 352 (5th ed. 1979). See also Barango v. E.L. Hedstrom Coal Co., 138 N.E.2d 829, 838 (Ill. 1956) (stating that the "primary notion is that of repairing plaintiff's injury or of making him whole as nearly as that may be done by an award of money"); Brichacek v. Hampton, 203 N.E.2d 737, (Ill. 1964) (same).

Compensatory damages are broken down into two types: general and special damages. RESTATEMENT (SECOND) OF TORTS § 904 (1979). "General damages" are "compensatory damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved." *Id.* "Special damages" are defined as "compensatory damages for a harm other than one for which general damages are given." *Id.*

he would have had absent injury. In addition, punitive damages²⁸ are not always available in personal injury actions.²⁹ Since compensatory and punitive damages may not fully compensate a plaintiff for his injury, interest,³⁰ particularly prejudgment interest, may be available to compensate the plaintiff for the loss of the use of money from the time of his injury.³¹

A. *The History of Prejudgment Interest*

At early common law, the courts disfavored interest³² of any kind.³³ Interest was considered to be in the nature of a penalty.³⁴ However, as people began to realize that money had a "use value,"³⁵

28. Punitive, or exemplary damages, are damages which are awarded to a plaintiff beyond compensatory damages in order to punish the wrongdoer and prevent future misconduct. BLACK'S LAW DICTIONARY 352 (5th ed. 1979). Generally, punitive damages are awarded only where the defendant has acted intentionally or recklessly. *Id.* Something more than the mere commission of a tort is required to justify an award of punitive damages. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984). It is the defendant's motives and conduct in committing the tort, rather than the tort itself, which serves as the basis for awarding punitive damages. *Id.* at 11. See also RESTATEMENT (SECOND) OF TORTS § 908 (1979).

29. *Id.* Punitive damages are not often awarded in personal injury actions because recovery of them requires intentional or reckless behavior by the defendant. KEETON, *supra* note 28, § 2 at 9-10. Proving intentional or reckless behavior is often difficult to do. In addition, some courts are beginning to perceive that punitive damage awards have dramatically increased and must be controlled. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990). Therefore, courts are often reluctant to instruct juries on the awarding of punitive damages. *Id.*

30. *Miller v. Robertson*, 266 U.S. 243, 258 (1924) (stating in dicta that "[w]hen necessary in order to arrive at fair compensation, the court in the exercise of sound discretion may include interest or its equivalent as an element of damages").

31. As Judge Learned Hand stated in recognizing that interest is necessary in order to fully compensate a plaintiff:

Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day [sic] is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and if I get no compensation for its loss, my remedy does not altogether right my wrong.

Proctor & Gamble Dist. Co. v. Sherman, 2 F.2d 165, 166 (2nd Cir. 1924).

32. Interest is "compensation for the use or detention of money and is a direct function of the time period over which the money is used or detained." *Beach v. Peabody*, 58 N.E. 679, 680 (Ill. 1900).

33. Originally, canon law considered interest "sinful," and this idea carried over to common law. 3 WILLIAM BLACKSTONE, COMMENTARIES 454. See also *Blakeslee's Storage Warehouses, Inc. v. City of Chicago*, 17 N.E.2d 1, 3 (Ill. 1938) (recognizing that at common law, interest could only be recovered where there was an express agreement between the parties); RESTATEMENT (SECOND) OF TORTS § 913 cmt. a (1979). See generally MCCORMICK, *supra* note 5, at §§ 51, 56.

34. *Id.*

35. David J. Pierce, *Insurers' Liability for Prejudgment Interest: A Modern Approach*, 17 U. RICH. L. REV. 617 (1983).

the application of interest generally, and the use of prejudgment interest, gradually progressed.³⁶ Courts began to award prejudgment interest in certain types of contract actions.³⁷ Eventually, this expanded to include actions involving negligent and tortious interference with property relationships.³⁸ Prejudgment interest was allowed in these early cases because the damages were said to be "liquidated" or "readily ascertainable."³⁹ However, in personal injury cases, damages are not always immediately certain.⁴⁰

Historically, the theory behind interest awards was that the defendant should be penalized for withholding the amount of money rightfully owed to the plaintiff.⁴¹ However, it was considered unfair to penalize the defendant when the amount owed was unliquidated or uncertain.⁴² Thus, when damages could not be readily ascertained, a penalty would not be assessed against the defendant. In recent years, the distinction between liquidated and unliquidated damages has begun to wane as courts increasingly allow interest on unliquidated claims.⁴³

36. By the sixteenth century, the religious idea that interest was sinful began to diminish with the expansion of commercial activity. MCCORMICK, *supra* note 5, at § 51. By 1545, a statute relating to the maximum interest rate which could be charged for loans was adopted. *Id.* Throughout the next several centuries, attitudes toward interest became more liberal as commercial activity continued to rapidly expand. *Id.*

37. For an early illustration of courts allowing prejudgment interest in contract actions see *Shipman v. State*, 44 Wis. 458 (1878).

38. *See, e.g., Chicago & N.W. Ry. Co. v. Ames*, 40 Ill. 249 (1866) (allowance of interest on the value of freight was a jury question).

39. MCCORMICK, *supra* note 5, at § 54. A liquidated amount is one which is made certain either by an agreement between the parties or by operation of law. *See also*, Comment, *Interest Damages in Virginia*, 28 VA. L. REV. 1138, 1141 (1942).

40. RESTATEMENT (SECOND) OF TORTS § 913 cmt. c (1979). In a typical personal injury action, it is rare that the amount of damages the plaintiff has suffered can be immediately calculated. This is because there is often ongoing medical treatment and wage loss.

41. *See, e.g., Geohegan v. Union Elevated R.R. Co.*, 107 N.E. 786 (Ill. 1915) (tracing the history of awarding interest in tort actions).

42. *Id.* at 789.

43. *See Laughlin v. Hopkinson*, 126 N.E. 591, 593 (Ill. 1920). *Laughlin* was a fraud case in which the Illinois Supreme Court allowed interest where the damages were not liquidated. *Id.* In doing so the court stated:

[T]here is a broad general distinction between a claim sounding in damages and entirely unliquidated and what is called a liquidated demand is not to be denied. The objection to this classification lies, not only in its difficulty of application, but also in its unfairness Interest will be allowed when the demand is of such a nature that its exact pecuniary amount can be ascertained by computation and when the time from which interest, if allowed, must run can be ascertained.

Id. at 593-94. *See also* *First Nat'l. Bank of Clinton v. Insurance Co. of N. Am.*, 606 F.2d 760, 769 (7th Cir. 1979) (holding that if a claim is capable of ascertainment by mere calculation or computation, it is liquidated, and if any judgment, opinion, or discretion is required to determine the amount of the claim, it is unliquidated). According to the court's reasoning in *Bank of Clinton*, most per-

B. Prejudgment Interest in the Federal System

The subject of prejudgment interest in federal courts arises in several different contexts. In order to properly analyze the treatment of prejudgment interest in federal courts, the courts' jurisdiction must be divided into two categories. One category includes cases which present a "federal question."⁴⁴ In federal question cases, prejudgment interest is a matter which the federal courts deal with according to federal law. A second category includes those cases based on "diversity of citizenship" jurisdiction.⁴⁵ In these cases, the court will apply the applicable state substantive law regarding prejudgment interest.

With respect to federal question cases, there are four major areas in which federal law is applied to personal injury claims. First, federal law applies when a claim is based on admiralty or maritime law.⁴⁶ There are numerous statutes under which a claim for personal injury may be made within this jurisdiction.⁴⁷ Some exam-

sonal injury claims should be considered liquidated. With the vast amount of information collected and readily available in today's society, damages can be ascertained by mere calculation or computation from medical, economic and mortality tables, as well as verdict and settlement reports.

Furthermore, the United States Supreme Court paved the way for the allowance of interest on unliquidated claims in *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163 (1933). In that case, the Court admitted that the many cases on the issue of awarding interest on unliquidated claims were not in agreement. *Id.* at 168. Because of this, the Court conceded that the subject of interest on unliquidated claims is one which is appropriate for the legislature to address. *Id.* Despite the fact that this case involved a contract action, the language of the Court spoke broadly about interest on unliquidated claims. The Court stated, "the statutory allowance is for the purpose of securing as a reasonable measure of the loss sustained through delay in payment. It has been recognized that a distinction . . . between cases of liquidated and unliquidated damages, is not a sound one." *Id.* at 168.

Courts have not been alone in departing from the distinction between liquidated and unliquidated damages. Commentators have also joined in the criticism of the distinction between liquidated and unliquidated damages. *See, e.g.,* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §§ 299, 315 (1920) ("The determination of whether or not interest is to be recognized as a proper element of damage is one to be made in view of the demands of justice [to the plaintiff] rather than through the application of any arbitrary rule.")

