Prejudgment Interest: Implementing Its Compensatory Purpose

Michael J. Martin
Prejudgment Interest: Implementing Its Compensatory Purpose

INTRODUCTION

As an element of damages, prejudgment interest compensates a plaintiff for lost earnings due to his inability to use money owed to him but not paid by the defendant during the pendency of litigation. Prejudgment interest is an adjustment that converts damages as measured at the time of the accident into damages as measured at the time of judgment.¹ The concept is based on the inherent earning power of money over time.

Whether Illinois courts should award prejudgment interest as an element of damages in all tort cases has been much debated between plaintiffs’ bar and defendants’ bar.² Currently, by statute, Illinois allows prejudgment interest only on claims for money due on written instruments, or where there has been unreasonable or vexatious delay.³ Illinois courts have consistently refused to award prejudgment interest on claims not within the scope of this statute.⁴ Plaintiffs’ bar, however, has

¹. A judgment for past damages only reflects damages incurred at the time of the loss. Where a judgment is not obtained until years after the deprivation, prejudgment interest provides an adjustment to compensate for the lost opportunity to invest this sum. See Note, Prejudgment Interest: Survey and Suggestion, 77 Nw U.L. Rev. 192 (1982).


Creditors shall be allowed to receive at the rate of five (5) percent per annum for 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.

urged the Illinois legislature to become one of an increasing number of states allowing prejudgment interest in personal injury and wrongful death actions.\textsuperscript{5} Defendants' bar has thus far successfully lobbied against proposed legislation that would extend the present scope of actions in which prejudgment interest is allowed.\textsuperscript{6}

This note will examine whether Illinois courts should award prejudgment interest as an element of damages in causes of action arising in tort. First, prejudgment interest awards will be discussed in light of the compensatory purpose of tort damages. Second, the arguments for and against prejudgment interest awards in tort cases will be examined in light of the goals of compensatory damages. This note will then present and analyze the Illinois judicial and statutory positions on prejudgment interest. A set of general guidelines will be developed for assessing the fairness of prejudgment interest statutes, and two pieces of legislation analyzed using these guidelines: the existing Colorado statute and the recently proposed Illinois legislation. Finally, this note proposes three statutory options to aid Illinois legislators in drafting a prejudgment interest statute that conforms to the purpose of prejudgment interest as an element of compensatory damages.

\textbf{AN OVERVIEW OF PREJUDGMENT INTEREST}

\textit{Tort Damages as Compensation}

The primary purpose of awarding damages in tort proceedings is to place the injured party in a position as close as possible to his position prior to the commission of the tort.\textsuperscript{7} The law thus imposes monetary damages in satisfaction of the plaintiff's loss.
or injury, with the ultimate goal of total compensation. Hence, compensatory damages are referred to as "actual damages." Illinois courts have stated that the purpose of such damages is to make the injured party whole. The compensatory purpose of tort damages places a ceiling on plaintiff's recovery. Absent aggravating circumstances accompanying the defendant's injurious conduct, a plaintiff is entitled to a just and adequate compensation, but no more. It is not the purpose of compensatory damages to punish the defendant or to bestow a windfall upon the plaintiff.

In general economic usage, the payment of interest compensates for the use, detention, or forbearance of money. Interest as an element of damages would compensate plaintiff for delay in the payment of a fixed sum or delay in the assessment and payment of damages. Hence, courts award prejudgment interest to compensate plaintiff for the loss of the use of money due him from the date of injury until the date of judgment.

---


11. See supra note 8 and accompanying text.


The Debate Over Prejudgment Interest in Tort Damages

The awarding of prejudgment interest as an element of tort damages has engendered continuing legal debate. On the one hand are those who advocate expanding the scope of those causes of action in which prejudgment interest may be awarded. They present a two-fold argument. First, they claim that prejudgment interest is necessary to fully compensate the plaintiff. This argument, which may be termed the "compensatory approach," reasons that, because the injured party is entitled to be made whole as of the moment the cause of action accrued, any delay in the receipt of compensation should itself be compensable. Delay results in two distinct injuries: first, the lost use of the money due during the pendency of the claim; and, second, the loss occasioned by paying yesterday's debt with today's inflated dollar. This argument thus advocates an expansion of the scope of prejudgment interest so as to compensate for the financially detrimental consequences of a time consuming judicial process in an inflationary economy.

Closely related to the compensation approach is a restitution argument. Defendant is, in effect, unjustly enriched by retaining funds theoretically due plaintiff during the pendency of the claim and in having the freedom to invest them and reap their fruits without charge. Defendant should, therefore, be required to disgorge the benefits derived from his inequitable detention of funds. Another related argument views plaintiff as having effectively subsidized defendant's investments during the pendency of the claim, and, in so doing, incurring costs himself. This theory maintains that defendant's withholding of money

16. See Londrigan, supra note 2, at 62.
17. See supra notes 7, 8, and accompanying text.
18. State v. Phillips, 470 P.2d 266, 272 (Alaska 1970). This argument reasons that although, the award for delay is in the nature of interest, in actuality it is an extension of the compensatory purpose of tort damages. For the proposition that, in Illinois, a wrongful death action vests immediately upon death, see Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973).
19. See supra note 14 and accompanying text.
20. Inflation decreases the purchasing power of the present dollar compared to past dollars; therefore money awarded is worth less the later it is received. Hare & Meelheim, Prejudgment Interest in Personal Injury Litigation; A Policy of Fairness, 5 AM. J. TRIAL ADV. 81, 87 (1981).
21. Id. at 89.
22. Id.
during the disputed claim may have caused plaintiff to raise funds for interim needs, thereby incurring a conventional interest charge. Prejudgment interest would compensate plaintiff for those interest charges.

The second major argument urged by advocates of expanding the awarding of prejudgment interest in tort cases may be referred to as the “judicial efficiency approach.” This argument asserts that defendants have a financial incentive to delay if they can continue to earn and retain interest on funds that are due to plaintiff but will not be awarded until some time in the future. Requiring defendant to pay plaintiff an amount equivalent to this prejudgment interest will, it is argued, remove this incentive for the defendant to delay the disposition of a case. Elimination of an incentive to prolong disposition of the case and the corresponding encouragement to settle claims prior to trial, it is asserted, may reduce the number of civil cases on an already crowded court docket and facilitate the expeditious disposition of those cases proceeding to trial. Improved case flow management, this argument concludes, would ultimately benefit plaintiffs and defendants alike.

