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Prejudgment Interest: The Illinois Consumer's Loss

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PREJUDGMENT INTEREST: THE ILLINOIS CONSUMER'S LOSS

by Jeffrey M. Goldberg*

I. Introduction

Plaintiffs seeking to avail themselves of the services of the Illinois civil court system must invest considerable time, money and energy in the endeavor. These "consumers" of the legal system require efficient and fair proceedings in the handling of their disputes. Ultimately, plaintiffs seek full compensation for the losses they have incurred.[1] However, many successful plaintiffs may discover that their investment in the legal system does not pay off. In Illinois, statutory and case law severely impede the ability of victorious litigants to recover full compensation for their losses. This impediment stems from the inability to recover prejudgment interest, which is the interest on damages from the date of the loss to the date of recovery.

Clearly, if a person suffers a loss of $10,000 on January 1, 1987, but does not recover until January 1, 1992 and is limited to the same $10,000, the person has not been compensated in full. In addition, this acts as an incentive for defendants to delay litigation since, in effect, they have free use of plaintiffs' money. Consequently, the incentive for defendants to delay the resolution of cases directly contributes to the tremendous backlog of cases pending in the courts.

The deficiency is exemplified where "A" wrongfully takes $10,000 that belongs to "B." B files suit but must wait one, two, or more years for judgment. Meanwhile, A has invested the money at 10 percent. When judgment is entered without prejudgment interest, which is the current law in Illinois, A gets to keep the interest and B loses the interest his money was earning for A.

A hypothetical tort case illustrates the problem facing the consumer who seeks redress for his injuries in a court that does not allow prejudgment interest. Suppose Stan and Oliver are driving down a one-way street in their identical 1980 automobiles when they come along side of each other at a red light. As both of them wait in anticipation of the green light, Charlie mistakenly turns his automobile onto the same one-way street heading in the wrong direction. Before Stan and Oliver can react, Charlie crashes his car squarely into both of the their vehicles.

Subsequently, the automobiles are taken to the same body shop for repairs. The mechanic scratches his head in amazement over the fact that the two cars sustained identical damages to their front ends and he repairs the cars for $10,000 per car. The next day, Charlie gives Stan, his boss's son, the $10,000 to cover the repairs. However, Charlie decides not to pay Oliver. As a result, Oliver is forced to file a lawsuit against Charlie to recover the $10,000 needed to repair his car. After four years, Oliver's case finally goes to trial. Oliver is successful and he is awarded damages of $10,000 based on the mechanic's estimate.

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The problem is apparent. Both Stan and Oliver received $10,000 for the damages to their cars, but they were not equally compensated for their identical injuries. Stan received his money four years before Oliver, and a dollar today is worth more than a dollar tomorrow. Oliver lost the interest that could have been generated on the $10,000 over four years. Calculation of a five percent interest rate, over those four years, shows that Oliver could have earned over $2,000 on the principal. Further, Charlie had incentive to delay the litigation because he could have earned that interest for himself until the judgment was rendered.

A law that would require the inclusion of prejudgment interest in damage awards for cases similar to Oliver's would achieve the goals of fully compensating successful plaintiffs and of reducing the backlog of cases strangling the court system. Prejudgment interest is the term used for the interest that accrues from the date of an injury until the date of final judgment.[2] Damages that include prejudgment interest award plaintiffs the monetary value of their injury from the time of the accident until payment of the judgment. At the same time, prejudgment interest awards deny defendants the benefit of the plaintiffs' income-generating money throughout the litigation. Additionally, prejudgment interest awards would induce defendants to settle cases before trial to avoid paying prejudgment interest, consequently reducing the backlog of pending cases.

This Article takes a four step approach in examining the concept of prejudgment interest. Initially, the Article details the legal history of prejudgment interest. Second, the Article discusses the evolution of prejudgment interest in Illinois, and highlights the outdated common law and statutory law on prejudgment interest currently in effect. Third, the status of prejudgment interest in other jurisdictions is examined. Finally, the Article advocates legislative enactment of

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pending prejudgment interest legislation concerning personal injury cases, and discusses the benefits of such legislative action.

II. Background

Historically, courts viewed the charging of any interest on money loaned as illegal.[3] This attitude reflected early societal beliefs that compensation for the use of another person's money was reprehensible. In the first agricultural societies, those who borrowed money were the needy, and the ethical standards of those times frowned upon the taking of interest when lending to a person in distress.[4] Consequently, the practice of usury, whereby a person received interest on money loaned, was condemned. Later, the ancient Greeks and the Biblical writers adopted these early beliefs, establishing a solid classical foundation for the judicial prejudice against prejudgment interest. Subsequently, this prejudice became embodied in the common law where it has remained entrenched in large part until modern times.