44. Federal question cases are those arising under the laws or statutes of the United States, those involving a treaty, and those where the United States is a party to the lawsuit. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988). *See also* 28 U.S.C. §§ 1345, 1346 (1988) (defining federal jurisdiction in cases where the United States is a party).

45. For a discussion on the application of prejudgment interest in diversity of citizenship cases, see *infra* notes 61-63 and accompanying text.

46. 28 U.S.C. § 1333 provides in pertinent part: "The district court shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . ." 28 U.S.C. § 1333 (1988).

47. *See infra* notes 48-50 for some examples of statutes under which admiralty claims may be made.

ples of admiralty or maritime claims include the Jones Act,⁴⁸ the Public Vessel Act,⁴⁹ and the Death on the High Seas Act.⁵⁰ Despite the many different statutes which govern a personal injury action in admiralty or maritime jurisdiction, the general consensus is that prejudgment interest is allowed under these statutes.⁵¹

The second instance where prejudgment interest may be awarded is when an injury occurs as a result of a violation of one's civil rights.⁵² In these cases, the jury may consider prejudgment interest only when they are *not* instructed to consider the delay between the injury and the verdict in fixing damages.⁵³ If an instruction is given telling the jury that it may consider delay as a factor in awarding damages, prejudgment interest will not be awarded.⁵⁴

Third, federal law applies where a railroad employee is injured

48. The Jones Act provides a cause of action in the district court in which the defendant-employer resides when any seaman is injured in the course of his employment. 46 U.S.C. § 688 (1988). For further information and provisions of the Jones Act, see 46 U.S.C. § 688 (1988).

49. The Public Vessel Act provides a cause of action in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found. 46 U.S.C. § 782 (1988). For more specific provisions and applications of the Public Vessel Act see 46 U.S.C. §§ 781-90 (1988).

50. The Death on the High Seas Act creates a cause of action in the district court of the United States whenever the *death* of a person is caused by wrongful act, neglect, or default occurring on the high seas. 46 U.S.C. § 761 (1988). The Act also provides for "fair and just compensation for the pecuniary loss to the decedent's representative in suit." *Id.* at § 762. For further details of the Death on the High Seas Act see 46 U.S.C. §§ 761-68 (1988).

51. See *First Nat'l. Bank of Chicago v. Material Servs. Corp.*, 597 F.2d 1110 (7th Cir. 1979). In that case, the Court of Appeals ordered the district court to award prejudgment interest in a wrongful death claim. In so doing, the court stated:

It is quite obvious that a party suffering a financial loss from the death of a bread winner . . . can be placed in the same position as he previously enjoyed only if the award is made at the time of the loss or if interest for the time between loss and payment is allowed.

Id. at 1121. See generally Alan R. Gilbert, Annotation, *Award of Prejudgment Interest in Admiralty Suits*, 34 A.L.R. FED. 126 (1988) for a more detailed discussion of the application of prejudgment interest to admiralty claims.

52. 28 U.S.C. § 1343 states in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs.

28 U.S.C. § 1343 (1988).

53. Compare *Bell v. Milwaukee*, 536 F. Supp. 462 (E.D. Wis. 1982), *modified*, 746 F.2d 1205 (7th Cir. 1984) (recognizing that jury may consider prejudgment interest in a police shooting incident) with *De La Cruz v. Pruitt*, 590 F. Supp. 1296 (Ind. 1984) (court did not allow the jury to consider prejudgment interest where the jury was instructed that they could consider the delay as an element of the plaintiff's damages).

54. See *supra* note 53.

as a result of work-related activities.⁵⁵ In these cases, the Federal Employers Liability Act (FELA) is the applicable federal law.⁵⁶ However, the majority of courts handling FELA cases do not allow prejudgment interest to be awarded.⁵⁷

Lastly, the Federal Tort Claims Act (FTCA) provides for a cause of action where a person has been injured due to the acts of a federal worker.⁵⁸ In these cases, prejudgment interest is not allowed absent any statutory authority.⁵⁹ However, some courts have found prejudgment interest appropriate in order to adjust the plaintiff's award to reflect inflation.⁶⁰

The second category of federal cases is based on diversity of

55. Federal Employers' Liability Act, 45 U.S.C. § 51 (1988). This act provides for a cause of action when a railroad employee is injured or killed while in the course of his employment as a result of negligence of any of the officers, agents, or employees of the railroad, or by reason of any defect or insufficiency in the equipment due to the railroad's negligence. *Id.* Under this Act, liability of the employer-railroad is based on negligence. *Id.* Though assumption of risk and contributory negligence do not serve as affirmative defenses, the employee's recovery may be reduced due to his contributory negligence. *Id.* § 54.

56. *Id.*

57. *See, e.g.,* *Moneseen v. Southwestern Ry. Co.*, 486 U.S. 330 (1984). In *Moneseen*, the United States Supreme Court noted that "[t]he federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under FELA." *Id.* at 338. In addition, the court also stated that Congress, in drafting the FELA Act, did not make any mention of prejudgment interest and therefore, did not intend for it to apply. *Id.* at 336. *See also, Poletto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987). In *Poletto*, the court denied the award of prejudgment interest for the plaintiff's injuries because it found a lack of Congressional intent that prejudgment interest apply in FELA cases. *Id.* However, in dicta, the court stated that there is an excellent case for the award of prejudgment interest for past economic losses and that the award of prejudgment interest would further the "goal of liberal recovery that underlies the FELA." *Id.* at 1278.

58. The Federal Tort Claims Act states in pertinent part: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (1991). For further information on the Federal Tort Claims Act see 28 U.S.C. §§ 1346, 2671 (1988).

59. Courts which have denied prejudgment interest in suits under the Federal Tort Claims Act have used reasoning similar to the early common law idea that interest serves a punitive, rather than compensatory, function. *Wilson, supra* note 17, at 130.

60. *See, e.g., Steckler v. United States*, 549 F.2d 1372 (10th Cir. 1977). In *Steckler*, the trial court refused to allow the jury to consider any inflationary factors when awarding damages for loss of both future and past earnings because of the "complicated and speculative" nature of such an element of damages. *Id.* at 1376. With respect to future earnings, the court looked to decisions in several other circuits for guidance on this issue. *Id.* at 1377. After a somewhat extensive analysis of the many different approaches, the Tenth Circuit decided to follow the approach which the Ninth Circuit took in *United States v. English*, 521 F.2d 63 (9th Cir. 1975). *Id.* at 1378. This approach allowed the trier of fact to take into account inflation, while at the same time, discounting the damages for future income to present value. *Id.* The court reasoned that there

citizenship⁶¹ jurisdiction. In cases where federal jurisdiction is based solely on diversity of citizenship, and the amount in controversy exceeds \$50,000,⁶² the applicable state's substantive law will govern the recovery, or non-recovery, of prejudgment interest.⁶³

C. Prejudgment Interest in the State Court Systems

Within the past fifteen years, a majority of the states have begun to allow for the recovery of prejudgment interest in personal injury claims.⁶⁴ In these states, the legislature has typically pro-

was sufficient evidence and data available to guide the trial court, on remand, to determine a reasonable inflation rate. *Id.*

With respect to the argument that inflation should be taken into account in awarding damages for loss of past earnings, the *Steckler* court concluded that since the rate of inflation was known for the 44 months between the time of the plaintiff's injury and trial, the court should have permitted the jury to consider it. *Id.* at 1380. The plaintiff's argument for an adjustment due to inflation in awarding the loss of past earnings is more analogous to a prejudgment interest award than that of the future earnings situation. The reason for this is that most states do not allow for the recovery of prejudgment interest on future earnings. For a list of states which currently have a prejudgment interest statute, see note 64 *infra*.

61. 28 U.S.C. § 1332 (1988) states in pertinent part:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between: (1) citizens of different States; (2) citizens of a State, and citizens and subjects of a foreign state; (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties; (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332 (1988).

62. *Id.*

63. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (in diversity cases, federal courts must apply the substantive law of the forum state unless a federal statute or the Constitution states otherwise). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1969). See generally PETER HAY & EUGENE F. SCOLES, CONFLICT OF LAWS §§ 17.1-17.49 (1984) for a discussion on choice of law decisions as they apply to tort cases.

An excellent example of the Seventh Circuit applying Illinois law to the issue of prejudgment interest is *In re Air Crash Disaster Near Chicago*, 644 F.2d 633 (7th Cir. 1981). In that diversity action, the plaintiffs sought to recover for the wrongful death of the passengers of an airplane crash. *Id.* at 635. In deciding whether prejudgment interest could be awarded, the court looked to Illinois law and found that the general rule was that absent a statute or an agreement between the parties, no prejudgment interest could be awarded. *Id.* at 638.