On the other hand, the opponents of expanding the application of prejudgment interest to all tort claims reject these arguments. They rely instead primarily on the common law requirement that prejudgment interest be awarded only when the claim is liquidated or readily ascertainable. This common law requirement is one of basic fairness, it is argued, which limits awards of


26. A 1982 study concluded that the average time from the filing of a complaint to its disposition by jury verdict within the Law Division of the Circuit Court of Cook County, Ill., was 51.9 months. Approximately 90% of all cases filed in the division were tort claims, and 85% of all cases were deemed not to involve complex issues or substantial monetary exposure. The study concluded, based in part on these statistics, that litigation was taking too long and costing too much. Report of the Committee to Study Case Flow Management in the Law Division 5 (Jan. 8, 1982).

27. See Hare & Meelheim, supra note 20, at 89; Note, supra note 1, at 194.

interest to those cases where defendant actually has the option to pay a known amount, thereby staying the accrual of interest.\textsuperscript{29} To award prejudgment interest in those other cases where the amount of the claim is disputed, and thus where this option does not exist, penalizes defendant for disputing damages in good faith.\textsuperscript{30} Defendant is put in the unfair position of being assessed further damages for exercising his right to have a jury assess his liability.\textsuperscript{31}

Opponents of extending the awarding of prejudgment interest to all tort cases also claim that juries already implicitly award prejudgment interest in their verdicts.\textsuperscript{32} Hence, to award additional interest would result in a windfall to plaintiff and a penalty to defendant.\textsuperscript{33}

Third, and finally, opponents of extending prejudgment interest insist that awarding such interest in all tort cases will not remedy the problem of protracted litigation and court backlogs. On the contrary, awarding prejudgment interest damages may actually make the situation worse by providing plaintiff with a financial incentive to procrastinate in the filing of his action and perpetuating the action once filed.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{29} See supra note 28.
\item \textsuperscript{30} See Note, Judgments: Interest on Judgments—Limitation on Recovery of Prejudgment Interest, 56 MINN. L. REV. 739, 740 (1972).
\item \textsuperscript{31} If the sum claimed as damages is not ascertainable by reasonable computation, defendant does not know the extent of his liability. Therefore, he cannot discharge the debt and thereby end the accrual of interest owed by him. D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 3.5, at 173 (1973).
\item \textsuperscript{32} See Carroll, Jury Awards and Prejudgment Interest In Tort Cases, A Rand Corporation Note (N-1994-ICJ May 1983) (prepared for the Institute for Civil Justice). This study stated that juries in Cook County, Ill., were implicitly awarding prejudgment interest in tort actions. The conclusion was based on an analysis of jury awards from 1960-79, which were found to have been increasing over and above inflation by a rate of 3.7% per year.
\item \textsuperscript{33} Id. See also Smith, supra note 2, at 74.
\item \textsuperscript{34} This argument may have greater merit as the rate of interest awarded increases relative to available market rates.
\item \textsuperscript{35} One commentator has cited Colorado’s prejudgment interest statute, COLO. REV. STAT. § 13-21-101 (1982), to support this contention. Prior to the statute, Colorado provided for interest to run from the date of filing of the lawsuit. The statute was amended in 1982 to provide for interest to accrue from the time the cause of action arose. The commentator concluded that because the interest was applied to all damages, the plaintiff was overcompensated and thus benefited from delay. See Note, Prejudgment Interest as an Element of Damages: Proposed Solutions for a Colorado Problem, 49 U. COLO. L. REV. 335, 341-50 (1978).
\end{itemize}
The foregoing arguments for and against awarding prejudgment interest in all tort cases have been accorded varying levels of deference in different jurisdictions, resulting in a variety of statutory provisions. Some jurisdictions limit the causes of action for which prejudgment interest may be awarded. Others allow prejudgment interest in all cases where applicable. Further, statutory provisions may differ as to the date on which the interest begins to accrue and as to what the rate itself should be. Michigan, for example, permits prejudgment interest at a rate of six percent in all civil actions, calculated from the date of filing of the complaint. Oklahoma, on the other hand, awards fifteen percent interest in civil actions for the period of time

36. Fifteen states currently have general prejudgment interest statutes: Alaska, ALASKA STAT. §§ 9.50.280, 45.45.010 (1983) (10.5% interest running from the date the cause of action accrued); California, CAL. CIV. CODE § 3291 (West 1982) (10% interest running from the date of plaintiff's first subjudgment settlement offer); Colorado, COLO. REV. STAT. § 13-21-101 (Supp. 1980) (9% interest running from the date the cause of action accrued); Hawaii, HAWAII REV. STAT. §§ 636-16, 478-2 (1976) (6% interest running from the time judge designates, but not earlier than the date when the injury first occurred); Iowa, IOWA CODE § 535.3 (1982) (10% interest running from the date of commencement of the action); Louisiana, LA. REV. STAT. ANN. § 4203 (West 1982) (7% interest running from the date the complaint is filed); Maine, ME. REV. STAT. ANN. tit. 14, § 1602 (1982) (8% interest running from the date the complaint is filed); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 6B (West 1983) (12% interest running from the date the action is commenced); Michigan, MICH. COMP. LAWS § 600.6013 (Supp. 1983) (5% interest running from the date the action is filed); New Hampshire, N.H. REV. STAT. ANN. § 524:1.b (1981) (8% interest running from the date the cause of action is filed); Oklahoma, OKLA. STAT. tit. 12, § 727 (Supp. 1983) (15% interest running from the date the suit is commenced); Rhode Island, R.I. GEN. LAWS §§ 9.21-10 (1980) (8% interest running from the time the cause of action accrued); Utah, UTAH CODE ANN. § 78-27-44 (1983) (8% interest running from the time the cause of action accrued); Virginia, VA. CODE § 8.01-382 (1983) (permits trier of fact to award interest in any action in law or in equity); Wisconsin, WISC. STAT. § 807.01 (1983) (14% interest running from the date the plaintiff's settlement offer is refused, provided that the offer is less than the eventual judgment amount).

In addition, states may legislate prejudgment interest into statutes for particular causes of action. See, e.g., MD. CTS. JUD. PROC. CODE ANN. § 1602 (1983) (automobile liability claims; statute also provides for such interest where the defendant has unnecessarily delayed disposition of a case). Two states have adopted prejudgment interest by court rules rather than by legislative enactment: New Jersey, N.J. SUP. CT. R. 4:42-11(b) (6% interest running from the date of commencement of the suit, or six months after the tort, whichever is later); Pennsylvania, 42 PA. CONS. STAT. (Purdon 1982) (10% interest running from the date the action is filed, or one year after the accrual of the cause of action is filed, or one year after the accrual of the cause of action, whichever is later).