It was not until the 1800's, with the tremendous development of industry and corresponding economic theory, that the public began to accept the practice of allowing interest on money loaned.[5] Once private enterprise transcended religion's dominance over the economy, society began to view interest as the natural growth of money. Merchants required loans to finance the creation of new business endeavors. To obtain the financing, merchants had to provide lenders with incentives that symbolized compensation for the use of the money. Eventually, society regarded the taking of interest as corrupt only when the payments involved an "extortionate" or "unconscionable" amount.[6]

Correspondingly, societal perceptions of interest were reflected in the common law. The liberalizing idea was the judicial recognition of compensating the wronged party by awarding damages for the lost use of the money.[7] Thus, in 1924, Judge Learned Hand stated the following:

> Whatever may have been our archaic notions about interest, in modern financial communities a dollar today 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.[8]

Ultimately, the level of acceptance of prejudgment interest, and the various situations in which it was recoverable, evolved on a state by state basis.

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III. Prejudgment Interest in Illinois

As the prejudice against interest diminished in Illinois, two categories of cases arose in which prejudgment interest was recoverable. Plaintiffs could recover interest in cases where contractual parties expressly agreed to the payment of interest, and where provided for in statutory law.

A. Prejudgment Interest in Contract Cases

Because of the common law, courts initially allowed prejudgment interest only when the damages were ascertainable, or "liquidated" at the time of the injury.[9] These cases usually involved contract disputes in which the parties had agreed previously on the amount of a party's potential liability.[10] Interest was allowed in these circumstances on the theory that the defendants knew the amount owed, and they should be penalized for not promptly paying this amount.[11]

If the damages were "unliquidated" or not ascertainable, courts would not allow prejudgment interest.[12] In these situations, the courts reasoned that it would be unfair to impose a penalty on a defendant for not paying an obligation that was uncertain in amount until a judgment was reached.[13] The defendants did not wrongfully withhold the plaintiff's money and they were unable to pay the plaintiff until the court determined the amount.

Currently, case law suggests that the liquidated versus unliquidated theory is being abandoned, and two new theories have arisen in support of prejudgment interest in contractual disputes.[14] These theories are known as the "lost use theory" and the "unjust enrichment theory." The lost use theory is based on the fact that a plaintiff suffers the lost use of money between the time of the accident and the judgment. Thus, prejudgment interest awards are designed to compensate victorious plaintiffs for the money they could have earned during that time.[15]

Under the second theory, prevention of unjust enrichment, a defendant's liability is thought to arise at the time of the plaintiff's injury. Thus, the trial is merely a determination, after the fact, of the defendant's preexisting liability, and any damages subsequently awarded are considered the plaintiff's property at the time of the injury. Therefore, any interest generated on the plaintiff's money before final judgment would unjustly enrich the defendant, and the delay caused by litigation should not serve to enrich the wrongdoer.[16]

B. The Illinois Prejudgment Interest Statute

In 1879, the Illinois legislature enacted a prejudgment interest statute that offered several provisions for awarding prejudgment interest. Specifically, these provisions, which are still in effect, allow prejudgment interest on amounts due on bonds, bills, notes, other written instruments, money wrongfully taken, and money withheld due to an unreasonable and vexatious delay of payment.[17] Although the enactment of the statute was a significant step in the evolution of prejudgment interest, there are a number of weaknesses in the statute that leave many

plaintiffs inadequately compensated in civil actions.

The first weakness of the existing prejudgment interest statute is that it exclusively applies to the provisions specified. Traditionally, Illinois courts denied prejudgment interest unless a case clearly fell into one of the statute's specific provisions. Thus, Illinois courts refused to award prejudgment interest in tort cases based on the argument that if the legislature had intended prejudgment interest awards to be allowed in such cases, they would have included such a provision in the statute.[18]

Illinois courts have given restrictive construction to the statute's provisions which could allow room for broad interpretation.

