



## **Mandating Prejudgment Interest Awards Would Introduce Needless Complexity and Discourage Defendants from Fighting Nonmeritorious Claims**

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Legislative proposals that would mandate the award of prejudgment interest to prevailing plaintiffs in all actions should be rejected. Such proposals operate on the presumption that a prevailing plaintiff should be entitled to the interest that would accrue between the date the plaintiff incurred a loss and the date of the judgment, in addition to the interest the plaintiff receives postjudgment as a result of a defendant's delay in paying the judgment. But requiring the award of prejudgment interest in these cases will needlessly complicate the calculation of damages awards for courts, overcompensate the plaintiff, and discourage defendants from fighting meritless claims.

### **Proposal Language**

For consideration in the regular 2017 legislative session, Senator Steube has filed SB 334, which would require a court to award prejudgment interest to a prevailing plaintiff in any type of action. Pursuant to that proposal, if economic damages, noneconomic damages, attorney fees, or costs are recovered by the prevailing plaintiff, a court must include in its final judgment prejudgment interest on the following:

- Each component of economic damages, with the interest accruing from the date of the loss of an economic benefit by the plaintiff;
- Each component of noneconomic damages, with the interest accruing from the date of the claim made by the plaintiff; and
- Attorney fees or costs, if awarded, with the interest computed on the fees or costs beginning on the first day of the month immediately following the month in which fees or costs were paid.

Specifically, SB 334 proposes to create section 55.035, Florida Statutes, to read:

#### 55.035 Prejudgment interest.—

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

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

(b) For noneconomic damages, interest accrues from the date of the claim made by the plaintiff.

(2) If the plaintiff recovers attorney fees or costs, the court shall include in the final judgment interest on such fees or costs beginning on the first day of the month immediately following the month in which fees or costs were paid.

(3) The rate of interest applicable to this section is the rate established pursuant to s. 55.03. Interest may not accrue on the prejudgment interest awarded in the final judgment.

(4) For any action to which prejudgment applies which is pending on July 1, 2017, or commenced thereafter, the court shall provide interest in accordance with this section, with such interest accruing from no earlier than July 1, 2017, regardless of the date when losses were incurred, the claim was made, or attorney fees or costs were paid.

Section 2. This act shall take effect July 1, 2017.

Economic damages generally refer to past lost income and future lost income, medical and funeral expenses, and other economic losses that would not have occurred but for the injury giving rise to the cause of action. *See, e.g.*, § 768.81(1)(b), Fla. Stat. Noneconomic damages typically mean nonfinancial losses that would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses. *See, e.g.*, § 766.202(8), Fla. Stat.

In the House, Representative Harrison has filed HB 469, which similarly requires the award of prejudgment interest on monetary damages recovered by the plaintiff in any type of action:

55.035 Prejudgment interest.—In any action in which a plaintiff recovers monetary damages, the court shall include in the award interest on each component of such damages in the final judgment. Such interest shall begin to accrue on the date on which the injury or loss occurred. If the plaintiff recovers attorney fees or costs, the court shall include in the final judgment interest on such fees or costs. Such interest shall begin to accrue on the first day of the month immediately following the month in which such costs or fees were incurred. The rate of interest applicable to this section is the rate established pursuant to s. 55.03.

Section 2. For any action to which prejudgment interest applied that is pending on July 1, 2017, or commenced thereafter, the court shall award interest in accordance with s. 55.035, Florida Statutes, as created by this act. Such interest

shall not begin to accrue earlier than July 1, 2017, regardless of the date on which the injury or loss occurred or the attorney fees or costs were incurred.

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

HB 469 does not define the term “monetary damages,” but both economic and noneconomic damages may constitute monetary damages. Importantly too, unlike SB 334, HB 469 does not specifically prohibit accrual of additional, postjudgment interest on the prejudgment interest awarded in the final judgment. To calculate prejudgment interest, both bills direct use of the interest rate established pursuant to section 55.03, Florida Statutes. The current rate of interest, in effect as of January 1, 2017, is 4.97%.<sup>1</sup>

### **Background on Prejudgment and Postjudgment Interest**

Theoretically, both prejudgment interest and postjudgment interest are awarded to make the injured plaintiff “whole.” The purpose of postjudgment interest is to compensate the successful plaintiff for the delay from the time the amount of judgment is determined until the time the defendant actually pays. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990). Postjudgment interest makes sense. The amount owed to the plaintiff has been concretely determined, and the delay between the date of judgment and payment is within the defendant’s control. Every day the judgment is not paid the plaintiff is losing the value of her judgment.