37. See supra note 36.
38. Id.
39. Id.
40. MICH. COMP. LAWS § 600.6013 (Supp. 1983).
between the commencement of the suit and the judgment.\textsuperscript{41} North Carolina allows six percent interest to accrue from the time the action is filed, but only if the sum of damages is readily ascertainable or liquidated.\textsuperscript{42}

**PREJUDGMENT INTEREST IN ILLINOIS**

The courts and legislature in Illinois have consistently opposed expanding the awarding of prejudgment interest. The Illinois statutory provision for prejudgment interest is very restrictive, authorizing a rate of interest of only five percent, and then only in two situations.\textsuperscript{43} The first is for creditors' causes of action on debts created by written instruments\textsuperscript{44} and liquidated accounts,\textsuperscript{45} i.e., actions based on contracts where the sum claimed as damages is readily ascertainable. The second is for claims for money unreasonably withheld, regardless of the theory under which the cause of action is brought.\textsuperscript{46}

Illinois courts have interpreted the statute strictly. As long ago as 1900, the Illinois Supreme Court, in *Beach v. Peabody*,\textsuperscript{47} declared that interest damages were a "creature of statute" and that Illinois courts should therefore grant such damages only

\begin{itemize}
\item \textsuperscript{41} OKLA. STAT. tit. 12, § 727 (1982).
\item \textsuperscript{42} N.C. GEN. STAT. § 24-5 (1981).
\item \textsuperscript{43} ILL. REV. STAT. ch. 17, § 6402 (1981). See supra note 3 for text of statute.
\item \textsuperscript{44} See West Chicago Alcohol Work v. Charles Sheer, 104 Ill. 586, 590 (1882).
\item \textsuperscript{45} See, e.g., Lepman & Heggie v. Inter-State Produce, 205 Ill. App. 270, 271 (1917).
\item \textsuperscript{46} ILL. REV. STAT. ch. 17, § 6402 (1981). Some commentators recognize that the purpose of awarding interest is to compensate plaintiff for lost use of money. Courts should not be concerned with defendant's motives in denying plaintiff the use of this money due him, for if there is a compensable injury, it is due regardless of the motivation behind the injury. The language of the statute, particularly "unreasonable and vexatious," may be more consistent with language which delineates elements of punitive damages. Punitive damages go beyond compensation, to which interest contributes, to penalize the defendant for his wrongful acts, and to act as a deterrent to others. See, e.g., J. STEIN, DAMAGES AND RECOVERY § 182, at 356 (1972). For an analysis of the purpose of punitive damages in Illinois, see Silver Mfg. Co. v. General Box Co., 76 Ill. 2d 413, 392 N.E.2d 1343 (1979); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Mattvasovsky v. West Towns Bus Co., 61 Ill. 2d 31, 330 N.E.2d 509 (1975).
\item \textsuperscript{47} 188 Ill. 75, 58 N.E. 679 (1900).
\end{itemize}
where so authorized. 48 Consistent with that holding, Illinois courts have since restricted prejudgment awards to those situations expressly provided for by statute. 49 Thus, although the first clause in the Illinois statute authorizing interest for debts "or other instruments of writing" can be read as potentially expansive, the statute has been interpreted under the doctrine of "ejusdem generis." 50 Consequently, its application has been limited to those writings which themselves create a legal indebtedness and carry a specific or inherent due date. 51 For example, Illinois courts have held writings in confirmation of the sale or purchase of securities, 52 building contracts, 53 and contractors' performance bonds 54 to be within the scope of the statute, but have held that a letter confirming an oral contract for services did not create a legal indebtedness itself, and therefore was not an instrument within the purview of the statute. 55

Judicial interpretation of the statute has also limited the use of the "unreasonable and vexatious delay" clause as a justification for granting prejudgment interest. It is not sufficient that a defendant's defense is drawn out and time consuming; courts require a showing of contrivance on defendant's part that approximates fraud. 56 The burden is even greater when the plaintiff is a creditor who has delayed bringing suit to collect the debt. In order for such a creditor-plaintiff to collect interest damages

48. Id. at 79, 58 N.E. at 680.
49. See supra note 4 and accompanying text.
50. See Hamilton v. American Gage Mach. Corp., 35 Ill. App. 3d 845, 853, 342 N.E.2d 758, 763 (1976). "Ejusdem generis" means that general words must be construed to include only things of the same kind as those indicated by the particular and specific words. Bullman v. City of Chicago, 367 Ill. 217, 226, 10 N.E.2d 961, 965 (1973). In the context of § 6402, the doctrine of ejusdem generis limits the application of prejudgment interest to writings that themselves create an indebtedness and possess the same legal attributes as bonds, bills, and promissory notes.
under this section of the statute, he must show that his delay was induced by the debtor’s own circumvention or management, or that the debtor had “thrown obstacles” in the way of collection.\(^{57}\)

Furthermore, Illinois case law has added to the statutory provisions a judicial requirement that the basic damages sum be liquidated or subject to easy computation before a party will be entitled to recover prejudgment interest.\(^{58}\) This requirement has effectively limited the recovery of interest to actions where the relationship of debtor and creditor could be said to exist between the parties.\(^{59}\) The mere fact that parties may reasonably disagree as to their liability does not, however, preclude the award of prejudgment interest under this statute, provided that the amount owed is readily ascertainable.\(^{60}\)

Illinois courts uniformly deny prejudgment interest claims in actions outside of the limited statutory provision.\(^{61}\) Thus, prejudgment interest has been denied in both personal injury actions and in wrongful death actions arising under the Illinois Wrongful Death Act.\(^{62}\) The Wrongful Death Act contains broad language concerning “fair and just compensation,” but does not expressly authorize prejudgment interest as an element of damages.\(^{63}\) Strict judicial reading of this statute allows recovery only for proven pecuniary losses\(^{64}\) claimed by authorized parties,\(^{65}\) the
courts once again deferring to the legislature to authorize an expansion of the scope of prejudgment interest for these actions.66

**Future Damages Awards**

Standing in contrast with the hard line taken in Illinois against awarding prejudgment interest on past damages is Illinois' position on future damages.67 Future damages are those losses plaintiff has not yet suffered, but reasonably anticipates, by virtue of the tortious injury.68 For example, in case of a negligence suit for partial disability, plaintiff's past damages might include hospital bills and other expenses already incurred. Plaintiff's future damages, by contrast, would include claims for reduced earning power or ongoing medical care over the next several years.

