GETTING WHAT'S DUE:
Prejudgment Interest in Illinois

Make no mistake, the accrued interest on your client's damage award can add up to real money. This article describes the steps for obtaining prejudgment interest and weighs the pros and cons of a recent proposed statutory amendment that would have provided prejudgment interest for tort claims.

By Adam N. Hirsch

You rise as the jury enters the room. You look confidently at your client, hoping your poker face hides the uncertainty that lies underneath. The judge asks the foreperson to hand the verdict to the clerk, who begins reading.

Your client grips the side of the table as the clerk announces that the jury has found in your favor and awarded your client $1 million for the defendant's breach of contract. After you exchange handshakes with your client and your team, your client turns to you and says, "That's great, but the defendant cheated me out of $1 million three years ago. Where's the rest of it?"

This question should not catch you off guard. A million dollars three years ago is worth substantially more today,[1] and Illinois law offers diligent lawyers the opportunity to recover the increase in value for their clients. Indeed, Illinois law provides for not less than 5 percent prejudgment interest for claims based upon a "written instrument."[2]

As shown below, attorneys can take steps from the complaint to the final judgment to ensure that their clients receive the prejudgment interest to which they are entitled. This article traces the origins of the concept of prejudgment interest, walks through the steps necessary to obtain prejudgment interest in Illinois, and discusses some of the current issues surrounding prejudgment interest in Illinois.

The theoretical origins of the time value of money

A centuries-old axiom holds that money is worth more today than tomorrow. The concept of the "time value" of money first gained broad legitimacy during the Renaissance, when a group of Spanish economists known as the School of Salamanca

1. Five percent simple annual interest on $1,000,000 over three years is $150,000.
2. See Illinois Interest Act, 815 ILCS 205/2.

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propounded several theories justifying – contrary to the custom at the time – charging interest on money.[3]

First, these economists argued, when money is exchanged, the borrower receives the benefit of immediate use of the borrowed money, for which he should have to pay a premium.[4] Second, since the creditor is deprived of the opportunity to use his money himself, the borrower should pay the creditor to cover this opportunity cost.[5] Finally, the Salamancans were among the first to conceptualize money itself as a good to be bought and sold, with the cost of purchasing money being interest paid on that money.[6]

It's better to prevail on the "written instrument" part of the Interest Act rather than the "vexatious delay" clause, under which an award of prejudgment interest is discretionary.

These theories have been fleshed out and reinforced in the intervening centuries. Any introductory economics text will now describe the "time value of money" and offer up the basic equations accountants and economists use to derive that value.[7] It is now an immutable law of economics that money changes in value over time.[8]

Authority for prejudgment interest in Illinois

Illinois law acknowledges the basic economics discussed above, but does not apply those principles in a consistent way. One Illinois court noted that "'if a creditor is denied payment of a sum rightfully his, he loses not only that sum but the right to use it.'"[9] And at least two courts have gone so far as to explicitly hold that prejudgment interest is not punitive but compensatory, because "[i]n our society the use of money is worth money."[10]

Despite this recognition of centuries-old economic reality, however, Illinois common law does not provide a right to prejudgment interest in money damages cases.[11] The common law of contracts may describe contract damages as "fairly and reasonably [to] be considered as naturally arising from the breach thereof,"[12] for example, but that description excludes prejudgment interest. Illinois courts of equity may exercise discretion to award non-contractual and non-statutory prejudgment interest in certain situations,[13] but courts of law have no such power.[14]

In short, for money damages claims, Illinois common law does not offer plaintiffs the true value of their damages. Indeed, in Illinois, there are only two ways to get prejudgment interest on a claim for money damages: by contract or pursuant to statute, either the Illinois Interest Act (Interest Act)[15] or a different Illinois statute.

Contracting for prejudgment interest

Parties may contract for recovery of prejudgment interest in the event of a breach. In light of the hurdles facing parties who attempt to recover prejudgment interest without contractual support, there will be very few occasions where your client should *not* contract for prejudgment interest. If your counterparty will agree, you should include as a matter of course contract language providing for prejudgment interest in the event of breach.