Illinois courts have even given restrictive construction to the statute's provisions which could allow room for broad interpretation. Thus, the courts construe the general phrase "or other instrument of writing" to apply only to writings sharing characteristics with the written instruments specified in the statute. Specifically, the "other instruments of writing" must establish a legal indebtedness in themselves, and convey a specific, or implicit due date.[19] For example, one Illinois court refused to allow a letter in confirmation of an oral contract to fall within the meaning of "other instrument of writing."[20] The court ruled that the legal indebtedness arose out of the oral contract, not out of the confirmation letter.[21]

Similarly, the majority of Illinois courts interpret the statutory phrase "unreasonable and vexatious delay" narrowly. Courts are not persuaded by plaintiffs' arguments that the phrase should apply to delay in payments due to defendants' initiation of legal proceedings.[22] One court held that if the delay in payment is due to the litigation process, the plaintiff must prove "actual fraud" on the part of the defendant to recover prejudgment interest.[23] Consequently, plaintiffs' attempts to broaden the scope of the Illinois prejudgment interest statute have failed.

Further evidence of the statute's inadequacy is shown by its allowance of a static five percent interest rate. The legislature has not changed the rate to correspond with the fluctuating interest rates in the market, or provided the courts with a method for adjusting the rate to match current rates. Ironically, the only amendment to the 1879 prejudgment interest statute came in 1891 when the legislature decreased the interest rate from the original six percent to the current rate of five percent.[24] Thus, the statutory rate provides an inaccurate measure of the value of money withheld.[25]

Although the statute firmly established the right to prejudgment interest in expressly enumerated situations, the statute's inadequacies frustrate plaintiffs' efforts to receive full compensation for their injuries. Parties in actions that do not fit into one of the express categories of the statute fail to receive full compensation. Moreover, parties who do fall into one of the categories in the statute receive interest arbitrarily set at five percent, a level that does not necessarily reflect the prevailing market rates.

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C. Current Judicial Trends in Illinois

In Illinois, there is growing evidence that courts are attempting to award prejudgment interest in tort cases despite the statute's silence on the issue. Because of equitable considerations, courts are given broad discretion in awarding interest and may give or withhold interest as it deems fair and just.[26] Empowered with this discretion, some Illinois courts have allowed prejudgment interest in certain situations not specified in the statute.

Equitable principles have also allowed Illinois courts to recognize that prejudgment interest may be appropriate where a fiduciary duty or confidential relationship exists,[27] or in cases involving fraud.[28] These courts have been able to award prejudgment interest by basing their decisions on the statute's language regarding "unreasonable and vexatious delay of payment."[29] These cases reflect the courts' dissatisfaction with the narrow scope of the prejudgment interest statute, and demonstrate their attempts to achieve proper results despite the legislative restrictions.

There is also evidence of a current trend in Illinois that courts are seeking ways to bypass the prejudgment interest statute altogether. The wrongful death case of *In Re Air Crash Disaster near Chicago, Ill., on May 25, 1979*,[30] is illustrative of this trend. In this case, the court sidestepped the Illinois prejudgment interest statute and awarded prejudgment interest as a part of the plaintiffs' damages. The court concluded that the absence of a specific provision in the statute does not eliminate an award of prejudgment interest if another state statute or equitable principle provides for such an award.[31] Thus, the court looked to the Illinois wrongful death statute which allows damages that are deemed "fair and just compensation."[32] The court then held that prejudgment interest is an essential element of full compensatory damages and awarded the interest.[33] Moreover, the court found equitable grounds on which to award prejudgment interest. The court held that since there was incentive for the defendants to delay the litigation, and that the defendant's liability was not questioned, the plaintiffs were entitled to prejudgment interest.[34]

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These judicial attempts to sidestep the outdated prejudgment interest statute demonstrate the

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courts' willingness to allow prejudgment interest to fairly and adequately compensate injured parties. Legislative enactment of a comprehensive statute allowing prejudgment interest in personal injury cases would eliminate the need for these creative approaches, and would establish uniformity and predictability on this issue.

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D. Legislative Efforts in Illinois

In April of 1991, Illinois Senator Rock and Illinois Representative Madigan introduced bills to the Illinois Senate and House, respectively. The bills set forth amendments to the current Illinois statute[35] regarding interest on judgments. The amendments provide that judgments recovered in any court in actions filed after the effective date of the amendment will accrue interest from the date the complaint is filed to the date the judgment is satisfied.[36] Further, the amendments allow this prejudgment interest to accrue at the rate of nine percent per year.

If enacted, the bills could effectively modernize prejudgment interest in Illinois; however, the bills are far from being passed into law. On May 24, 1991, the House Judicial Committee declined to pursue enactment of the House bill and designated the bills' official status as "recommitted interim study calendar."[37] This cryptic status basically signifies that the bills have been indefinitely set aside for further examination.

IV. Prejudgment Interest in Other Jurisdictions

A. Other States

Legislative enactment of the prejudgment interest amendment would align Illinois with current trends in other states. Despite minor variances, a majority of states are allowing prejudgment interest in a broader range of cases. A review of other states' treatment of prejudgment interest highlights the current trends in this area.