Illinois courts recognize future damages as compensable, but they discount to present cash value the amount a defendant must pay.69 Courts recognize that some of a plaintiff's anticipated losses will not occur for many months or years. To require


66. See supra note 4 and accompanying text.


69. ILLINOIS PATTERN JURY INSTRUCTION No. 34.02 (West 1971) provides:

In computing the damages arising in the future [because of injuries] [because of future (medical) (caretaking) expenses] [or] [because of the loss of future earnings] you must not [simply multiply the damages (by the length of time you have found they will continue) (or) (by the number of years you have found that the plaintiff is likely to live)]. Instead, you must determine their present cash value. “Present cash value” means the sum of money needed now, which, when added to what the sum may reasonably be expected to earn in the future, will equal the amount of the [damages][expenses][and][earnings] at the time in the future when [the damage from the injury will be suffered] [the expenses must be paid] [or] [the earnings would have been received]. Damages for [pain and suffering][disability][and][disfigurement] are not reduced to present cash value.

In wrongful death cases, No. 34.03 provides:

If you find for the plaintiff, then in assessing damages you may consider how long the [widow] [and] [next of kin] would be likely to have received pecuniary benefits from the decedent, considering how long he was likely to have lived and how long [she] [they] are likely to live.

In calculating the amount of these pecuniary benefits you must not simply multiply the life expectancies by the annual benefits. Instead, you must determine their present cash value. “Present cash value” means the sum of money needed
defendant to compensate plaintiff for such losses now gives plaintiff a windfall: the use of money before it is technically due.\textsuperscript{70} The interest earned on that money in the interim between judgment and the actual accrual of plaintiff's future damages rightfully belongs not to the plaintiff, but to the defendant. Courts in Illinois accordingly adjust downward the judgment against the defendant to an amount that, when added to the interest such amount would earn in the period between judgment and the realization of the future loss, will equal the amount of the actual loss when realized at that future date.\textsuperscript{71} In one sense, this form of "postjudgment interest award" to defendant is the mirror image of prejudgment interest to plaintiff.\textsuperscript{72}

Illinois courts have neither noted nor explained the apparent inconsistency of bestowing upon defendants, but not plaintiffs, the benefit of discounting. The Illinois courts are thus in the anomalous position of allowing to a defendant a credit for his "prepayment" of debts not yet owed, but at the same time not debiting him for the postponed payment of debts he has already incurred. Rather than address the problem directly, Illinois courts have deferred to the legislature, summarily rejecting all claims for recovery of prejudgment interest absent statutory authorization.\textsuperscript{73}

**Federal Interpretation of Prejudgment Interest in Illinois**

A single federal court decision stands as an exception to the generally accepted interpretation of Illinois law on prejudgment interest. In 1979, the United States District Court for the Northern District of Illinois, in consolidated pretrial proceedings in *In Re Air Crash Disaster Near Chicago*,\textsuperscript{74} recognized prejudgment interest as an essential element of compensatory damages in a wrongful death action governed by Illinois law.\textsuperscript{75} The court now, which, together with what that sum will earn in the future, will equal the amounts of the pecuniary benefits at the times in the future when they would have been received.

\textsuperscript{70} ILLINOIS PATTERN JURY INSTRUCTIONS NO. 34.03 (West 1971). D. DOBBS, supra note 31, § 3.5, at 178.

\textsuperscript{71} See Note, supra note 28, at 468.

\textsuperscript{72} *RESTATEMENT (SECOND) OF TORTS* § 913A comment a (1977).


\textsuperscript{74} 480 F. Supp. 1280, 1282 (N.D. Ill. 1979). Several cases originating from a May 1979 crash of an American Airlines DC-10 jet plane were consolidated for pretrial proceedings.

\textsuperscript{75} Id. at 1286.
relayed on the “fair and just compensation” language of the Illinois Wrongful Death Act. Specifically, the court noted the inequity of granting to defendant the benefit of discounting future damages without a corresponding adjustment to plaintiff’s recovery of past damages. In a subsequent trial, the jury found defendants liable, and the verdict, pursuant to the court’s instructions, included prejudgment interest calculated on the entire award and accruing from the date of death.

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the damages award, relying, as the lower court did, on the discounting-interest symmetry. In dicta, court recognized that where future damages are discounted to the date of trial, it may also be necessary to make a parallel adjustment for the delay in receiving past losses. Where, as in this case, the judge discounted the plaintiff’s entire loss to the date of death, the interest adjustment was necessary to bring the “death value” to “present value”.

The appellate court stated that it would be improper to designate these damages as an award of “prejudgment interest.” Instead, it expressed these damages in terms of a present value calculation, stating that the “so-called” prejudgment interest

---

76. Id. at 1285.
77. The court noted:

The law recognizes the earning potential of money by requiring that an award for future damages such as lost future income be discounted to its present value. It is inequitable to allow a defendant in a wrongful death action to obtain the benefit of discounting any judgment to present value while not allowing a plaintiff to obtain the benefit of prejudgment interest. Under the general rules governing damages in a wrongful death action, a trier of fact takes into account postjudgment interest and discounts any judgment to compensate for interest which the plaintiff can earn on it. The benefit to the defendant of this accounting in determining damages is apparent. However, inequity obviously results if the defendant gets the advantage of this accounting for postjudgment interest but the plaintiff does not get the corresponding advantage of prejudgment interest.

Id. at 1287.
78. In Re Air Crash Disaster Near Chicago, 644 F.2d 633, 635 (7th Cir. 1981).
79. Id. at 644-46. The court suggested that in the future all future damages should be decreased by present value discounting and past damages should be augmented by interest for the amount of income flow lost between death and the trial. Id. at 646.
80. The Seventh Circuit stated: “We find that the reasons for augmenting these ‘past losses’ are exactly the same as those for discounting ‘future losses’.” Id. at 644.
81. Id.
82. “The formula should be clearly spelled out by the court in terms of present value, not prejudgment interest. Once this calculation is done for present value at trial of both
was just an element of the formula for calculation of compensatory damages.83 Furthermore, the Seventh Circuit rejected the district court’s ruling that prejudgment interest is recoverable per se under Illinois law in wrongful death actions.84 Despite these differences in terminology and disagreement over the ultimate meaning of the language of the Illinois Wrongful Death Act, the appellate court nonetheless recognized that the outcome of its decision was “substantially the same” as the district court’s in awarding prejudgment interest,85 and that compensatory damages did require awarding prejudgment interest, or its equivalent, for the period of time prior to the judgment.86