However, the court did find that the Illinois rule against prejudgment interest would not serve to bar any adjustment on the award of damages where appropriate. *Id.* at 641. Therefore, the court allowed for a calculation of the present value of the plaintiff's pecuniary losses and adjusted the plaintiff's award to include an extra \$27,500. *Id.* at 646. The court did make it clear, however, that this was not an award of "prejudgment interest." *Id.*

64. See ALA. CODE § 8-8-10 (1984); ALASKA STAT. § 09.30.065 (1987 & Supp. 1991); CAL. CIV. CODE §§ 3287, 3288, 3291 (West 1984); COLO. REV. STAT. § 13-21-101 (1984); GA. CODE ANN. § 51-12-14 (Michie 1982); HAWAII REV. STAT. § 636-16 (1985); IND. CODE ANN. § 34-4-37-10 (West 1988); IOWA CODE ANN. § 668.13 (1981); KY. REV. STAT. ANN. § 360.040 (Michie/Bobbs-Merrill 1984); LA. REV.

vided statutes which either specifically allow for the award of prejudgment interest,⁶⁵ or provide for "fair compensation," which the courts have construed to allow for prejudgment interest.⁶⁶ Other state courts have lessened the prejudgment interest hurdle by overruling prior case law which held it unavailable in personal injury claims.⁶⁷

While no two states' prejudgment interest statutes are identical, all have two basic features in common.⁶⁸ First, all specify the date from which interest is to accrue.⁶⁹ This date is usually either the date on which the injury occurred⁷⁰ or the date on which the complaint was filed.⁷¹ Second, all specify the rate of interest that will be assessed, or the method in which the interest will be calculated.⁷² In addition, many prejudgment interest statutes include a provision stating that the plaintiff will not be entitled to prejudgment interest if the judgment he receives is less than any settle-

STAT. ANN. § 5112 (West 1991); ME. REV. STAT. ANN. tit. 14, § 1602 (West 1984); MD. CTS. & JUD. PROC. CODE ANN. § 11-301 (1989); MASS. GEN. LAWS ANN. ch. 231, §§ 6B, 6C (West 1985); MICH. COMP. LAWS ANN. § 600.6013 (West 1987 and Supp. 1991); MINN. STAT. ANN. § 549.09 (1988); MO. ANN. STAT. § 408.040 (Vernon 1990); NEB. REV. STAT. § 45-103.02 (1990); NEV. REV. STAT. § 17.130(2) (1987); N.J. Ct. C.P.R. 4:42-11(b) (1991); N.H. REV. STAT. ANN. § 524:1-b (1974); N.M. STAT. ANN. § 56-8-4 (Michie 1984); N.C. GEN. STAT. § 24-5 (1991); OHIO REV. CODE ANN. § 1343.03 (Anderson 1984); OKLA. STAT. ANN. tit. 12, § 727 (West 1990); PA. CONST. STAT. § 8101 (1982); R.I. GEN. LAWS § 9-21-10 (1985 & Supp. 1991); S.D. CODIFIED LAWS ANN. § 21-1-11, 21-1-13 (1987); TENN. CODE ANN. § 47-14-123 (1988); TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (West 1987); UTAH CODE ANN. § 78-27-44 (1984); VA. CODE ANN. § 8.01-382 (Michie 1984); W. VA. CODE § 56-6-31 (1984); WIS. STAT. ANN. § 807.01 (West 1985).

65. For example, Oklahoma's prejudgment interest statute states in pertinent part: "When a verdict for damages by reason of personal injuries . . . due to an act or omission of another is accepted by the trial court, the court in rendering judgment *shall* add interest on said verdict . . . from the date the suit was commenced to the date of verdict." (emphasis added). OKLA. STAT. ANN. tit. 12, § 727 (West 1990). See also ALASKA STAT. § 09.30.065 (1987 & Supp. 1991).

66. See, e.g., OKLA. STAT. ANN. tit. 12 § 727 (West 1990); S.D. CODIFIED LAWS ANN. § 21-1-11 (1987).

67. See *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985). In *Cavnar*, the Texas Supreme Court overturned eighty-eight years of precedent in holding that prejudgment interest was recoverable in personal injury, wrongful death, and survival actions. *Id.* at 556. In doing so, the court held that "as a matter of law, a prevailing plaintiff may recover prejudgment interest compounded daily on damages that have accrued by the time of the judgment." *Id.* at 554. Shortly after the decision in *Cavnar*, the Texas legislature enacted a statute governing the recovery of prejudgment interest. See TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (West 1987).

68. See *supra* note 64 for a list of the states which currently have a prejudgment interest statute in effect.

69. *Id.*

70. See, e.g., ALASKA STAT. § 09.30.065 (1987 & Supp. 1991); COLO. REV. STAT. § 13-21-101 (1984); OHIO REV. CODE ANN. § 1343.03 (Anderson 1984).

71. See, e.g., IOWA CODE § 668.13 (1981); LA. REV. STAT. ANN. § 5112 (West 1991); MICH. COMP. LAWS ANN. § 600.6013 (West 1987 and Supp. 1991).

72. See *supra* note 64 for a list of the prejudgment statutes currently in force.

ment offer made by the defendant.⁷³

PART II: ARGUMENTS IN FAVOR OF AND AGAINST PREJUDGMENT INTEREST

There are three common premises which underlie proponents' arguments in favor of prejudgment interest. These premises are fairness to the plaintiff, prevention of unjust enrichment of the defendant, and reduction of court delays and backlogs.⁷⁴ Opponents of prejudgment interest raise a multitude of arguments in response to the proponents' assertions.⁷⁵ These arguments range from the unconstitutionality of a prejudgment interest statute to the fact that insurance rates will necessarily rise in response to the enactment of such a statute.⁷⁶

A. *Prejudgment Interest Allows the Plaintiff to be Fairly Compensated*

The first premise that proponents of prejudgment interest use to support their argument is that unless prejudgment interest is awarded, the plaintiff is not *fairly* compensated for his loss.⁷⁷ Unless the plaintiff is awarded prejudgment interest, his damages will not be adequate because he has not been reimbursed for the "opportunity costs" from the time of his injury until the time of judgment.⁷⁸

This "fairness argument" is difficult to illustrate because the term "fair" does not have a technical meaning in the law. "Fair"

73. See *id.* California's prejudgment interest statute is a good illustration of the three common elements to most prejudgment interest statutes. It states in pertinent part:

If the plaintiff makes an offer . . . which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer . . . which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment.

CAL. CIV. CODE § 3291 (West 1984).

74. For a discussion of the effect of prejudgment interest on fairness to the plaintiff, see *infra* notes 77-89 and accompanying text. See *infra* notes 90-98 and accompanying text for an analysis of the impact of prejudgment interest on unjust enrichment of the defendant. For a discussion of the effect of prejudgment interest on court delays and backlogs, see *infra* notes 99-111 and accompanying text.

75. For a critical discussion of opponents' arguments against prejudgment interest, see *infra* notes 85-89, 95-98, 108-10, and corresponding text.

76. *Id.*

77. Wilson, *supra* note 17, at 109.

78. "Opportunity cost" is an economic term which describes the benefit that is foregone when a resource is not used to its next best alternative. John C. Keir & Robin C. Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW. 129, 146 (1983).

has been described as that which is ethically right and proper.⁷⁹ Though the idea of fairness, or equity in the legal sense, implies justice, there is no specific set of rules delineating a precise legal meaning of what that term requires. Perhaps the definition of fairness is best equated with Justice Stewart's statement concerning pornography: "perhaps I could never succeed in intelligibly [defining obscenity]. But I know it when I see it."⁸⁰

To better illustrate this fairness argument, take the illustrative case of *Smith v. Fast*. Smith was injured on January 1, 1980 and did not receive any compensation (damages) until January 1987. During those seven years,⁸¹ Smith (or his insurance company) paid medical bills and other expenses totalling \$50,000. As a result, Smith had to borrow money in order to continue to provide necessities for himself and his family. Moreover, the pressure of inflation during those seven years reduced the value of Smith's eventual recovery.

In the meantime, Thrifty, Fast's insurance company, earned interest on the money that "rightfully" belonged to Smith. By forcing the case to go to trial, Thrifty maximized the time it could hold Smith's money and thereby minimized its loss at Smith's expense. When Smith receives his judgment which was arguably owed to him as of the time he was struck by Fast, it will not be an accurate reflection of his actual loss because Smith lost the use of his money for seven years. Fairness dictates that Thrifty should pay for the use of Smith's money during that time.

The fairness argument gains additional persuasive force in situations where multiple parties are injured. For example, suppose Fast had also struck Jones, who was visiting from Colorado. Moreover, suppose that Jones suffered the same injuries as Smith. If Jones were to file a diversity suit against Fast in federal court, Jones may be eligible to recover prejudgment interest depending on what law the court applies, whereas Smith, a resident of Illinois, would likely not be able to do so.⁸² This result would be patently unfair to Smith in that Jones would receive a larger award of damages for the same injury.

Opponents of prejudgment interest counter this "fairness argument" in two ways. First, they claim that the amount of damages is not the sole issue determined at trial. Rather, the primary purpose

79. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 471 (7th ed. 1978).

80. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

81. Although the average time it takes for a case to reach trial in Cook County, Illinois is six years, Smith waited one year before filing his case in an effort to settle. See Grady, *supra* note 19, § 1, at 1.