In California, for example, prejudgment interest can be sought in personal injury and wrongful death cases under section 3288 of the California Civil Code.[38] Section 3288 states that in actions other than contract, "interest may be given, in the discretion of the jury."[39] The California legislature enacted section 3288 in 1872, and the section has never been repealed or amended since that date.

In an even more liberal approach, Alaska has enacted a statute granting prejudgment interest as a matter of right. In 1965, the Alaska legislature amended their interest statute[40] with the intent that prejudgment interest be awarded more liberally than previous judicial interpretations would allow.[41] The Alaska legislature recognized that failure to award prejudgment interest creates a substantial financial incentive for defendants to litigate, and thus defer payment to injured plaintiffs, even when the liability is clear and the jury award is predictable.[42] The current Alaska statute imposes an obligation on defendants in tort actions to pay prejudgment interest compounded from the date of the injury.[43]

In New York, as in Illinois, legislators are continuing their attempts to amend current prejudgment interest laws to allow prejudgment interest in personal injury cases. New York Senate Judiciary Chairman, Christopher Mega, sponsored a prejudgment interest bill that would direct the payment of interest in personal injury and product liability cases from the date the lawsuit was commenced or six months after the cause of action arose, whichever is later.[44] Unfortunately, the New York bill has faced opposition from the insurance industry, and from the New York Supreme Court Committee on Civil Practice.[45] Despite lobbying efforts from the New York State Trial Lawyers Association and others, the bill currently remains inactive.[46]

B. Admiralty Law

Federal courts sitting in admiralty have a long history of awarding prejudgment interest. In 1818 the United States Supreme Court stated that the true measure of damages in an admiralty case was the "value of the property lost, at the time of the loss...with interest upon such valuation."[47] This concept was reiterated in 1897 when the Supreme Court stated, that as a general rule, ship collision damages should be assessed as the value of the property plus the interest from the time of the accident.[48] Later, the United States Congress expanded the general admiralty rule allowing prejudgment interest in wrongful death and personal injury cases.[49]

Admiralty courts have justified prejudgment interest awards because of the lost use theory. Admiralty courts view damages as sustained on a certain date, regardless of when the court finally enters a judgment. By awarding prejudgment interest, admiralty courts attempt to fully compensate plaintiffs for the lost use of the value of the injury.[50]

Nevertheless, prejudgment interest is not compulsory. In admiralty cases, courts retain discretion whether or not to award prejudgment interest to compensate the injured party in full.[51] However, it is an abuse of discretion for admiralty courts to deny prejudgment interest absent peculiar circumstances. These circumstances may include delay in litigation, mutuality of fault, and uncertainty as to liability.[52] Therefore, under this discretionary approach, admiralty courts are able to fairly and completely compensate injured parties for the lost use of damages sustained at the time of the injury.

V. Beneficial Effects of Awarding Prejudgment Interest

A. Injured Party Fully Compensated

The primary purpose of personal injury litigation is to fully compensate the injured parties for the losses they have suffered within the

scope of their legally recognized interests.[53] Accepting this presupposition as true, injured parties are receiving something less than the full amount of the loss sustained when they are denied reasonable prejudgment interest awards. A judgment handed down several years after an accident only provides the amount of damage sustained at the time of the accident. The plaintiff will not recover the money that could have been earned through investment at prevailing market rates of return. Prejudgment interest can make up the difference between the value of the damages at the time of the accident, and the value of the damages at the time of the judgment. Consequently, judicial awards of prejudgment interest based on a rate consistent with prevailing market rates will achieve the goal of full compensation for plaintiffs.[54]

B. Reduction of Backlog of Civil Litigation

Prejudgment interest awards in personal injury cases can reduce the backlog of cases that is currently inhibiting the court system's ability to award full compensation to injured parties. The backlog creates substantial delays in the judicial process. The statistics on the backlog of civil lawsuits in Cook County, Illinois are staggering. At the start of 1990, there were 67,776 lawsuits pending in the Law Division.[55] Of these, 13,657, or 20 percent, were at least five years old.[56] According to recent studies, the average length of time it had taken a lawsuit to reach trial in 1988 was slightly more than six years.[57] Further, compare those statistics with the American Bar Association's recommendation that most personal injury lawsuits should be resolved in two years.[58] These numbers indicate serious delays in the litigation process, and correspondingly, an ineffectiveness of the courts to fully compensate plaintiffs for their losses.[59]