Illinois state courts have refused to follow the Seventh Circuit’s initiative. Instead, they have continued to reject the federal court’s unprecedented allowance of prejudgment or its equivalent in Illinois wrongful death actions,87 and have likewise denied any proposed expansion of the statute’s scope in other actions.88 The Illinois legislature has been equally unwilling to change the existing law. The Illinois Senate recently voted down the proposed Illinois Senate Bill 087, which would have provided for prejudgment interest commencing 180 days after the accrual of a cause of action at a rate equal to one percentage point above the federal discount rate for the Federal Reserve Bank of Chicago.89 Thus, despite the Seventh Circuit’s holding in In Re Air Crash Disaster Near Chicago, Illinois plaintiffs are, as a rule, unable to receive prejudgment interest damages in wrongful death and personal injury actions.

past and future losses, plaintiff’s arguments for prejudgment interest as a separate element of damages disappear.” 644 F.2d at 646. For a more detailed analysis of In Re Air Crash Disaster Near Chicago, see Note, supra 28, at 453.

83. The court recognized that the “present value at trial” represented the true compensatory damages figure. To attain this sum, the court required “interest” to be added to the “present value at death” sum for the time period between death and judgment, thus offsetting the discounting of these damages. Id. at 644-46.
84. Id. at 646.
85. Id. at 640.
86. Id. at 644.
89. Proposed Illinois Senate Bill 087 would have amended § 2-1303 of the Code of Civil Procedure to read, in relevant part, as follows:

Sec. 2-1303. Interest on judgment.
DEVELOPING A FUNCTIONAL APPROACH TO PREJUDGMENT INTEREST

Resolution of the Debate Over Prejudgment Interest

In order for tort damages to achieve their primary purpose of making plaintiff whole, they must address and compensate all injuries proximately caused by defendant's culpable conduct. Plaintiff has suffered a loss from the moment of injury, a loss which is augmented by the withholding of the judgment sum during the delay inherent in the judicial process. In addition, the current Illinois practice whereby the courts discount defendant's

(a) Judgments recovered before any court after June 30, 1983 in actions filed before July 1, 1983 shall draw interest at the rates certified by the State Treasurer to the Court Administrator on each July 1 and January 1 at 1 percentage point above the federal discount rate, which is the rate of interest a commercial bank pays to the Federal Reserve Bank of Kansas City, Missouri, using a governmental bond ... as security, from the date of the judgment until satisfied.

(b) Judgments recovered before any court in actions filed after June 20, 1983, except as provided in paragraph (c), shall draw interest at the rates provided in paragraph (a) from the date the complaint is filed to the date of judgment and such interest shall be determined in the manner prescribed in paragraph (a).

(d) Where a party seeking money damages does not accept a written offer filed with the clerk of the court and served upon the attorney for the party seeking damages more than 30 days prior to the commencement of trial and where such party seeking damages fails to obtain a judgment in an amount more than the total forfeit the prejudgment interest described in paragraph (b).

(e) When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of appeal, or other steps to reverse, vacate or modify the judgment.

Senate Amendment No. 1 changed the Federal Reserve Bank location from Kansas City to Chicago. Senate Amendment No. 2 allowed defendant to make a motion to suspend prejudgment interest for periods of unreasonable delay by the plaintiff. Such delay must be shown by a preponderance of the evidence. Senate Amendment No. 3 stated that prejudgment interest commences 180 days after the cause of action accrued. Senate Amendment No. 4 excluded actions in small claims court from such interest damages.

The bill was defeated by a vote of 41-14 on May 27, 1983. The companion House Bill 713 was identical except for an amendment allowing for prejudgment interest to run from the time the cause of action accrued. The house bill was approved by the House Judiciary Committee by a vote of 10-8 on April 11, 1984. A consideration of the bill before the full House is pending as of this writing. I & II LEGISLATIVE REFERENCE BUREAU, LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1983 SESSION OF THE EIGHTY-THIRD GENERAL ASSEMBLY (1983).

90. See supra notes 7-9 and accompanying text.
payments for future damages but do not augment defendant's payments for past damages\(^9\) is both unfair and logically inconsistent, as the Seventh Circuit, in *In re Air Crash*,\(^9\) convincingly pointed out. The more desirable practice would be to recognize uniformly the earning power of money over time, and to allocate interest to plaintiff for injuries incurred prior to judgment while providing defendant with an interest credit for prepayment of damages for injuries incurred after the judgment.

The distinction between ascertainable and non-ascertainable damages\(^9\) is essentially irrelevant. Plaintiff's temporary deprivation of money owed to him by defendant, and the corresponding loss of interest thereon, occurs whether the claim is liquidated, readily ascertained, or incapable of being ascertained. By virtue of the express purpose of tort damages, it is an injury for which plaintiff is entitled to compensation.\(^9\) Since an award of prejudgment interest does no more than make defendant responsible for all losses directly flowing from his act, it is more properly viewed as a legal obligation than a penalty.

In addition, opponents' contention that juries are already implicitly awarding prejudgment interest without court instruction, is a double-edged sword. If juries have, in fact, independently recognized the unfairness of awards without compensation for prejudgment delay, and are awarding ad hoc prejudgment interest, the present lack of jury instructions leaves a jury with virtually unbridled discretion in determining whether interest should be awarded, and, if so, how much.\(^9\) As one noted commentator maintains, uninstructed jurors are not likely to utilize their discretion in this matter very wisely or consistently.\(^9\) A properly drafted prejudgment interest statute could either take

---

91. See supra note 69.
92. See supra notes 74-86.
93. See supra notes 28-31.
94. Several commentators have recognized the compensatory purpose of prejudgment interest. See Hare & Meelheim, supra note 20, at 81; Note, supra note 1, at 192; Note, supra note 35, at 335; Note, supra note 28, at 453.
95. See Londrigan, supra note 2, at 65. "The Rand study seems to suggest that the only way a plaintiff can be fairly compensated in Illinois is if a jury is willing to ignore the unfairness of our present law and instead follow its conscience and common sense to reach a just result." Id.
96. C. McCormick, supra note 14, § 59 at 231. McCormick generally lacks confidence in a jury's ability to exercise its discretion wisely in determining interest awards, even with proper instruction.
Prejudgment Interest

this damages element away from the jury while explaining to
the jurors that their award will be augmented by the court with
interest to compensate for the prejudgment period,97 or, alterna-
tively, authorize specific instructions to guide juries so that ver-
dicts will be more judiciously and uniformly awarded.98