In contrast, prejudgment interest was historically awarded as a penalty for the defendant’s “wrongful” act of disputing a meritorious claim. *See Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214-15 (Fla. 1985). However, Florida courts rejected this view near the turn of the century, instead recognizing that prejudgment interest may be a part of a damages award only when there is a defined amount of monetary damages, such as in breach of contract cases, or a tangible loss, such as in tort cases involving a property loss. *See Bosem v. Musa Holdings, Inc.*, 46 So. 3d 42, 45-46 (Fla. 2010). Florida courts have continually rejected the idea that prejudgment interest is appropriate in other contexts, particularly personal injury cases in which the amount of damages is not defined but speculative until a judgment is entered. *Id.* at 46 (citing cases). Thus, in Florida, the goal of prejudgment interest is to compensate a plaintiff for a concrete monetary loss rather than to penalize the defendant. *See Argonaut*, 474 So. 2d at 214-15; *cf. Alvarado v. Rice*, 614 So. 2d 498, 500 (Fla. 1993). As stated by the Florida Supreme Court, “a plaintiff is entitled to prejudgment interest only when it is determined that the plaintiff has suffered an actual, out-of-pocket loss at some date prior to the entry of judgment.” *Alvarado*, 614 So. 2d at 499. In *Alvarado*, the Court also clarified that in a personal injury action, a claimant may be entitled to prejudgment interest on past medical expenses “when the trial court finds that the claimant has made actual, out-of-pocket payments on those medical bills at a date prior to the entry of judgment.” *Id.* at 500. Even under *Alvarado*, a court’s award of prejudgment interest lies entirely within the court’s discretion. This is important, as it gives the trial judge the ability to determine what is fair and reasonable in each case.

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<sup>1</sup> The current effective judgment interest rate may be found at the following link: <http://www.myfloridacfo.com/Division/AA/Vendors/>.

## Prejudgment Interest Should Not Be Mandated in Every Case

Proponents of legislation mandating the award of prejudgment interest in every case will say that awarding prejudgment interest fully compensates the plaintiff for losses, encourages early settlements, and reduces delay in the disposition of cases. But the practical effects will be unnecessarily complicating damages awards, over-compensating plaintiffs, faulting defendants for delays they may not have caused, and impeding settlements.

### *Economic Damages*

Requiring that prejudgment interest be added for each component of an economic damages award, beginning to accrue upon the date of each loss, would require incredibly burdensome, time-consuming individualized calculations. In a property damage case, there is a discrete date of loss. With medical expenses and lost wages, there may be dozens, even hundreds, of separate dates to consider. Traditionally, a jury verdict form simply asks for an award for past medical expenses and past lost wages—a sample is included at the end of this memorandum. The jury calculates a single number for each category and fills it in. If there is competent evidence to sustain the award, it is proper and valid.

For prejudgment interest to be applied, each medical expense and each awarded lost wage incident would have to be listed on the verdict form—if the court is going to apply prejudgment interest, it must know the date of the loss, which determines the applicable interest rate, as well as the specific amount for each day.<sup>2</sup> The jury would be required to indicate on the verdict form whether the specific medical expense was compensable by the defendant. A jury verdict form may thus necessitate dozens of pages so that a jury may indicate to the court which of, for example, 300 physical therapist treatments the plaintiff received should be compensated as damages, on what date, and at what individual amount. Then, the court would be required to calculate prejudgment interest through the date of the judgment for each medical expense.

The following charts capture prejudgment interest calculations for just *three* medical treatment expenses out of **397** in a real personal injury case, presuming that the judgment in the plaintiff's favor was entered on September 1, 2013. Thus, under proposals like that described above, prejudgment interest would be calculated for each medical treatment from the date of the treatment to the judgment date.<sup>3</sup> While neither bill would permit the accrual of prejudgment interest prior to the bills' effective date of July 1, 2017, the following examples illustrate the complicated calculations that must be performed when prejudgment interest must be awarded on a loss incurred years prior to the judgment date.

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<sup>2</sup> The applicable interest rate for each year and/or quarter is set by the Chief Financial Officer ("CFO"). See *Argonaut Ins. Co.*, 474 So. 2d at 215; *Genser v. Reef Condo. Ass'n*, 100 So. 3d 760, 762-63 (Fla. 4th DCA 2012); § 55.03, Fla. Stat.

<sup>3</sup> The common-law rule is that prejudgment interest is not compounded. See Restatement (Second) of Contracts § 354 cmt. a (1981); Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293 n.76 (1996).