82. See *supra* note 61-63 and accompanying text for a brief discussion of the application of prejudgment interest in diversity of citizenship cases.

of a trial is to determine whether or not a plaintiff's claim is legitimate, and if so, which party is liable. Opponents also believe that the idea of prejudgment interest presumes that a defendant is fully and automatically liable.⁸³ They assert that this simply is not true.⁸⁴ In addition, opponents assert that despite the fact that a defendant may be adjudged to be completely at fault at trial, he may have reasonably believed that he had a meritorious defense to the plaintiff's claim. Therefore, opponents to prejudgment interest reason that a defendant should not be penalized for attempting to assert a valid defense.⁸⁵

A second argument that opponents raise in response to proponents' "fairness argument" is that a prejudgment statute may violate the United States Constitution.⁸⁶ Opponents claim possible

83. Smith, *supra* note 12, at 63.

84. In arguing that prejudgment interest presumes that a defendant is completely liable, opponents point to the idea of comparative negligence. *Id.* Opponents claim that although a defendant may have been negligent with respect to the plaintiff's injury, it is possible that he may not be liable. *Id.* at 71. This is true in Illinois according to ILL. REV. STAT. ch. 110, para. 2-1116 (1989). This statute provides that if the trier of fact finds that the plaintiff contributed to his own injury by more than 50%, then he is completely barred from recovery. ILL. REV. STAT. ch. 110, para. 2-1116 (1989). In addition, paragraph 2-1116 also provides that if the plaintiff is not more than 50% at fault, but he is still somewhat at fault, his damages will be reduced in proportion to his fault. *Id.*

Opponents are correct in their application of comparative negligence. However, they are incorrect in making the presumption that prejudgment interest assumes that the defendant is completely liable. Prejudgment interest does no such thing. Prejudgment interest only awards interest where the defendant is found to be liable. If the plaintiff is found to be more than 50% liable, then he does not recover any prejudgment interest. If the plaintiff is found to be 20% at fault, he will only be awarded prejudgment interest on 80% of his damages. By asserting this argument, it appears that opponents of prejudgment interest miss the simple point of prejudgment interest. If the defendant is not liable, no prejudgment interest can be assessed.

85. Opponents continually maintain that prejudgment interest is a penalty despite the fact that the underlying principle of prejudgment interest is clearly restitution. Londrigan, *supra* note 12, at 65. Again, the idea of prejudgment interest is to make the plaintiff "whole." Most states, including Illinois, currently have provisions which penalize defendants for "unreasonable and vexatious delay." See, e.g., ILL. REV. STAT. ch. 17, para. 6402 (1989). The Illinois statute mandates interest when delay in *payment due* is unreasonable and vexatious. However, Illinois courts have explicitly held that the conduct of litigation does not constitute such an unreasonable and vexatious delay. See *Schulz v. Rockwell Mfg. Co.*, 438 N.E.2d 1230, 1236 (Ill. App. Ct. 1982) (conduct of litigation does not constitute unreasonable or vexatious delay), *cert. denied*, 462 U.S. 1113 (1983); *Edens View Realty & Invest. v. Heritage Enter.*, 408 N.E.2d 1069 (Ill. App. Ct. 1980).

86. Smith, *supra* note 12, at 71. In raising this argument, opponents often rely on two United States Supreme Court cases: *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), and *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337 (1969). Though both of these cases held that creditor prejudgment garnishment statutes were invalid, the Court, in dicta, voiced concern that prejudgment remedies in general may not be fair. *Id.*

However, despite the above decisions, it does not seem likely that a prejudgment interest statute would be found to be unconstitutional. Though the

violations under the Fifth Amendment equal protection component,⁸⁷ the Seventh Amendment right to a trial by jury,⁸⁸ and the Fourteenth Amendment rights to due process and equal protection.⁸⁹

B. *The Denial of Prejudgment Interest Unjustly Enriches Defendants*

The second premise which proponents of prejudgment interest use to support their position is that the defendant is unjustly enriched⁹⁰ by the retention of the money due to the plaintiff. This argument parallels the fairness argument above. However, while the fairness argument focuses on the plaintiff's perspective, the unjust enrichment argument focuses on the defendant's actions in retaining the plaintiff's money.⁹¹

several possible Constitutional arguments are beyond the scope of this Note, the reason why a prejudgment statute would probably not be found violative of equal protection principles is because defendants in a lawsuit are not a suspect class (e.g., classifications based on race, ancestry, alienage). Because the persons affected by prejudgment interest statutes are not members of a suspect class, minimal scrutiny will be applied in examining the interest statutes. Thus, under minimal scrutiny, where the means used need only be rationally related to a legitimate governmental purpose, legislation will be upheld. *Hodel v. Indiana*, 452 U.S. 314 (1981).

In relation to a prejudgment interest statute, the government's purpose is to reduce court delay and backlog. This purpose is certainly legitimate and under a minimal scrutiny analysis, the passage of a prejudgment interest statute (the means) is rationally related in that it will encourage early settlement of tort cases.

87. The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V.

88. The Seventh Amendment provides that "In suits at common law . . . the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

89. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In *Nichols v. T.I.M.E., Inc.*, 373 F. Supp. 811 (E.D. Okla. 1973) the defendants alleged that Oklahoma's prejudgment interest statute violated their right not to be deprived of property without due process. However, in arguing the unconstitutionality of the statute, the defendants did not cite one case to support their proposition. *Id.* at 814. In holding that no constitutional violation occurred, the court noted that no other state's prejudgment interest statute had been held unconstitutional. *Id.*

90. The doctrine of unjust enrichment applies when one has and retains money which in justice or equity belongs to another. *Hummel v. Hummel*, 14 N.E.2d 923, 927 (Ohio 1938). The doctrine of unjust enrichment prevents one person from enriching himself at the expense of another. *Id.* If one receives or retains the property or benefits of another, he must make restitution. *Id.* For a complete discussion of the doctrine of unjust enrichment see JOHN PHILIP DAWSON, UNJUST ENRICHMENT, A COMPARATIVE ANALYSIS (1951).

91. The "fairness argument" and the unjust enrichment argument are similar and sometimes combined into one general argument. Wilson, *supra* note 17, at 109. However, there is a difference between the two. *Id.* The "fairness argument" takes the position that the defendant's retention of the plaintiff's money is *unfair to the plaintiff* while the unjust enrichment argument takes the posi-

Proponents of prejudgment interest examine the position which the *defendant* was in prior to the plaintiff's injury and compare that with the position he is in at the time of final judgment.⁹² Prior to the plaintiff's injury, the defendant had none of the plaintiff's money. However, as of the time of the judgment, the defendant will possess the plaintiff's money plus the interest earned from its use or investment. Thus, the defendant has substantially profited from the use of the plaintiff's money during the period between plaintiff's injury and judgment. Because the judgment determined that the defendant was liable for the plaintiff's injury as of the time of injury, the defendant will be unjustly enriched if he is allowed to keep the interest that the plaintiff would have earned, absent the defendant's wrongful action.

To briefly illustrate this, again take the fictitious case of *Smith v. Fast*. When Smith received a judgment in his favor for \$50,000 in compensatory damages,⁹³ it meant that as of January 1, 1980 (the date of the injury), Fast was liable. The judgment, in effect, declared that Fast owed Smith \$50,000 on January 1, 1980. However, by going to trial, Fast (Thrifty) enjoyed the use of Smith's money for seven years. Had Smith received the award of \$50,000 on January 1, 1980, he would have had more money as of January 1987.⁹⁴ Instead, Thrifty earned interest on that money. Thus, Thrifty is rewarded for the delay, and thereby unjustly enriched.

Opponents of prejudgment interest frequently counter proponents' unjust enrichment argument in two manners. First, opponents maintain that the plaintiff will be overcompensated if

tion that the defendant's earning of interest on the plaintiff's money is *unfair action by the defendant*. *Id.* at 110-11. The "fairness argument" looks at what the plaintiff has lost and the unjust enrichment argument looks at what the defendant has gained. *Id.*

92. *Id.* at 109.

93. Most proponents of prejudgment interest accept the proposition that it is not available on punitive damages. Anthony E. Rothschild, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 220 (1982). In theory, the nature of punitive damages is to punish defendants for intentional or reckless conduct, not to reward the plaintiff. *See supra* notes 28-29 regarding punitive damages. A plaintiff who receives punitive damages never lost the use of that money. *Id.* The award of prejudgment interest on punitive damages would be a windfall to the plaintiff and completely unfair to the defendant. Therefore, in *Smith v. Fast*, even though Smith's total judgment was for \$600,000, he can only receive prejudgment interest on the compensatory portion.