Recommended Guidelines for Prejudgment Interest Awards

Proponents of expanding the awarding of prejudgment inter-
est argue that prejudgment interest furthers two goals: first,
compensating the plaintiff, the essential objective of all suits in

tort;99 and, second, expediting the judicial process by eliminat-
ing an incentive for defendant to delay.100 While both goals are
laudable in fashioning a just and effective prejudgment interest
law, primary emphasis must be placed on the compensatory
goal.101 A law which has case flow management as its main
purpose may result in unjust compensation102 and even exacer-
bate problems of delay in adjudication.103 Clear adherence to the
pre-eminence of the goal of compensation, however, will not only
assure a just result consistent with general tort law, but is also
more likely to ultimately achieve judicial efficiency.104 Therefore,
an equitable and logical approach must focus on the injured
party and the loss that he has sustained. Specifically, the two
material elements of any prejudgment interest statute should
consist of the same standards as are used in determining com-
penyatory damages: the applicable portion of damages on which

the interest accrues, and the rate of compensatory interest.105

Past and Future Losses Should Be Distinguished

Since prejudgment interest compensates only for lost use of

98. See infra notes 136, 137.
99. See supra note 7 and accompanying text.
100. See supra notes 18-27 and accompanying text.

object is to give compensation to the party injured for the actual loss sustained." Id. See
also supra notes 7-9.
102. Compensatory damages focus on the plaintiff, seeking his full compensation, but
no more. See supra notes 8-11. Case flow management proposals often focus on the
defendant and his incentive to delay, and may overcompensate the plaintiff in order to
promote pretrial settlement. See supra notes 23-25 and accompanying text.
103. See infra notes 123-26.
104. See infra notes 127-29.
105. Note, supra note 35, at 335.
money to which plaintiff is entitled, an authorizing statute should also distinguish between past and future losses. Past losses are those which are realized in the time period between the injurious incident and the judgment, in contrast to future losses, which include all losses resulting from the incident that will be incurred but have not yet manifested themselves at the time the judgment is entered. It is clear that only past damages should qualify for prejudgment interest, for those are the damages that have already accrued and to which plaintiff is legally and factually entitled. Plaintiff has not lost the use of those funds not yet due, and therefore does not require interest compensation for their non-payment prior to judgment.106

In Re Air Crash Disaster Near Chicago107 suggests a minimally acceptable but inferior alternative for handling past versus future damages. In that case, the Seventh Circuit discounted the entire damages award, including both past and future damages, back to the date of the incident. All damages, in effect, became “past” damages, and thus due to plaintiff from the day of the incident. The court then added prejudgment interest to the discounted sum as a necessary consideration of present value determinations.108 Although the In Re Air Crash approach may initially appear attractive, its application must be limited to those situations where the discount rate is equal to the prejudgment interest rate.109 Any difference in these rates will result in improper compensation of the plaintiff, thus defeating the primary purpose of prejudgment interest.110

The Prejudgment Interest Rate Should Reflect the Market

Turning to the second key element in a prejudgment interest statute, the proper rate of interest to be applied, any proposed statute must recognize that prejudgment interest attempts to

106. In fact, because plaintiff receives damages in presenti in payment for losses in futuro, the courts in Illinois decrease his award according to present value principles. See supra note 69.
107. 644 F.2d 633 (7th Cir. 1981). See supra notes 74-86 and accompanying text.
108. 644 F.2d at 646.
109. Id. at 644 n.19 (discussing Moore-McCormick Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961)).
110. In fact, the Seventh Circuit itself only adopted the method it did because the parties agreed to it. The court expressed a preference for the method that clearly differentiates past and future damages. Id. at 646.
compensate plaintiffs for actual lost investment earnings.\textsuperscript{111} Thus, the interest rate should reflect returns from relevant alternatives in the actual marketplace. The available sum to be invested and the duration of the investment should be considered.\textsuperscript{112} The relevant sum should be past damages, accruing incrementally during the period of the dispute,\textsuperscript{113} and the relevant duration of investment should be the time period between the accrual of the cause of action and the judgment.\textsuperscript{114} Only by considering market alternatives within these criteria can it be assured that plaintiff is duly compensated without overcompensating, and opponents’ concerns that prejudgment interest causes defendants to suffer a penalty are dispelled.

**Analysis of Current Legislative Approaches**

An analysis of two actual legislative efforts to enact provisions for prejudgment interest damages illustrates how the failure to adhere to compensatory principles in drafting these types of provisions may result in ineffective or unjust awards. The Colorado prejudgment interest statute\textsuperscript{115} has been selected as representa-
tive of many other currently enacted state statutes. The recently rejected Illinois Senate Bill 087\textsuperscript{116} will also be considered.\textsuperscript{117}

There are two key deficiencies in both the Colorado statute and the Illinois bill which potentially mitigate their effectiveness. First, neither piece of legislation distinguishes between past and future damages. Interest accrues on all damages, whether or not they have yet been realized by the plaintiff. Because the plaintiff is improperly earning interest on funds to which he is not yet technically entitled, he is overcompensated to the extent of interest earned on future damages. A secondary consequence of this windfall is that the plaintiff benefits financially from delay in litigation, thus creating an incentive to stall.

Second, neither the Colorado statute nor the Illinois bill provides for a prejudgment interest rate that accurately reflects relevant market conditions. The Colorado statute provides for nine percent interest to be compounded annually.\textsuperscript{118} It is arguable that nine percent is more than a compensatory rate of interest, for there are few relevant market alternatives\textsuperscript{119} which yield nine percent.\textsuperscript{120} Illinois Senate Bill 087 ties prejudgment interest

\textsuperscript{116} See supra note 89.
\textsuperscript{117} The following table presents a comparative review of pertinent provisions:

<table>
<thead>
<tr>
<th></th>
<th>Interest Rate:</th>
<th>Accrues From:</th>
<th>Past/Future</th>
<th>Differentiation:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>1.0% above federal discount rate</td>
<td>180 days after cause of action accrued</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>9.0%</td>
<td>time cause of action accrued</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{118} See also supra note 36.
\textsuperscript{119} Relevant alternatives would include investments involving like amounts of money and time period of investment.
\textsuperscript{120} For example, key U.S. annual interest rates on February 23, 1984 were:
Prime Rate: 11% (base rate on corporate loans at large U.S. money center commercial banks);
Passbook Savings Accounts: 5-1/2%;
Discount Rate: 8-1/2% (the charge on loans to depository institutions by the New York Federal Reserve Bank);
Money Market Accounts: average rates unavailable;
rates to the federal discount rate in an attempt to reflect market interest rates. The federal discount rate, however, usually reflects the whole interest market,\textsuperscript{121} rather than only plaintiff's relevant investment market; it is the latter which should determine the rate of his prejudgment interest. Moreover, the federal discount rate may be manipulated to affect desired monetary and credit policies, and thus often does not reflect actual interest markets.\textsuperscript{122} The Illinois bill is a step in the right direction, but it fails to isolate from the range of rates available in the market those rates that are returns on viable investment alternatives for the average plaintiff investor. Thus, there is the potential for substantial deviation from the goal of proper compensation for actual injuries sustained.