Drafting this language presents two issues. First, you should specify the date on which interest accrues. Typical dates include the date of the breach and the date the complaint is filed; either may have advantages or disadvantages.

Second, you should specify the interest rate. Illinois courts will enforce reasonable contractual interest rates.[16] They will also analyze a contractual interest rate to ensure it is compensatory and not punitive, and will not enforce interest obligations that act as penalties.[17]

Prejudgment interest under the Interest Act

Absent contractual entitlement, prejudgment interest may only be recovered pursuant to statute. The Interest Act permits prejudgment interest to be awarded:

> [F]or all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment.[18]

The above-quoted section lists eight separate circumstances in which prejudgment interest may be awarded. Six are relatively straightforward and apply to specific instruments; they either apply or they do not.

Two are broader, subject to interpretation and, for litigators, are where the action is. One is "other instrument of writing" (often referred to as the "written instrument" provision) and the other is "an unreasonable and vexatious delay of payment" (often referred to as the "vexatious delay" provision). For each of these two parts of the Interest Act, Illinois courts have developed coherent and predictable interpretations that dictate their application.

What is a "written instrument" under the Interest Act?

The Interest Act does not define "written instrument." Taken literally, it has broad meaning; thus, Illinois courts have

3. Marjorie Grice-Hutchinson, *Early Economic Thought in Spain 1177-1740*, 102. (Allen & Unwin 1978).
4. Marjorie Grice-Hutchinson, *The School of Salamanca. Readings in Spanish Monetary Theory*, 124-125 (Oxford 1952).
5. Id at 124. ("[B[ecause money is the merchant's tool by which he earns his bread, and if he deprives himself of its use for the benefit of his neighbor, it is just that the latter should reward him.").
6. Id at 50-51, 90-91.
7. See, for example, Thomas Riggs, ed, *Everyday Finance: Economics, Personal Money Management, and Entrepreneurship*, 438 (Gale Cenage 2008); Burton S. Kaliski, ed, Volume 2, *Encyclopedia of Business and Finance*, 735 (Thompson-Gale 2d ed 2007).
8. Inflation, a phenomenon distinct from interest, also causes money to change value over time. See Riggs, ed, *Everyday Finance* at 439 (cited in note 7).
9. *Milligan v Gorman*, 348 Ill App 3d 411, 416, 810 NE2d 537, 541 (1st D 2004), quoting *Hass v Cravatta*, 71 Ill App 3d 325, 332, 389 NE2d 226, 231 (2d D 1979).
10. *Hass* at 332, 389 NE2d at 231; see also *Milligan* at 416, 810 NE2d at 541.
11. *Moody v First Natl Bank of Moline*, 239 Ill App 3d 986, 990, 608 NE2d 589, 591 (3d D 1993).
12. *Maloney v Pihera*, 215 Ill App 3d 30, 46, 573 NE2d 1379, 1390 (5th D 1991).
13. See *Comtinental Cas Co v Commonwealth Edison Co*, 286 Ill App 3d 572, 577, 676 NE2d 328, 331 (5th D 1997).
14. Id.
15. 815 ILCS 205/2.
16. See *Medcom Holding Co v Baxter Trevenol Lab, Inc*, 200 F3d 518, 519 (7th Cir 1999); *Weidner v Szostek*, 245 Ill App 3d 487, 490, 614 NE2d 879, 881 (2d D 1993).
17. See, for example, *Chemical Bank v American Natl Bank & Trust Co*, 180 Ill App 3d 219, 229-30, 535 NE2d 940, 946 (1st D 1989).
18. 815 ILCS 205/2.

supplied a limiting definition, requiring that a "written instrument" under the Interest Act establish a creditor-debtor relationship, and that the amount owed by the debtor on the instrument be fixed and easily calculable.[19] Many cases follow this two-part definition of "written instrument."[20]