94. The following tables illustrate the amount Smith would have earned (at the minimum that Thrifty earned) had he had the use of his \$50,000. The tables calculate the interest lost by Smith from both the date of his injury and the date of filing. A table calculating interest from the date of notification of Smith's claim to Fast (Thrifty) is not included because in this case, notification occurred only one month after the injury. Therefore, the difference in interest is de minimis. *See infra* notes 115-117 and accompanying text for language which proposes to set the time that interest begins to accrue at the date of notification.

prejudgment interest is allowed.⁹⁵ In support of this contention, opponents point to a study by the Rand Corporation which showed that juries in Cook County, Illinois, implicitly award the equivalent of prejudgment interest in violation of current law.⁹⁶ They also

*Simple Interest @ 9% Calculated from Date of
Accident*

<u>Period</u>	<u>Principal</u>	<u>Interest/period</u>
1980-1981	\$50,000	\$ 4,500
1981-1982	\$50,000	\$ 4,500
1982-1983	\$50,000	\$ 4,500
1983-1984	\$50,000	\$ 4,500
1984-1985	\$50,000	\$ 4,500
1985-1986	\$50,000	\$ 4,500
1986-1987	\$50,000	\$ 4,500
<i>Total</i>		\$31,500

*Compound Interest @ 9% Calculated From Date Of
Accident*

<u>Period</u>	<u>Principal</u>	<u>Interest/period</u>
1980-1981	\$50,000	\$ 4,500
1981-1982	\$54,500	\$ 4,905
1982-1983	\$59,405	\$ 5,346.45
1983-1984	\$64,751.45	\$ 5,827.63
1984-1985	\$70,579.08	\$ 6,352.12
1985-1986	\$76,931.20	\$ 6,923.81
1986-1987	\$83,855.01	\$ 7,546.95
<i>Total</i>		\$41,401.96

Simple Interest @ 9% Calculated from Date of Filing

<u>Period</u>	<u>Principal</u>	<u>Interest/period</u>
1981-1982	\$50,000	\$ 4,500
1982-1983	\$50,000	\$ 4,500
1983-1984	\$50,000	\$ 4,500
1984-1985	\$50,000	\$ 4,500
1985-1986	\$50,000	\$ 4,500
1986-1987	\$50,000	\$ 4,500
<i>Total</i>		\$27,000

*Compound Interest @ 9% Calculated from Date of
Filing*

<u>Period</u>	<u>Principal</u>	<u>Interest/period</u>
1981-1982	\$50,000	\$ 4,500
1982-1983	\$54,500	\$ 4,905
1983-1984	\$59,405	\$ 5,346.45
1984-1985	\$64,751.45	\$ 5,827.63
1985-1986	\$70,579.08	\$ 6,352.12
1986-1987	\$76,931.20	\$ 6,923.81
<i>Total</i>		\$33,855.01

95. Smith, *supra* note 12, at 70.

96. In a study of tort cases in Cook County, Illinois, the Rand Corporation concluded that jury awards were increasing approximately 3.7% beyond the inflation rate. Wilson, *supra* note 17, at 112. Therefore, interest appears to have almost implicitly been awarded to judgments in recent years. Naturally, de-

point to the fact that in a majority of cases, the plaintiff has insurance which can cover any outstanding expenses. Therefore, according to the opponents, it is simply a windfall to the plaintiff to recover interest on money which he did not directly expend.⁹⁷ Second, opponents threaten that if the Illinois General Assembly enacts a prejudgment interest statute, liability insurance rates will dramatically increase in order to offset insurance companies' "costs."⁹⁸

fense attorneys strongly support the findings of this study. However, such an argument fails because there are two problems with the study. First, it makes "assumptions from assumptions" without introducing any empirical data to support its conclusion. Wilson, *supra* note 17, at 112. One of the worst assumptions the study makes is that all tort cases are alike. *Id.* This is clearly not so, and each case must be evaluated in light of the surrounding circumstances. *Id.* Second, the study uses data from 1960-1979. *Id.* In the past thirty years, a multitude of changes have taken place which could account for an increase in jury verdicts. In light of this study's obvious flaws, there is no empirical evidence to suggest that juries implicitly award interest in tort cases.

97. Opponents feel that plaintiffs will be overcompensated if they are awarded prejudgment interest because most plaintiffs are covered by insurance. Smith, *supra* note 12, at 70. Since this is true, opponents maintain that the plaintiff has incurred no actual out-of-pocket expenses as a result of his injury because it is actually the insurance company that is making the payments. *Id.* This argument has been made many times with respect to the collateral source rule. The collateral source rule provides that regardless of whether the plaintiff's insurance company pays his expenses, the plaintiff still has a right to be reimbursed by the defendant. *Bell v. Primeau*, 183 A.2d 729, 730 (N.H. 1962). Furthermore, often when a plaintiff is injured his insurance company will file a subrogation lien against any settlement or judgment which he may receive. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 209-10 (1988). When this happens, the plaintiff is required to reimburse his own insurance company for any expenses that it incurred. *Id.* Thus, in cases where a subrogation lien is filed, the plaintiff is not being overcompensated by receiving prejudgment interest. See generally, Donald J. Srail, Note, *Insurance Subrogation in Personal Injury Torts*, 39 OHIO ST. L.J. 621 (1978) for further information on the topic of subrogation with respect to the collateral source rule.

98. Londrigan, *supra* note 12, at 67.

Of all of the arguments opponents of prejudgment interest raise, this argument is probably the most persuasive. In theory, however, insurance premiums should not rise. In reality, premiums should not rise because insurance companies are not really losing anything, as they allege. The truth is that insurance companies must now pay the plaintiff the interest which they earned using his money. This should not be considered a loss to the insurance companies; they are merely not profiting as much as they feel they should. See Wilson, *supra* note 17, at 110 n.34.

In the case of a corporation that acts as a self-insurer, the results will most likely be more apparent. Corporations will be able to pass on the additional costs of self insurance to consumers more readily because corporations are not regulated to the extent that insurance companies are with respect to prices. See Londrigan, *supra* note 12, at 66. Opponents allege that prejudgment interest is anti-business because it will raise operating expenses and threaten that in the end, the "added cost" of prejudgment interest will be passed on to the consumer. *Id.* Sadly, this is probably true.

C. *The Allowance of Prejudgment Interest Will Ease Court Backlog and Reduce Delay*

The last, and perhaps most important, premise that proponents of prejudgment interest use to support their argument is that prejudgment interest will increase the number of settlements and encourage quicker settlements, thereby reducing court delay and backlog.⁹⁹ One study of the Illinois court system stated that delay is the "most serious indictment of our civil justice system" and is the "means by which a defendant may obtain a more favorable settlement."¹⁰⁰ Many methods have already been proposed¹⁰¹ and implemented in an attempt to ease the extensive judicial backlog.¹⁰² However, the enactment of a prejudgment interest statute would arguably have the most significant effect in reducing the judicial

99. Londrigan, *supra* note 12, at 62.

100. See generally MEMORANDUM TO THE ILLINOIS COMMITTEE TO STUDY CASEFLOW MANAGEMENT IN THE LAW DIVISION, CIRCUIT COURT, COOK COUNTY, ILL. (1982).

101. Some examples of recent proposals to reduce court backlog include reduced discovery periods, tighter judicial management, the abolition of jury trials in negligence actions, and adoption of the English system which allows the winner to collect costs and expenses from the loser. See Monek, *supra* note 14, at 155. For an analysis of an alternative method of handling the large number personal injury claims see Alfred F. Conard, *Tort and Commercial Law: Coup de Grace for Personal Injury Torts?*, 88 MICH. L. REV. 1557 (1990) (reviewing STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS AND BUSINESS* (1989)).

102. Court congestion in Cook County has been a great problem, especially in the last 25 years. Priest, *supra* note 19, at 547. During that time, a number of changes have been instituted in order to remedy court congestion. *Id.* In 1964, the state trial courts were completely reorganized to increase efficiency and give greater authority to the Chief Judge of Cook County to allow him to institute new management procedures. *Id.* at 545. In 1965, a computerized case tracking system was added. *Id.* In the same year, the Illinois Supreme Court adopted strict products liability. *Id.* at 546. In 1966, the Illinois Legislature approved the construction of additional courtrooms. *Id.* at 545. In 1967, downstate judges were assigned to Cook County. *Id.* In 1975, a specialized medical malpractice trial division was created. *Id.* at 547. From 1963-1979 the Illinois Legislature added seventy-seven new judgeships. *Id.*

The newest attempt to reduce backlog in the Law Division in Cook County involves the implementation of mandatory arbitration screening. Grady, *supra* note 19, § 1, at 1. This program, which began in 1990, requires a judge to screen each case six months after it has been filed, to decide which ones are likely to result in less than \$30,000 in damages. ILL. REV. STAT., ch. 110 A, para. 86. These cases are assigned to arbitration, rather than the trial call. *Id.* Though the mandatory arbitration system does have some effect on court backlog, it has not worked as well as anticipated. In screening the cases, many judges tend to keep the cases on the trial call in marginal situations (which is a large number of cases). Telephone Interview with prominent Chicago attorney (Oct. 22, 1991). While this is certainly beneficial to plaintiffs, it does not reduce court backlog. This result is not the fault of the judges since it is very difficult to determine the value of a claim only six months after it has been filed when discovery has not been completed. While the intentions behind the mandatory arbitration screening are good, it will take some time to determine the real effect it will have in reducing court backlogs.