One reason for the tremendous backlog is that defendants have an incentive to delay litigation. Due to the enormous backlog of cases, and the limited statutory provisions for prejudgment interest awards, defendants, particularly insurance companies, can earn huge profits while awaiting the final judgment. It is standard practice in the insurance business to set aside a "reserve" to cover unpaid claims.[60] By not paying out settlements, and keeping these reserves invested, insurance companies can reap a hefty profit. Thus, it is reasonable to surmise that defendants use a simple formula for determining whether to settle a case out of court, or to delay the litigation as long as possible. If defendants' costs are less than the interest that can be earned on their monetary reserves, then they will allow the backlog of cases to push the trial date back. To maximize profits, insurance companies would resist offering fair settlements before trial so they can invest the value of claims and earn money above what it might have to pay in six years when cases finally go to trial. If a plaintiff eventually does receive a favorable verdict, the value of the award is less than the value of the injury at the time of the accident.

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The potential profit defendants may earn can be quite substantial. For example, in a case where the damages were estimated at between 115 and 500 million dollars, the court calculated the interest that the defendants or their insurers may have earned, and plaintiffs lost, was between 11.5 and 50 million dollars per year, or between $31,800 and $136,200 per day.[61]

Moreover, defendants who do seek a settlement before trial typically offer a plaintiff a lower amount than might be awarded after a trial.[62] Plaintiffs realize that the settlement offer is worth more today than the damages awarded at trial would be in a few years.[63] Consequently, the knowledge that prejudgment interest will not be awarded as part of a favorable verdict forces plaintiffs to accept lower settlements, and therefore receive inadequate compensation for their injury.

One remedy to the backlog is legislative enactment of broader provisions for prejudgment interest in civil litigation.[64] Faced with the prospect of paying out prejudgment interest, defendants will actively pursue out of court settlements, thereby reducing the number of lawsuits pending. Prejudgment interest awards would encourage early settlements by eliminating the existing incentive to delay litigation. If a defendant has to pay the interest on the money ultimately, there is no reason to invest the money and wait for the judgment. In fact, defendants will have an incentive to settle meritorious claims out of court as early as possible to avoid paying the interest that would accrue up to the time of trial. As the number of settlements increase, the backlog of cases should correspondingly decrease.

C. Jury Assessment of Damages More Accurate

Those opposed to prejudgment interest often argue that juries already take interest into account when awarding damages, and if prejudgment interest were allowed, plaintiffs would be receiving double their damages.[65] Although there is evidence which indicates that juries may be calculating interest into damages, there is no way to ascertain whether all jurors are adding interest into the calculation, or how they arrive at their numbers.[66] Judicial acceptance of prejudgment interest would eliminate the arbitrariness of implicit jury awards of interest. Courts would be able to instruct the jury to disregard any delay considerations because the court would award interest on whatever damages the jury determined.[67] Thus, jury assessments of damages would be made on a more accurate basis and parties to the litigation would benefit from greater certainty in estimating the damages before trial.

D. Courts Would Have Discretion to Award Prejudgment Interest

Critics of prejudgment interest

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also claim that by awarding prejudgment interest, the roles would be reversed, with plaintiffs then having the incentive to delay litigation.[68] However, these concerns are unfounded.

An analysis of cases in which prejudgment interest is allowed, such as cases arising under the laws of admiralty, reveals that the courts balance the equities involved in a particular case before awarding prejudgment interest.[69] These courts carefully consider whether the plaintiff delayed in pursuing the litigation before awarding prejudgment interest. When there has been a delay in the litigation, the courts look to other factors to determine whether a party is responsible for the delay. These factors may include mutuality of fault, uncertainty as to liability and uncertainty as to the extent of damages.[70] Other equitable factors may include bad faith estimates of damages, or any frivolous claims.[71]

Therefore, a court's consideration of all the equitable factors in a case before allowing prejudgment interest prevents plaintiffs from taking advantage of the litigation process.

VI. Proposed Modifications for Prejudgment Interest in Illinois

To facilitate judicial efficiency in awarding prejudgment interest, the Illinois legislature should enact legislation that specifically addresses the inherent problems found in the current system. Bound by an archaic statute, Illinois courts are forced to limit the availability of prejudgment interest in tort cases resulting in inadequate compensation for plaintiffs. To achieve equitable results, courts must formulate creative alternatives to bypass the statute. These recent judicial efforts to award prejudgment interest in a broader range of cases are laudable, but unpredictable. A new statute, or amendment to the existing statute, must adopt specific provisions which recognize prejudgment interest as an essential element of damages in tort actions. Prejudgment interest is compensatory in nature because it assists in placing plaintiffs in the position they would have been in if no injury had occurred. To fully compensate injured parties, new legislation must provide for prejudgment interest as a matter of right.