One probable rationale for higher-than-relevant-market prejudgment interest rates is that prejudgment interest statutes are being used to stimulate defendants to settle,\textsuperscript{123} in effect encour-

---

\textsuperscript{121} J. WHITE, BANKING LAW 54 (1976). "The discount rate is usually set to follow the market." \textit{Id.}

\textsuperscript{122} \textit{Id.} at 51-65. The discount rate is one of the weapons the Federal Reserve utilizes to effect its policies. Therefore, the discount rate at any one time may reflect the actual market rate or the Federal Reserve Board's desired market rate.

\textsuperscript{123} See Bond v. City of Huntington, 276 S.E.2d 539 (W. Va. 1981), in which the court expressed its disapproval of setting prejudgment interest with the goal of effectuating settlement: "We do not preceive that prejudgment interest should be utilized in a context foreign to its historical purpose regardless of the benign goal sought." \textit{Id.} at 548. See also Kotzia v. Barr, 81 N.J. 360, 408 A.2d 131 (1979). The court therein followed the New Jersey Supreme Court's statement that the New Jersey prejudgment interest statute does not apply where a judgment is entered following a settlement, but only where the judgment is made as a result of a trial. \textit{Id.} at 360, 408 A.2d at 134. The court's rationale was that to award prejudgment interest without a trial would be contrary to the spirit of the law. This suggests that the court views the compensatory purpose as subordinate to case flow considerations. 95 N.J.L.J. Index 341 (1972), \textit{quoted in Kotzia}, 81 N.J. at 360, 408 A.2d 134.
aging defendants to forego their right to have a jury determine the extent of liability. In their attempts to effect a greater number of settlements, some overzealous jurisdictions may be requiring defendants to pay more than their actual liability. Whatever the stated purpose in such jurisdictions, their pre-judgment interest awards cannot be entirely justified as compensatory damages. Rather, the amount of interest in excess of compensation interest is more analogous to punitive damages, the purpose of which is deterrence and punishment. Thus, by attempting to give primary importance to what should be the secondary goal of case flow management, such jurisdictions may be penalizing defendants for exercising their rights.

It should be stressed that although an undue emphasis on the goal of expediting case flow can result in sacrificing the all-important goal of compensation, the converse is not necessarily true. A prejudgment interest statute that gives pre-eminence to the goal of compensation can also serve as a catalyst to better case flow. All that is required is that the prejudgment interest rate reflect the actual relevant market as closely as possible. If the statutory rate is greater than market rates, plaintiffs may profit from delaying judgment; by contrast, a rate approximating market rates would eliminate this profit and the related financial incentive to delay. In fact, since prejudgment interest accrues only until there is a judgment, plaintiff remains uncertain of the eventual award. Furthermore, he is denied cash flow during the accrual period. Such realities may provide plaintiff with an incentive to seek prompt legal action rather than delay, while still ensuring full compensation.

As a further incentive to the prompt disposition of a case, the payment of the judgment in the form of a lump sum may avail a plaintiff of previously unreachable investment opportunities offering higher yields than the rate of prejudgment interest based only on past damages. Realistically, the lump sum satisfaction of the claim may break down a minimum term or deposit barrier, or allow the plaintiff to take a greater risk on an investment offering potential returns in excess of the compensatory amount.

For this reason, delay in obtaining a judgment could work

125. See Note, supra note 28, at 453 n.1.
126. See, e.g., supra note 120.
against the best interests of the plaintiff, provided that the prejudgment interest rate is reasonably related to relevant market rates.

PROPOSAL

As previously discussed, it is not uncommon for jurisdictions to fail to emphasize the compensatory purpose of prejudgment interest, to fail to distinguish between past and future damages, and to fail to set interest rates reflective of relevant markets.\(^1\)\(^2\)\(^7\) All three failures have serious consequences. The first two, however, may be corrected relatively easily. The third problem, that of determining the proper rate for prejudgment interest, is a knottier question, as evidenced by the widely varying rates of interest in different jurisdictions.\(^1\)\(^2\)\(^8\) This note therefore proposes three interest rate options that more accurately reflect the compensatory purpose of prejudgment interest damages.\(^1\)\(^2\)\(^9\) Each of the three proposals takes into account the factors affecting the availability of investment instruments yielding different interest returns, including the amount to be deposited, desired liquidity, and the duration of the investment. The proposals also accommodate the dynamics of deregulation in the savings industry, a development which is providing greater opportunities and higher yields for investors at all income levels.\(^1\)\(^3\)\(^0\) The three options are: a weighted average method; an evidence method; and a fixed statutory rate based upon statistically evidenced preferences.

**Weighted Average Method**

Under the weighted average method, a prejudgment interest statute would require a state treasurer to compute the average interest earned by non-commercial investors based on statistics regularly compiled and published by the regulators of commercial banks and thrift institutions.\(^1\)\(^3\)\(^1\) Existing statistics denom-
inate the total dollars that non-commercial investors invest in various types of instruments such as certificates of deposit and treasury bills. Each of these instruments carries a different rate of return. A weighted average could be calculated as follows:

1) Calculate each instrument's proportional share of all non-commercial investment dollars.
2) Multiply each type of instrument's interest rate by the fraction representing its proportional share of all non-commercial investment dollars.
3) Add together the results for each type of instrument.
4) Divide the sum by the number of investment instrument types considered. The result will be a weighted average interest rate.\(^{132}\)

The calculation of the weighted average interest rate would be performed by the court. The jury would be instructed that it should not include any allowance for prejudgment interest, because the court would add such interest to any verdict they might deliver.\(^{133}\) A disadvantage to the weighted average method is that it may become increasingly impractical to compute as deregulation continues to lift restrictions on savings institutions.