backlog.¹⁰³

When prejudgment interest is authorized by statute, defendants lose the incentive to delay a pending case.¹⁰⁴ A defendant, knowing that the interest he earns on the plaintiff's money will have to be paid to the plaintiff, has less incentive to delay and will come to the negotiation table with a more "open mind."¹⁰⁵ Defendants will make more realistic settlement offers, and these offers, in turn, will increase the likelihood of plaintiffs accepting an early settlement offer.¹⁰⁶ Prejudgment interest would drastically reduce the backlog in our court systems and it may reduce the number of suits filed.¹⁰⁷ With a reduction in the number of suits, if a case must

103. In 1982, California's Legislature enacted a prejudgment interest statute. CAL. CIV. CODE § 3291 (West 1984). One of the legislature's goals was to reduce court backlog. Christopher J. Day, Comment, *Prejudgment Interest in Personal Injury Litigation; California's Long-Awaited Remedy in Civil Code Section 3291*, 11 W. ST. U. L. REV. 85, 88 (1983). In support of the legislation, State Senator Omer Rains said that "Senate Bill 203 [California's prejudgment interest bill] will do more to reduce court congestion than any law passed in recent history." *Id.* Shortly after passage of the bill the senator said that he "had already received indications from judges that the legislation was having its intended effect." *Id.* at 89. California's past situation is very similar to Illinois' current situation with respect to court backlogs and delays. Judging from California's results, it appears that prejudgment interest statutes *do* reduce court congestion.

104. See *infra* notes 105-109 and accompanying text for a discussion on defendants' loss of incentive to delay.

105. With the incentive to delay eliminated (because the defendant will have to pay interest to the plaintiff), the likelihood that the defendant will make a more reasonable initial settlement offer is greatly increased, especially in cases where the defendant's liability is apparent. By making a more reasonable settlement offer early on, the defendants will increase the chance that the plaintiff will accept a lower offer in order to get his money quicker.

106. In *Smith v. Fast*, prejudgment interest would have played an important role in the parties settling the case. Thrifty's highest offer to Smith was \$10,000, merely 1.8% of Smith's demand. This offer came on a claim in which the evidence strongly favored Smith (*i.e.*, Fast admitted he had been drinking and Smith had a witness). However, because no prejudgment interest was available, Thrifty forced the case to go to trial.

Thrifty's strategy of forcing a trial was clear from the beginning. Thrifty knew that it could earn interest on Smith's money for about six years, thereby mitigating its damages when it finally came time to pay Smith. Had a prejudgment interest statute been in effect, Thrifty would have made a significantly higher initial offer. Smith, in preferring to have his money sooner, rather than later, probably would have accepted a much lower sum than what he originally demanded because most of his damages were punitive and could not earn prejudgment interest. However, because no such statute existed in Illinois, Thrifty was able to earn interest on Smith's money and pay Smith with that same money. Thrifty also wasted valuable judicial resources and further added to the delay within the court system.

107. If a plaintiff knows that the defendant is more likely to settle, he may delay filing his claim. This is because the filing of the claim costs the plaintiff money (*i.e.*, filing fees, service of process fees, etc). In addition, personal injury attorneys must lay out these costs with the hopes of recovering them. Since nobody wants to spend unnecessary money, the plaintiff may wish to delay filing with the hopes of settling.

go to trial, it will do so in a shorter period of time. This significant decrease in delay may help restore some of the faith which has been lost in our legal system.

Once again, opponents counter this argument. Opponents claim that if plaintiffs have the opportunity to collect prejudgment interest, any incentive to delay will merely shift to the plaintiff.¹⁰⁸ Thus, plaintiffs are actually *rewarded* with prejudgment interest for refusing to settle.¹⁰⁹ This being true, a prejudgment interest statute will not have any effect on delay, and may in fact, increase delay due to an increase in the number of filings. A second claim by opponents is that prejudgment interest will create a new element of damages, affecting cases in a myriad of ways, from complicating the pleadings to confusing the jury. Opponents continue by claiming that if court delays are truly to be eliminated more effective methods are available.¹¹⁰

Despite opponents' arguments, the benefits which will result from the enactment of a prejudgment interest statute far outweigh any potential injustice to defendants in a personal injury action. Of the 33 states (plus the District of Columbia) which currently allow for the recovery of prejudgment interest in personal injury actions, to date, none have attempted to repeal its application. With an overwhelming number of states in favor of prejudgment interest,¹¹¹ it is clear that prejudgment interest works. The Illinois General Assembly must realize this and enact similar legislation.

PART III: ADDITIONAL CONCERNS IN FORMULATING A PREJUDGMENT INTEREST STATUTE FOR ILLINOIS

Both factions of the prejudgment interest debate counter each other's arguments one by one. While the arguments and counter-arguments discussed in Part II are the most prevalent, numerous other questions arise, especially with regard to the specific provisions which a prejudgment statute in Illinois might include. The goal of part III is to propose a prejudgment interest statute for Illinois. In doing so, this section will raise questions and issues as to the specifics of a prejudgment interest statute in Illinois. Next, it will propose language which will address those questions and issues. Finally, it will explain how the language will fairly represent the interests of plaintiffs without being overly biased against defendants' interests.

108. Londrigan, *supra* note 12, at 66.

109. *Id.*

110. For some alternative proposals to reduce court backlog, see *supra* note 101.

111. For a list of states which currently allow prejudgment interest to be awarded in personal injury actions, see *supra* note 64.

A. Date of Accrual

The first, and perhaps most important issue which arises is the time at which prejudgment interest should begin to accrue. With regard to this question, there are four possible choices: 1) the date of the plaintiff's injury,¹¹² 2) the date of filing,¹¹³ 3) a set number of days after injury,¹¹⁴ or 4) upon notice of claim to the defendant.¹¹⁵ To balance competing interests, the date of accrual should allow the plaintiff to maximize his possible compensation, while still allowing the defendant to receive fair and timely notice of a pending claim.

The following language is proposed to establish the time at which the accrual of prejudgment interest should begin: "Prejudgment interest shall begin to accrue from the date the claimant sends, by certified mail,¹¹⁶ written notification that would lead a reasonably prudent person to believe that a claim will be made against him or his insurance policy."¹¹⁷

Although, in theory, the plaintiff is entitled to prejudgment interest from the date of his injury, this is not always fair to the defendant.¹¹⁸ For example, in *Smith v. Fast*, Smith was injured on January 1, 1980 and gave notice to Thrifty just one month later.

112. See, e.g., R.I. GEN. LAWS § 9-21-10 (1985 & Supp. 1991). For a discussion of prejudgment interest accruing on the date of the plaintiff's injury, see *supra* notes 77-82 and accompanying text.

113. See, e.g., MINN. STAT. ANN. § 549.09 (1988). Opponents of prejudgment interest often argue that the computation of prejudgment interest as of the date of filing will encourage more premature filings and possibly increase court dockets. Londrigan, *supra* note 12, at 66. In addition, they claim that premature filings may lead to an increase in legal malpractice claims. 1983 *Hearings*, *supra* note 10. However, the opponents' argument regarding a possible rise in legal malpractice claims due to premature filings is unwarranted. An increase in premature filings will not occur because sanctions are available against attorneys who file claims which are not well grounded in law and fact or not filed in good faith. ILL. REV. STAT. ch. 110A, para. 137 (1989). Fear of sanctions will adequately dissuade attorneys from filing claims prematurely.

114. See, e.g., MO. ANN. STAT. § 408.040 (Vernon 1990).

115. See, e.g., ALASKA STAT. § 09.30.065 (1987 & Supp. 1991).

116. The requirement that written notification by the plaintiff to the defendant (or his insurance company) be sent by certified mail is taken from Missouri's prejudgment interest statute. MO. ANN. STAT. § 408.040 (Vernon 1990). The purpose of this requirement is to prevent disputes between the parties as to when notification of a pending claim was actually received by the defendant.

117. The requirement that prejudgment interest begins to accrue upon written notification to the defendant is common to several state's prejudgment interest statutes. See, e.g., ALASKA STAT. § 09.30.065 (1987 & Supp. 1991). This requirement simply prevents any ambiguities associated with oral communication as to whether a claim will be pending against the defendant or his insurance policy.

118. For a discussion on why a plaintiff should be entitled to prejudgment interest as of the date of his injury, see *supra* notes 77-82 and accompanying text.

However, Smith could have waited up to two years to file suit.¹¹⁹ If Smith had waited longer to file suit, and then received a favorable judgment, Thrifty would have had to pay interest on a two-year period during which it did not have notice of Smith's claim or the opportunity to attempt to negotiate and settle Smith's claim.¹²⁰ Thus, awarding damages from the date of injury would be unfair to Thrifty. In an effort to protect the defendant's interests, the proposed statute states that prejudgment interest should begin to accrue when written notification of a pending claim is sent to the defendant by certified mail.