As many different types of documents have been held to create a creditor-debtor relationship, most litigants will find it easy to satisfy that part of the definition of "written instrument."[21] In a recent decision resolving a split of authority[22] as to whether the Illinois Pension Code[23] is a written instrument under the Interest Act, the Illinois Supreme Court defined "written instrument" broadly to include "instruments evincing transactions of a business and commercial nature which create a debtor-creditor relationship."[24] The court found, however, that the Pension Code did not fit this otherwise broad definition.[25]

Though prejudgment interest is not by itself a cause of action, the careful plaintiff's attorney would do well to treat it as such in drafting the complaint.

As for whether a debt is "fixed or easily calculable," Illinois courts have focused on whether the debt may be calculated (or, put differently, is capable of "legal ascertainment")[26] from the evidentiary record, as opposed to requiring a discretionary judgment call. Some courts have characterized this requirement as one of "liquidation," and have considered whether the debt at issue was "liquidated."[27]

For example, the debt a client owes his or her attorney on the attorney's contingent-fee contract is easily calculable, even though neither the client nor the attorney knows at the time of contract formation what the precise sum owed will be.[28]

The entire record may be used to show that a debt is easily calculated. In *Oak Park Tr & Sav Bank v Intercounty Title Co of Illinois*,[29] the first district reversed the lower court's denial of prejudgment interest with instructions that the trial court award prejudgment interest based on the entire record.

The lower court had previously denied prejudgment interest because even though the interest amount could have been easily calculated by a "simple investigation" into the record, the judge determined that he could not go beyond the face of the contract at issue. Even the use of an expert witness to calculate the amount of prejudgment interest does not automatically render the interest amount difficult to calculate.[30]

The "written instrument" and "fixed or easily calculable" requirements take their strongest bites out of oral contracts. For example, in *First Natl Bank of LaGrange v Lowrey*,[31] the issue was not whether the debt was fixed or easily calculable, but whether there was an agreement at all. Because the plaintiff prevailed based on her theory that no written contingent-fee agreement existed between her and the lawyer defendant, the court did not award prejudgment interest.[32]

If a party is entitled to prejudgment interest under the "written instrument" clause of the Interest Act, then prejudgment interest is mandatory, and the trial judge has no discretion to deny it.[33] Thus, it is preferable to prevail on the "written instrument" part of the Interest Act, rather than the "vexatious delay" clause, under which an award of prejudgment interest is discretionary.[34]

What constitutes "unreasonable and vexatious delay" under the Interest Act?

Though most litigators have their own definition of "vexatious delay," under the Interest Act, that phrase has become a term of art. It does not mean *any* delay, nor does it include refusal to pay based on a belief that the debt is not due.[35] If the alleged debtor can raise an "honest dispute" as to whether the debt is owed, including defending any lawsuit to collect that debt, then such delay is not "vexatious" under the Interest Act and prejudgment interest on that basis is not warranted.[36]

In order to prove "vexatious delay," therefore, you are far better off in relying on pre-filing (or even pre-demand letter) events. There is little a plaintiff can do to demonstrate that conduct subsequent to the filing of a complaint or the sending of a demand letter constitutes vexatious delay.

Pleading entitlement to prejudgment interest under the Interest Act

Though prejudgment interest is not by itself a cause of action, the careful plaintiff's attorney would do well to treat it as such in drafting the complaint. A complaint should include the facts necessary to prove entitlement to prejudgment interest as well as a prayer that prejudgment interest be awarded from the earliest arguable date. If you are fortunate enough to be suing on a contract that provides for prejudgment interest, you should quote that provision and identify the accrual date as the earliest possible date.

If you are claiming prejudgment interest under the "written instrument" clause of the Interest Act, you may want to refer in the complaint to the contract at issue as a "written instrument." You may also want to include an allegation that the

19. *Zayre Corp v SM & R Co*, 882 F2d 1145, 1156-1157 (7th Cir 1989).