---

rates available at federally insured institutions in the Federal Reserve Bulletin. The Federal Home Loan Bank Board ("FHLBB") publishes like statistics for Federal Savings Associations and Federal Savings and Loan Insurance Corporation Member Institutions in its monthly publication, the FHLBB JOURNAL.

132. Assume, for example, four viable investment instruments (A, B, C, and D). They earn 5%, 6%, 7%, and 8% interest respectively, and have on deposit at the time of the State Treasurer's accounting $1 billion, $2 billion, $3 billion, and $4 billion respectively. The weighted average rate would be calculated as follows:

\[
\begin{align*}
(\text{"Total deposits"} & = A + B + C + D = \$10 \text{ billion}) \\
(\text{"i"} & = \text{interest rate}) \\
& = \left( \frac{A \text{ deposits} \times i_A}{\text{Total deposits}} \right) + \left( \frac{B \text{ deposits} \times i_B}{\text{Total deposits}} \right) + \left( \frac{C \text{ deposits} \times i_C}{\text{Total deposits}} \right) + \left( \frac{D \text{ deposits} \times i_D}{\text{Total deposits}} \right) \\
& = \left( \frac{10 \times 0.05}{10} \right) + \left( \frac{20 \times 0.06}{10} \right) + \left( \frac{30 \times 0.07}{10} \right) + \left( \frac{40 \times 0.08}{10} \right) \\
& = 0.005 + 0.012 + 0.021 + 0.032 \\
& = 0.07
\end{align*}
\]

Therefore, the rate certified by the State Treasurer in this example would be seven percent.

133. See supra text accompanying note 96.
Prejudgment Interest

and to allow individual institutions to set their own rates to meet individual deposit needs. With the assistance of regulatory agencies that compile investment statistics, and statistics on average past damages awards and case disposition time, an accurate and comprehensive determination may nonetheless be feasible.

Evidence Method

The evidence method would bestow upon the jury, in whose province the determination of damages normally lies, the duty to weigh evidence on the issue of prejudgment interest. The parties would argue from evidence presented on this point, as with any element of damages. The jury, properly instructed by the court, would then determine the interest due to plaintiff in each particular case.

At trial, evidence would be presented showing the plaintiff's past investment patterns. Expert testimony on available relevant investment alternatives, given the approximate size of plaintiff's claim and the particular time period involved, could also be presented. The court would then instruct the jury that the plaintiff may have suffered a substantial loss by reason of the lost use of money, thus allowing the jury to decide the issue of whether the plaintiff has actually been damaged by this deprivation. If the jury decides this issue affirmatively, the determination of a compensatory rate of interest would then also fall to the jury.

Present procedural safeguards will allow the court to supervise and set aside an obvious abuse of this discretion, but ordinarily the jury would have the same discretion as in other damage award determinations. One commentator has suggested that the evidence method may entrust too much discretion to the jury. One result could be inconsistent verdicts and the attendant undesirable consequence of constant judicial intervention. The

134. See generally, United States League of Savings Institutions, supra note 130.
135. See supra note 120.
137. Ill. Rev. Stat., ch. 110A, ¶ 306 (1981). This motion empowers the trial court to exercise its discretion to grant a new trial on the grounds of an excessive damages award. A new trial may also be granted on damages alone where the damage issue is so separable and distinct from the issue of liability that a trial on it alone may be had without injustice. Hartsel v. Culligan, 40 Ill. App. 3d 1067, 1070, 353 N.E.2d 12, 13 (1976).
same criticism, however, might be leveled at all jury awards. Furthermore, it is contrary to the judicially recognized presumption that jurors are competent in everything pertaining to the ordinary and common knowledge of mankind.139

Fixed Statutory Rate

A final alternative is to set a statutory rate at a rate of return slightly above returns offered by passbook savings accounts. As of January 1984, a reasonable rate would be approximately six percent.140 The fixed rate option makes sense in part because most United States households hold passbook savings accounts, while a much smaller proportion of households use other types of investment instruments.141 Deregulation may continue to cause funds to flow out of passbook accounts into higher yielding but riskier or less liquid investments,142 but it is a fair assumption that a majority of households will continue to hold passbook accounts. Certainly no other single financial option has achieved the same popularity among non-commercial investors. If a majority of the members of households, all potential plaintiffs, are earning interest that a passbook account yields, then that fact should be reflected in the compensatory rate.143

The fixed rate method also makes sense because the American public does not invest a significant portion of its assets,144 nor does it always invest in the highest yielding instrument available. A prejudgment interest rate reflecting the maximum available interest on 100% of the underlying damages would be based

---

140. On Jan. 3, 1984, the interest rate ceiling for passbook accounts was 5.5% annually. Wall St. J., Jan. 3, 1983.
141. As of July 1982, 75% of U.S. households held passbook savings accounts. By contrast, no more than 18% of the households surveyed used any other type of investment instrument. McKenzie & Winger, Who is the Thrift User?, FHLBB J. 2 (Jan. 1983).
143. The fact that the interest rate on passbook accounts is artificially low due to federal regulation is immaterial to this analysis, for it is only the fact that a majority of people are earning this rate of interest, rather than whether they are content with it, that determines what is fair and true compensation.
144. United States Department of Commerce statistics estimated the 1982 disposable personal income at $2,172.5 billion, of which $540.8 billion, or about 25%, was estimated to have been invested in tangible and financial assets. United States League of Savings Institutions, supra note 130, at 17.
Prejudgment interest should be permitted in all tort actions in Illinois to implement the basic goal of tort law, to make the plaintiff whole. The judicial history of prejudgment interest in Illinois illustrates that assistance will not be forthcoming from the state courts, which have exercised strict judicial restraint by allowing such prejudgment interest damages only where expressly authorized by statute. Therefore, any relief from the present state of affairs must come from the legislature.

The drafters of prejudgment interest legislation should focus their attention on the primary goal of plaintiff's full compensation, resisting the temptation to overemphasize the laudable but purely secondary consideration of case flow management. Prejudgment interest is a substantive right of plaintiffs and should not be sacrificed in an attempt to promote settlements and clear up court backlogs. Legislators should therefore include two elements in any proposed prejudgment interest statute: first, prejudgment interest applied only to past damages and running

from the time the cause of action accrued; and second, a genuinely compensatory rather than punitive rate of interest that reflects actual relevant interest rates. Three methods have been proposed for implementing this last objective: the weighted average method, the evidence method, and the fixed rate method. The ultimate choice will depend on the drafters' weighing of the relative advantages and disadvantages of each.

MICHAEL J. MARTIN