B. Determining the Percentage Rate and Method of Calculation

A second question which arises with regard to a prejudgment interest statute entails two parts: first, what percentage rate will be used in assessing prejudgment interest, and second, what method of calculation will be used. In terms of part one, either a fixed¹²¹ or an adjustable¹²² interest rate may be used. In terms of part two, either simple¹²³ or compound¹²⁴ interest may be used to calculate prejudgment interest.¹²⁵

The following language is proposed to establish the rate of prejudgment interest and the method used to calculate it: "Prejudgment interest shall be computed as compound interest per annum at the rate of one (1) percentage point above the prime lending rate.¹²⁶ Such interest shall be calculated by the clerk of the court and adjusted every January 1 and June 1 to reflect any changes

119. Illinois' statute of limitations for filing a personal injury suit provides that "Actions for damages for an injury to the person . . . shall be commenced within 2 years next after the cause of action accrued . . ." ILL. REV. STAT. ch. 110, para. 13-202 (1989). In addition, in medical malpractice claims, Illinois courts allow the two-year limitation to begin when the person "knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused." *Witherall v. Weimer*, 421 N.E.2d 869, 874 (Ill. 1981), *rev'd on other grounds*, 515 N.E.2d 68 (Ill. 1987).

120. In order to clearly see the difference in the amount of interest accrued from the date of Smith's injury versus the date of filing, see *supra* note 94.

121. See, e.g., CAL. CIV. CODE § 3291 (West 1984); R.I. GEN. LAWS § 9-21-10 (1985 & Supp. 1991).

122. See, e.g., OKLA. STAT. ANN. tit. 12, § 727 (West 1990).

123. See, e.g., MINN. STAT. ANN. § 549.09 (1988); OHIO REV. CODE ANN. § 1343.03, § 2743.18 (Anderson 1984 & Supp. 1991).

124. See, e.g., COLO. REV. STAT. § 13-21-101 (1984); MICH. COMP. LAWS ANN. § 600.6013 (West 1987 & Supp. 1991).

125. For a sample calculation of simple and compound interest at a fixed rate, see *supra* note 94.

126. This language has been adapted from Illinois' proposed prejudgment interest statute in 1983. H.B. 713, 83rd Leg., 1st Sess., 1983 and S.B. 87, 83rd Leg., 1st Sess., 1983. See *supra* note 10 for a discussion of H.B. 713 and S.B. 87.

made in the prime lending rate.¹²⁷ When the judgment debtor is a unit of local government, as defined in § 1 of Article VII of the Illinois Constitution,¹²⁸ a school district, a community college district, or any other governmental entity, interest shall be computed as simple interest per annum at the fixed rate of nine (9) percent."¹²⁹

Although a majority of states with prejudgment interest statutes provide for simple interest at a fixed rate,¹³⁰ the above language allows for more accurate compensation to the plaintiff. First, compound interest is necessary to make prejudgment interest fully compensatory.¹³¹ This is because an injured party would most likely receive compound interest on his money had he received his damages on the date of the accident.¹³² Therefore, the lost investment opportunity justifies compensation through compound interest.¹³³

Second, a fixed rate of prejudgment interest does not protect against changing economic conditions.¹³⁴ The proposed language accommodates changes in money market conditions and allows for the prejudgment interest rate to rise and fall with the market. As a result of this provision, compensation is commensurate with the plaintiff's loss.¹³⁵

127. This language is borrowed from Rhode Island's prejudgment interest statute. See R.I. GEN. LAWS § 9-21-10 (1985 & Supp. 1991) for the entire text of Rhode Island's prejudgment interest statute.

128. Article VII of the Illinois Constitution defines local government as "counties, municipalities, townships, special districts, and units, designated as units of local government by law, which exercise limited governmental powers." ILL. CONST. art. VII, § 1.

129. This exception is common to many states' prejudgment interest statutes. See, e.g., CAL. CIV. CODE § 3291 (West 1984); OKLA. STAT. ANN. tit. 12, § 727 (West 1990). The rationale for providing an alternative interest rate and method of calculation for governmental entities is that the payment of prejudgment interest affects the general public more directly (usually in the form of increased taxes) than when private individuals or corporations are the defendant. Therefore, when a governmental entity is a defendant in a personal injury case, a fixed interest rate will be used to calculate prejudgment interest so as to minimize any ill effects on the general public.

130. See, e.g., CAL. CIV. CODE § 3291 (West 1984); IOWA CODE ANN. § 668.13 (1981).

131. Keir, *supra* note 78, at 145.

132. *Id.*

133. *Id.* at 146. In determining that compound interest is necessary in order to fully compensate an injured plaintiff, Keir defines the value of the damages withheld from the plaintiff as the principal plus the opportunity cost. *Id.* Keir explains how compound interest and adjustable prejudgment interest rates take into account the "time value" of money. *Id.*

134. *Id.* at 133.

135. For a detailed discussion on changing interest rates in tort actions see Diane M. Allen, Annotation, *Validity and Construction of State Statute or Rule Allowing or Changing Rate of Prejudgment Interest in Tort Actions*, 40 A.L.R.4TH 147 (1989).

C. Application to Different Types of Damages

A third issue which arises in formulating a prejudgment interest statute concerns the type of damages that will be subject to prejudgment interest. This question is important because if prejudgment interest is available on other damages, as well as pecuniary damages, negotiation and settlement strategies may be affected.¹³⁶ The following language settles this question: "Prejudgment interest shall be recoverable on pecuniary damages only.¹³⁷ Under no circumstances shall prejudgment interest be recoverable on punitive damages, future damages,¹³⁸ pain and suffering, emotional distress, loss of consortium, loss of enjoyment of life, or loss of society and companionship."¹³⁹

An issue which flows from the damage question is that Illinois' current pleading statute¹⁴⁰ does not require plaintiffs to distinguish between pecuniary damages and other types of damages. If Illinois were to enact a prejudgment interest statute containing the above language regarding damages, it would become necessary to amend

136. Negotiation strategy is extremely important in a personal injury case and the possible amounts and types of damages may influence which strategy is relied upon in settlement negotiations. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiations*, 46 OHIO ST. L.J. 41 (1985). However, a discussion of the several different strategies is beyond the scope of this Note.

137. This language is borrowed from South Dakota's prejudgment interest statute. See S.D. CODIFIED LAWS ANN. § 21-1-13.1 (1987). Punitive damages are not subject to prejudgment interest for two reasons: 1) the plaintiff has not lost the use of those punitive damages, and 2) the purpose of punitive damages is to punish defendants and deter future wrongful conduct, not to compensate the plaintiff. Rothschild, *supra* note 93, at 220.

138. Though most states do not allow for the recovery of prejudgment interest on future damages, such as loss of future earnings, it is possible to apply prejudgment interest to such damages. Most courts award damages for loss of future earnings, and require that the damages be reduced to present value. Francis H. Hare, Jr. & Richard A. Meelheim, *Prejudgment Interest in Personal Injury Litigation: A Policy of Fairness*, 5 AM. J. TRIAL ADVOC. 81, 87 (1981). Thus, since these damages are readily ascertainable and subject to calculation, prejudgment interest is arguably proper. For a more detailed discussion of the application of prejudgment interest on non-pecuniary damages, see Jerome R. Morse, *Prejudgment Interest: Entitlement to and the Rate of Non-pecuniary General Damages in the Amount of the Rough Upper Limit Plus Inflation*, 7 ADVOC. Q. 337 (1986).

139. This language is borrowed from South Dakota's prejudgment interest statute. See S.D. CODIFIED LAWS ANN. § 21-1-13.1 (1987).

140. Under current Illinois law, in personal injury actions, a plaintiff may only plead damages "to the minimum extent necessary to comply with the circuit court rules . . . where the claim is being filed." ILL. REV. STAT. ch. 110, para. 2-604 (1989). Because of this provision, pecuniary and non-pecuniary damages are not distinguishable upon the filing of a complaint. Thus, a defendant is not able to immediately determine the amount of prejudgment interest which he may be liable for. In addition, punitive damages may only be included in a complaint "pursuant to a pretrial motion and after hearing before the court." ILL. REV. STAT. ch. 110, para. 2-604.1 (1989).