20. See, for example *Milligan* at 416, 810 NE2d at 541; *New Hampshire Ins Co v Hanover Ins Co*, 296 Ill App 3d 701, 703, 696 NE2d 22, 24 (1st D 1998); *Kruse v Kuntz*, 288 Ill App 3d 431, 683 NE2d 1185 (4th D 1996); *E. M. Melahn Const Co v Village of Carpentersville*, 100 Ill App 3d 544, 545, 427 NE2d 181, 183 (2d D 1981).

21. See, for example, *Milligan* at 412, 810 NE2d at 538 (settlement agreement); *New Hampshire* at 703, 696 NE2d at 24 (insurance policy); *E. M. Melahn* at 545, 427 NE2d at 183 (construction contract).

22. Compare *Fenton v Bd of Tr of the City of Murphysboro*, 203 Ill App 3d 714, 561 NE2d 105 (5th D 1990) with *Basset v Pekin Police Pension Bd*, 362 Ill App 3d 235, 839 NE2d 130 (3d D 2005).

23. 40 ILCS 5/1-101 et seq.

24. *Kouzoukas v Retirement Bd of the Policemen's Annuity and Benefit Fund of Chicago*, 234 Ill 2d 446, 477, 917 NE2d 999, 1017 (2009).

25. Id.

26. *Oak Park Tr & Sav Bank v Intercounty Title Co of Ill*, 287 Ill App 3d 647, 654, 678 NE2d 723, 728 (1st D 1997).

27. See, for example, *Kehoe v Wildman, Harrold, Allen and Dixon*, 387 Ill App 3d 454, 483, 899 NE2d 1179, 1193 (1st D 2008); *Alguire v Walker*, 154 Ill App 3d 438, 447-48, 506 NE2d 1334, 1341 (1st D 1987).

28. See *Krantz v Chessick*, 282 Ill App 3d 322, 327, 668 NE2d 77, 80 (1st D 1996).

29. *Oak Park*, 287 Ill App 3d 647, 654, 678 NE2d 723, 727 (1st D 1997).

30. See, for example, *In re Liquidation of Inter-American Ins Co of Ill*, 329 Ill App 3d 606, 614, 768 NE2d 182, 189 (1st D 2002).

31. *Lowery*, 375 Ill App 3d 181, 216-217, 872 NE2d 447, 481 (1st D 2007).

32. Id.

33. *Milligan* at 416, 810 NE2d at 541.

34. See, for example, *Boyd v United Farm Mut Reins Co*, 231 Ill App 3d 992, 1000, 596 NE2d 1344, 1349 (5th D 1992).

35. See *Ouwenga v Nu-Way AG, Inc*, 239 Ill App 3d 518, 527, 604 NE2d 1085, 1092 (3d D 1992).

36. See, for example, *Oldenberg v Hagemann*, 207 Ill App 3d 315, 565 NE2d 1021 (2d D 1991).

breach resulted in the defendant owing a debt to the plaintiff, and the plaintiff becoming a creditor of the defendant.

Pleading damages is a bit trickier, as plaintiffs have an interest in not being hemmed in on a fixed ad damnum at the pleading stage. However, if the facts of your case allow you to plead that the debt owed is either fixed or easily calculable, you should do so.

Granted, such conclusory pleadings do not aid in your proof, but by pleading them, you will put the court and your opponent on notice that you intend to seek prejudgment interest. Also, pleading these elements can serve as a reminder to follow through on any discovery necessary to prove them up.

Senate Bill 184

In 2009, the Illinois legislature considered and rejected an amendment to the Illinois Rules of Civil Procedure that would have, for the first time, allowed recovery of prejudgment interest on unliquidated claims, including negligence-based tort claims.