Further, new legislation must eliminate the fixed interest rate and provide for an alternative index that reflects current market rates. A fixed statutory rate does not allow for changes in the economy. Consequently, plaintiffs may receive more, or less, interest than they could have earned on the value of their damages. These arbitrary results could be eliminated with the adoption of a uniformly applied index rate based on an established economic indicator. For example, the interest rate could correspond to the Prime Lending Rate, or Federal Treasury Bill rates. This would allow a more accurate measure of the interest that could have accrued on the value of plaintiff's loss through investment, and at the same time, allow greater predictability of damages.

VII. Conclusion

Prejudgment interest is a necessary element of damages to provide full and fair compensation for plaintiffs in tort cases. However, current consumers of the Illinois judicial system are being short changed. Despite encouraging trends in other jurisdictions, Illinois courts adhere to an outdated system that, in the vast majority of cases, denies prejudgment interest for injured parties. The Illinois courts and legislature have failed to recognize the costs associated with delays inherent in the legal system. By failing to award prejudgment interest, the system provides an incentive for defendants to delay settlement at the expense of injured plaintiffs. To remedy the existing inequities, the Illinois Legislature must enact a statute allowing prejudgment interest as a matter of right in a broader range of lawsuits.

Comprehensive new legislation that applies prejudgment interest to a broader range of injuries and incorporates an appropriate interest rate calculated from the time of the plaintiff's loss, would fully compensate victims for their losses. In addition, such legislation would reduce the backlog of lawsuits pending in the court system. Until the Illinois Legislature adopts such a statute, consumers who are required to participate in the Illinois judicial system will continue to receive inadequate compensation.

ENDNOTES

1 Compensation is the fundamental purpose of damages in tort law. *Miller v. Robertson*, 266 U.S. 243, 257 (1924).

2 *See* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.5, at 164 (1973)(defining the different categories of interest, including prejudgment interest).

3 ARTHUR G. SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES 135 (2d ed. 1909); David S. Fleming, Comment, *Prejudgment Interest: An Element of Full Compensation in Wrongful Death Cases*, 1981 U.ILL. L. REV. 453, 458 & n.29; Joel A. Williams, Comment, *Prejudgment Interest: An Element of Damages Not to Be Overlooked*, 8 Cumb. L. Rev. 521, 521 & n.6 (1977).

4 CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 51, at 207 (1935).

5 *Id.* at 208.

6 *Id.*

7 *See, e.g., Spalding v. Mason*, 161 U.S. 375, 396 (1895); *Crescent Mining Co. v. Wasatch Mining Co.*, 151 U.S. 317, 323 (1893); *Curtis v. Innerarity*, 47 U.S. (6 How.) 146, 154 (1848).

8 *Procter & Gamble Dist. Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924).

9 Recent Developments, *Prejudgment Interest as Damages: New Application of an Old Theory*, 15 STAN. L. REV. 107, 107 n.6 (1962) (referring to the common law rule requiring liquidated damages, which are damages of a "sum certain in amount and payable at a specific date"). The liquidated damages theory has been followed in Illinois. *See, e.g., Michigan Ave. Nat'l Bank of Chicago v. Evans, Inc.*, 531 N.E.2d 872 (Ill. App. Ct. 1988) (prejudgment interest allowed where party shows that the instrument was in writing and the amount due was fixed and determinable); *First Nat'l Bank Co. v. Ins. Co.*, 606 F.2d 760, 769 (7th Cir. 1979) (the "rule has evolved that for interest to be awarded under the Illinois statute, the sum due must be liquidated; that is, be subject to exact computation").

10 MCCORMICK, *supra* note 4, 54, at 213-17.

11 Recent Developments, *supra* note 9, at 107 n.7.

12 SEDGWICK, *supra* note 3, at 137.

13 *Id.* at 137-38.

14 *See Funkhouser v. J. B. Preston Co.*,

290 U.S. 163, 168 (1933) (the Court determined that the distinction between liquidated and unliquidated damages is not sound); *see also* Recent Developments, *supra* note 9, at 108-09 (discussing the rejection of the liquidated versus unliquidated damages theory).

15 *See In Re Estate of Wernick,* 535 N.E.2d 876, 888 (Ill. 1989) (prejudgment interest is designed to compensate an injured party for any economic loss occasioned by the inability of the party to use his money); Michael K. Brown, Comment, *The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases,* 16 U.S.F. L. REV. 325, 342 (1982) (discussing the lost use theory).