Illinois' pleading statute in order to eliminate any inconsistencies between the two statutes.¹⁴¹

D. Terms Necessary for Prejudgment Interest to Apply

A fourth concern with regard to a prejudgment interest statute is whether the plaintiff's final judgment must merely be equal to any settlement offer made by either party or whether it must be greater than any settlement offer. If the statute requires that plaintiff's judgment must be greater than any settlement offer, a determination must be made as to how much greater the judgment must be before prejudgment interest will be awarded.¹⁴² The following language would resolve this concern: Prejudgment interest shall be available if the amount of the judgment rendered in favor of the plaintiff is: 1) greater than or equal to any written offer of settlement to the plaintiff by the defendant, or 2) greater than or equal to any good faith offer made by the plaintiff which the defendant does not accept prior to trial or within thirty (30) days after the offer is made, whichever occurs first.¹⁴³

E. Tolling by Means of a Reasonable Offer

A fifth issue that exists with regard to prejudgment interest is whether a statute should include a provision that tolls the accrual of prejudgment interest if the defendant makes a reasonable offer to the plaintiff and the plaintiff refuses it.¹⁴⁴ The simple answer to this question is no. If the plaintiff refuses to accept the defendant's

141. The following amendment is proposed for ILL. REV. STAT. ch. 110, para. 2-604 (1989):

Prayer for Relief. Every complaint, counter-claim, cross-claim, or third party claim shall contain specific prayers for the relief to which the pleader deems himself or herself entitled except that in actions for injury to the person, a clear statement making claim to prejudgment interest on pecuniary damages may be included.

142. For a good example of a requirement that the judgment must exceed any settlement offer by a specified percentage see Pennsylvania's prejudgment interest statute. PA. CONS. STAT. § 8101 (1982) (prejudgment interest tolls as of the date of defendants first offer if it equals 80% of the plaintiff's final judgment, thus requiring the plaintiff to obtain 20% more than the defendant's offer in order to receive prejudgment interest).

143. This language has been adapted from California's prejudgment interest statute. See CAL. CIV. CODE § 3291 (West 1984). Language requiring that the plaintiff's judgment exceed the defendant's offer by a certain percentage is not fair to the plaintiff and is therefore violative of one of the principal reasons for the award of prejudgment interest. For a discussion of fairness to the plaintiff regarding the award of prejudgment interest, see *supra* notes 77-82. Though several states require that the plaintiff simply receive a favorable judgment in order to receive prejudgment interest, a fairer rule for defendants is that the plaintiff's judgment be at least equal to the defendant's offer.

144. For an example of such a provision, see TEX. REV. CIV. STAT. ANN. art. 5069-1.05(6) (West 1987).

offer, it is usually because he does not feel that the offer was reasonable. Should the plaintiff refuse a reasonable offer by the defendant, he does so at his own risk. This provision compels the plaintiff to objectively evaluate his position rather than continually demanding a larger settlement offer from the defendant because if the plaintiff's judgment is not equal to or greater than the defendant's offer, the plaintiff will not receive prejudgment interest. In addition, the inclusion of a provision which allows prejudgment interest to toll as a result of a reasonable offer by the defendant would require too much speculation as to what a reasonable offer is, given the unique circumstances of every personal injury case.

In addition to the five larger questions above, several smaller issues arise with regard to a prejudgment interest statute. One such issue is whether a prejudgment interest statute should be retroactive. Though it is possible to make prejudgment interest retroactive as of a pre-determined date, much confusion would likely result.¹⁴⁵ Therefore, in order to avoid confusion, the following language is proposed: "In all actions filed after January 1, 1993 brought to recover damages for personal injuries or wrongful death sustained by any person as a result of a tort occasioned by any person, corporation, association, partnership, or governmental entity, it is lawful for the injured party or his representative at suit to recover prejudgment interest on alleged pecuniary damages."¹⁴⁶

Another issue which arises is whether the courts will have any discretion over the award of prejudgment interest. Generally, the answer is no. A prejudgment interest statute should be mandatory if it is to work effectively.¹⁴⁷ However, to allay defendants' concerns regarding delay by plaintiffs,¹⁴⁸ the following language is proposed: "The court may, at its discretion, deny prejudgment interest for any period of unreasonable delay for which it finds the claimant

145. Allowing prejudgment interest to apply retroactively would cause many problems. For example, it would not be fair to defendants who might have settled earlier had they known that prejudgment interest would apply to their cases. Also, court clerks would have to determine what interest rates to apply and calculate those interest rates from several years back. This would take up much time and may even burden the application of prejudgment interest to newly filed cases.

146. Portions of this provision have been borrowed from Colorado's prejudgment interest statute. See COLO. REV. STAT. § 13-21-101 (1984) for the complete text of Colorado's prejudgment interest statute.

147. If prejudgment interest were left completely to the discretion of the courts, attorneys would spend too much time arguing to the court whether it should apply or not. In effect, a trial within a trial may occur over the issue of prejudgment interest. This would ultimately add to court delay and defeat one of prejudgment interest's major purposes.

148. For a discussion of opponents' concerns that prejudgment interest will cause plaintiffs to delay, see *supra* notes 108-109 and accompanying text.

wholly responsible."¹⁴⁹

A final issue which arises is whether prejudgment interest will continue to accrue if a defendant chooses to appeal or attempts to modify or vacate the judgment. The answer to this question is that prejudgment interest will not continue to accrue. This is because Illinois has a post-judgment interest statute which should apply in this situation.¹⁵⁰ However, in order to eliminate any doubts about the application of Illinois' post-judgment interest statute, the following language is proposed: "Nothing in this section shall be construed as prohibiting the award of post-judgment interest pursuant to § 2-1303 of this chapter."

CONCLUSION

The goal of tort law is to fully compensate those who have been injured due to the wrongful acts of others by awarding damages. However, due to delay between the time of a plaintiff's injury and a court judgment in his favor, a plaintiff is not fully compensated for his losses. As a result of the defendant's wrongful act, the plaintiff must pay medical bills and other costs resulting from his injury. Thus, during this delay, the plaintiff loses the use of the money he would have had absent the defendant's wrongful act. At the same time, the defendant earns interest on the money. Not only is this unfair to the plaintiff, but it also unjustly enriches the defendant.

The Illinois General Assembly should respond to this inequity by adopting a statute which allows an injured plaintiff to recover prejudgment interest in a personal injury action. By doing so, the General Assembly would simply fulfill the basic goal of tort law. At the same time, the General Assembly would reduce one of the legal system's biggest problems, court backlog. In order to meet these ends, the Illinois General Assembly should enact the appended proposed statute.¹⁵¹ Recognition of the merits of prejudgment interest by thirty-three other states should persuade the Illinois General

149. This language has been borrowed from Ohio's prejudgment interest statute. See OHIO REV. CODE ANN. § 1343.03 (Anderson 1984) for the complete text of the statute. Though a plaintiff really has no incentive to delay (he wants his money as soon as possible), this provision can be used by the court, under extraordinary circumstances, to "punish" a plaintiff for wasting the court's time and resources.

150. The Illinois post-judgment interest statute provides that "[j]udgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied . . ." ILL. REV. STAT. ch. 110, para. 2-1303 (1989).

151. The complete text of the proposed statute is included in an appendix to this Note.

Assembly that prejudgment interest is an appropriate means of furthering the goals of our tort system.

Jeffrey R. Sandler

APPENDIX: PROPOSED PREJUDGMENT INTEREST STATUTE

§ 2-1303.1. Prejudgment Interest.

1. In all actions filed after January 1, 1993 brought to recover damages for personal injuries or wrongful death sustained by any person as a result of a tort occasioned by any person, corporation, association, partnership, or governmental entity it is lawful for the injured party or his representative at suit to recover prejudgment interest on alleged damages, provided:

(A) The original pleading in the principal action, any third party claim, cross claim, or counter-claim, contains a clear statement making claim to such interest, and;

(B) The amount of the judgment rendered in favor of the plaintiff is: 1) greater than or equal to any written offer of settlement to the plaintiff by the defendant, or 2) greater than or equal to any good faith offer made by the plaintiff which the defendant does not accept prior to trial or within thirty (30) days after the offer is made, whichever occurs first.

2. Damages. Prejudgment interest shall be recoverable on pecuniary damages only. Under no circumstances shall prejudgment interest be recoverable on punitive damages, future damages, pain and suffering, emotional distress, loss of consortium, loss of enjoyment of life, or loss of society and companionship.

3. Accrual. Prejudgment interest shall begin to accrue from the date the plaintiff sends, by certified mail, written notification that would lead a reasonably prudent person to believe that a claim will be made against him or his insurance policy.

4. Rate. Prejudgment interest shall be computed as compound interest per annum at the rate of one (1) percentage point above the prime lending rate. Such interest shall be calculated by the clerk of the court and adjusted every January 1 and June 1 to reflect any changes made in the prime lending rate.

When the judgment debtor is a unit of local government, as defined in § 1 of Article VII of the Constitution, a school district, a community college district, or any other governmental entity, interest shall be computed as simple interest per annum at the fixed rate of nine (9) percent.

5. Discretion. The court may, at its discretion, deny prejudgment interest for any period of unreasonable delay for which it finds the claimant wholly responsible.

6. In actions based solely on the issue of damages, prejudgment interest shall apply as in §§ 1-5 above.

7. Nothing in this section shall be construed as prohibiting the awarding of post-judgment interest pursuant to § 2-1303 of this chapter.