This amendment, offered as Senate Bill 184 (SB 184) first required the plaintiff to give the defendant (or its insurer) notice of the claim.[37] Such notice would entitle the plaintiff to recover prejudgment interest on any final award or judgment at a rate of 2 percent over the one-year Treasury constant maturity.[38]

The defendant, however, could abrogate the plaintiff's right to recover prejudgment interest by making a timely settlement offer.[39] If the defendant made a settlement offer within 120 days of the date of its answer, the plaintiff rejected the settlement offer, and the final award or judgment was less than the settlement offer, then the plaintiff would not receive prejudgment interest.[40] Conversely, if the final settlement award or judgment were greater than the defendant's settlement offer, the plaintiff "must" be awarded prejudgment interest.[41]

SB 184 died in committee,[42] but it could conceivably be reintroduced in the future.[43] In February 2009, the *ISBA Bar News* featured articles on both sides of the issue, each of which demonstrates how SB 184 both fits within and deviates from the economic rationale for prejudgment interest.[44]

Writing in support of SB 184, Robert C. "TJ" Thurston highlighted objections to the bill that indicate the time value of money is very much on everyone's mind.[45] According to Thurston, insurance companies are more willing to pay defense lawyers on an hourly basis to drag out cases than they are to settle because they can deduct their legal bills as business expenses and can earn compound interest on their litigation reserves.[46] Thurston also could have mentioned that when tort plaintiffs cannot recover prejudgment interest, the value of their claims decreases over time.

Writing against SB184, Gregory Cochran raises an excellent question, asking, "if the purpose [of SB 184] is to provide prejudgment interest on past damages for which the plaintiff is theoretically out-of-pocket, why does the proposal also award prejudgment interest on future damages?"[47] Indeed, the economic justification for prejudgment interest has no application to future damages, which, by definition have yet to be incurred. It would seem odd to discount future damages to present value and then award prejudgment interest on that present value, which would undo the discounting.

Beyond the future damages issue highlighted by Cochran, SB 184 has a conceptual problem because it uses prejudgment interest as an incentive to promote settlement rather than an undifferentiated part of compensatory damages. SB 184 would better reflect economic reality if it mandated prejudgment interest for tort plaintiffs at an interest rate set to represent the true value of their claims and used other means to promote case evaluation and settlement. The conception of prejudgment interest as an extra to be doled out as a punishment or reward for certain behavior is at odds with the reasons prejudgment interest exists at all.

Rather, prejudgment interest should be considered an integral and undifferentiated part of compensatory damages. Perhaps SB 184's notice-offer-response structure could be overlaid on top of a mandatory prejudgment interest award, with the plaintiff entitled to an interest rate increase if he or she obtains a settlement or judgment in excess of the defendant's offer, or a reduction of the settlement or judgment is less.

Conclusion

Illinois law on prejudgment interest is not perfectly aligned with the economic theory that justifies such interest, but it is reasonably coherent and predictable. Because prejudgment interest is often treated as an add-on, it is easy to overlook or forget. It should not be. ■

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37. See SB 184, proposed 735 ILCS 5/2-1303.1, Illinois General Assembly, available at http://www.ilga.gov/legislation/BillStatus.asp?DocNum=184&GAID=10&DocTypeID=SB&LegId=40656&SessionID=76&GA=96.
38. Id.
39. Id.
40. Id.
41. Id.
42. *Prejudgment interest proposal is adopted*, January 2009 ISBA Bar News, available at http://www.illinoisbar.org/publications/barnews/2009/01/prejudgmentinterest.html.
43. Id.
44. *Prejudgment interest proposal issues debated*, February 2009 ISBA Bar News, available at http://www.illinoisbar.org/publications/barnews/2009/02/prejudgmentinterest.html.
45. Robert C. "TJ" Thurston, *Pro: statute would rectify injustice, follow a trend*, February 2009 ISBA Bar News, available at http://www.illinoisbar.org/publications/barnews/2009/02/prejudgmentinterest.html.
46. Id.
47. Gregory L. Cochran, *Con: measure could cause economic woes for Illinois*, February 2009 ISBA Bar News, available at http://www.illinoisbar.org/publications/barnews/2009/02/prejudgmentinterest.html.