16 *See* Brown, *supra* note 15, at 342 (discussing the unjust enrichment theory); *cf. In Re Estate of Wernick,* 535 N.E.2d 876, 887 (Ill. 1989) (reviewing the appellate court's allowance of prejudgment interest due to the defendant's unjust enrichment).

17 ILL. REV. STAT. ch. 17, para. 6402 (1989).

18 *See Matich v. Gerdes,* 550 N.E.2d 622, 631 (Ill. App. Ct. 1990) ("No indication has been given that the statute is intended to provide for prejudgment in tort cases."); *Bart v. Union Oil Co. of California,* 540 N.E.2d 770, 776 (Ill. App. Ct. 1989) ("There is no statutory authority authorizing a trial court to impose prejudgment interest."); *Northern Trust Co. v. County of Cook,* 481 N.E.2d 957, 962 (Ill. App. Ct. 1985) ("It is clear that Illinois statutes do not authorize prejudgment interest in tort cases."); *Schulz v. Rockwell Mfg. Co.,* 438 N.E.2d 1230, 1236 (Ill. App. Ct. 1982) (under Illinois law the conduct of litigation by itself does not justify prejudgment interest); *Garner v. Geraghty,* 423 N.E.2d 1321, 1324 (Ill. App. Ct. 1981) (prejudgment interest award cannot be sustained absent statutory authority).

19 *Reserve Ins. Co. v. General Ins. Co.,* 395 N.E.2d 933, 940-41 (Ill. App. Ct. 1979).

20 *Hamilton v. American Gage & Mach. Corp.,* 342 N.E.2d 758, 765 (Ill. App. Ct. 1976).

21 *Id.*

22 *See, e.g., Kespohl v. Northern Trust Co.,* 266 N.E.2d 371, 373 (Ill. App. Ct. 1970).

23 Id. at 374.

24 *See* ILL. ANN. STAT. ch. 17, para. 6402, historical note (Smith-Hurd 1980).

25 The insufficiency of the prejudgment interest rate is further shown by comparing it with the nine percent rate allowed under the Illinois prejudgment interest statute. ILL. REV. STAT. ch. 110, para. 2-1303 (1989).

26 *Finley v. Finley,* 410 N.E.2d 12, 19 (Ill. 1980); *Zoykoych v. Spalding,* 463 N.E.2d 943, 954 (Ill. App. Ct. 1984).

27 *In Re Estate of Wernick,* 535 N.E.2d 876, 888 (Ill. 1989); *In Re Marriage of Pitulla,* 559 N.E.2d 819, 831 (Ill. App. Ct. 1990); *La Barbera v. La Barbera,* 452 N.E.2d 684, 690 (Ill. App. Ct. 1983).

28 *Lovejoy Electronics, Inc. v. O' Berto,* 873 F.2d 1001, 1007 (7th Cir. 1989); *Emmenegger Construction Co., Inc. v. King,* 431 N.E.2d 738, 744 (Ill. App. Ct. 1982); *see also Steward v. Yoder,* 408 N.E.2d 55, 57 (Ill. App. Ct. 1980) (an element of bad conduct is necessary before allowing prejudgment interest).

29 ILL. REV. STAT. ch. 17, para. 6402 (1989).

30 480 F.Supp. 1280 (N.D. Ill. 1979), aff'd, 644 F.2d 633 (7th Cir. 1981).

31 *Id.* at 1285.

32 *Id.* The Illinois wrongful death statute provides: "[T]he jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person." ILL. REV. STAT. ch. 70, para. 2 (1989).

33 *In Re Air Crash Disaster,* 480 F.Supp. at 1286.

34 *Id.* at 1287.

35 ILL. REV. STAT. ch. 110, para. 2-1303 (1989).

36 Senate Bill No. 1100 (introduced by Senator Rock on April 12, 1991) and House Bill No. 1385 (introduced by Representative Madigan on April 3, 1991), 87th General Assembly, State of Illinois (1991 and 1992).

37 The discovery that the official status of the bill was "recommitted interim study calendar" was determined from a telephone call on April 30, 1992 made to Illinois Dial-A-Bill at 1-800-252-6300.

38 CAL. CIV. CODE 3288 (West 1970 & Supp. 1992).

39 *Id.*

40 ALASKA STAT. 45.45.010 (1986).

41 *State v. Phillips,* 470 P.2d 266, 272-74 (Alaska 1970).

42 *Id.* at 274.

43 *Guin v. Ha,* 591 P.2d 1281, 1284 (Alaska 1979).

44 Gary Spencer, *In Albany, Interests Clash on Bill to Allow Prejudgement Interest,* N.Y. L.J. Legislative Update, June 27, 1991, at 1.

45 *See Committee on Civil Practice,* N.Y. L.J., Feb. 24, 1992, Supplement; Supreme Court Committee Reports, at 1 (Committee agrees that no change to the prejudgment interest rule should be recommended, but should be reconsidered in the coming term).

46 *See* Gary Spencer, *Bar Associations Marshall Forces to Lobby Legislature on Bills to Lawyers,* N.Y. L.J., Feb. 27, 1992, at 1.

47 The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 560 (1818).

48 The Umbria, 166 U.S. 404, 421 (1897).

49 Death on the High Seas Act, 46 U.S.C. app. 761 (1988); The Jones Act, 46 U.S.C. app. 688 (1988).

50 Petition of Midwest Towing Co., 203 F.Supp. 727, 733 (E.D. Ill. 1962), aff'd, 317 F.2d 270 (7th Cir. 1963).

51 *United States v. Peavey Barge Line,* 748 F.2d 395, 401 (7th Cir. 1984).

52 *First Nat'l Bank of Chicago v. Material Serv. Corp.,* 597 F.2d 1110, 1121 (7th Cir. 1979).

53 W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984).

54 *See Lazzara v. Howard A. Esser, Inc.,* 802 F.2d 260, 270 (7th Cir. 1986) (prejudgment interest award affirmed in order to fully compensate plaintiff for the loss).

55 Charles Mount and William Grady, *Personal-Injury Suits Can Drag on a Decade,* Chi. Trib., Mar. 25, 1990, at 1.

56 *Id.*

57 *Id.*

58 *Id.*

59 Commentators discussing the backlog dilemma in the court system often quote the old adage that "justice delayed, is justice denied." Lawrence H. Cooke and Kennard M. Goodman, *The State of the Nation's State Courts; An Overview of the Issues,* NAT'L L.J., Mar. 19, 1984, at 23.

60 Brown, *supra* note 15, at 347; UNITED PRESS INTERNATIONAL AM CYCLE RELEASE, June 7, 1981, Regional News, Texas (available through WESTLAW).

61 *See* In Re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 480 F.Supp. 1280, 1285 (N.D. Ill. 1979), aff'd, 644 F.2d 633 (7th Cir. 1981).

62 *Id.;* Brown, *supra* note 15, at 348.

63 Patrick C. Diamond, Note, *The Minnesota Prejudgment Interest Amendment: An Analysis of the Offer-Counteroffer Provision,* 64 MINN. L. REV. 1401, 1403 n.7 (1985).

64 Of course, the backlog problem would best be remedied by using a combination of solutions. For discussions of other possible remedies, *see Clogged Courts Look to Computer,* CHI. TRIB., Aug. 26, 1987, (Chicagoland), at 3 (court commission recommends using computer system to speed up cases); Cheryl Devall, *Pucinski Tells Court Reform Plan,* CHI. TRIB., Feb. 8, 1988, (Chicagoland), at 3 (clerk candidate proposes the use of arbitration, private judging and summary jury trials); Nancy Ryan, *Lawsuit Arbitration Lets Justice Be Swifter,* CHI. TRIB., Aug. 8, 1990, (Chicagoland), at 6 (arbitration is a logical and inexpensive way to make significant improvements).

65 STEPHEN J. CARROLL, *Jury Awards and Prejudgment Interest in Tort Cases* 2 (The Rand Corporation May 1983) (preliminary research results from a study conducted for the Institute of Civil Justice).

66 The Institute of Civil Justice preliminary study concluded that jurors in Cook County, Illinois implicitly provide prejudgment interest in damage assessments. *Id.* at 13.

67 MCCORMICK, *supra* note 4, § 59, at 231.

68 CARROLL, *supra* note 66, at 2.

69 *United States v. Peavey Barge Line,* 748 F.2d 395, 401-02 (7th Cir. 1984); MCCORMICK, *supra* note 4, at 227-29.

70 *Hillier v. Southern Towing Co.,* 740 F.2d 583, 585 (7th Cir. 1984); *First National Bank of Chicago v. Material Serv. Corp.,* 597 F.2d 1110, 1121 (7th Cir. 1979).

71 *Bunge Corp. v. American Com. Barge Line Co.,* 630 F.2d 1236, 1242 (7th Cir. 1980).