<b>CLAIM 1 – Laparoscopic, Radical Nephrectomy by Dr. Smith</b>				
<b>Paid Amount: \$2,046.00</b>				
<b>Treatment Date: 11/16/06</b>				
<b>Year</b>	<b>Annual Interest Rate</b>	<b>Days of Interest During Year</b>	<b>Prejudgment Interest</b>	
<b>2006</b>	9%	45	22.70	
<b>2007</b>	11%	365	225.06	
<b>2008</b>	11%	365	225.06	
<b>2009</b>	8%	365	163.68	
<b>2010</b>	6%	365	122.76	
<b>1/1/11-9/30/11<sup>4</sup></b>	6%	272	91.48	
<b>10/1/11-12/31/11</b>	4.75%	91	24.23	
<b>2012</b>	4.75%	366	97.19	
<b>2013</b>	4.75%	243	64.70	
<b>CLAIM 1 PREJUDGMENT INTEREST TOTAL</b>			<b>1,036.86</b>	
<b>CLAIM 1 TOTAL PREJUDGMENT</b>			<b>3,082.86</b>	

<b>CLAIM 2 – CT Scan of Pelvis by Central Health Clinic</b>				
<b>Paid Amount: \$43.48</b>				
<b>Treatment Date 1/17/07</b>				
<b>Year</b>	<b>Annual Interest Rate</b>	<b>Days of Interest During Year</b>	<b>Prejudgment Interest</b>	
<b>2007</b>	11%	348	4.56	
<b>2008</b>	11%	365	4.78	
<b>2009</b>	8%	365	3.48	
<b>2010</b>	6%	365	2.61	
<b>1/1/11-9/30/11</b>	6%	272	1.94	
<b>10/1/11-12/31/11</b>	4.75%	91	0.51	
<b>2012</b>	4.75%	366	2.07	
<b>2013</b>	4.75%	243	1.37	
<b>CLAIM 2 PREJUDGMENT INTEREST TOTAL</b>			<b>21.32</b>	
<b>CLAIM 2 TOTAL PREJUDGMENT</b>			<b>64.80</b>	

<sup>4</sup> The January 1, 2011 interest rate was established prior to the law change under Chapter 2011-169, Laws of Florida, and Florida's historical judgment interest rates website indicates that the rate established January 1, 2011, applied through September 30, 2011. After July 1, 2011, interest rates began being established quarterly by the CFO. However, because the relevant rate did not change over the quarters, the interest rate for the entire year for each year after 2011 is provided.

<b>CLAIM 3 – Drainage of Peritoneal Abscess by Dr. Jones</b>				
<b>Paid Amount: \$1,815.80</b>				
<b>Treatment Date: 9/24/2007</b>				
<b>Year</b>	<b>Annual Interest Rate</b>	<b>Days of Interest During Year</b>	<b>Prejudgment Interest</b>	
<b>2007</b>	11%	98	53.63	
<b>2008</b>	11%	365	199.74	
<b>2009</b>	8%	365	145.26	
<b>2010</b>	6%	365	108.95	
<b>1/1/11-9/30/11</b>	6%	272	81.19	
<b>10/1/11-12/31/11</b>	4.75%	91	21.50	
<b>2012</b>	4.75%	366	86.25	
<b>2013</b>	4.75%	243	57.42	
<b>CLAIM 3 PREJUDGMENT INTEREST TOTAL</b>			<b>753.94</b>	
<b>CLAIM 3 TOTAL PREJUDGMENT</b>			<b>2,569.74</b>	

To calculate prejudgment interest, this analysis would be required to be performed for each of the 397 treatments. All the amounts assessed as prejudgment interest, together with the treatment amounts themselves, would then become part of a single final judgment.

The required calculations would be the same for lost wages. Instead of a single verdict amount, the jury would have to determine an amount day by day and list the specific individual days and amounts. In a complex case, the verdict forms could take hours to fill out.

Another difficulty inherent in this is that juries often calculate past medical damages based on the “retail” value—or billed amount—of medical expenses and not the amount that is actually paid by the insurers and accepted by the providers for those services. For example, assume that a plaintiff injured in a car accident as a result of the defendant’s negligence incurred \$100,000 in medical services. The plaintiff had health insurance of which the jury is not informed, and the plaintiff’s health insurer had agreements with the plaintiff’s medical providers to pay certain discounted amounts for those services. Pursuant to those agreed-upon discounts, the plaintiff’s insurer ultimately paid \$40,000 to the plaintiff’s medical providers, who accept this amount in complete satisfaction of the plaintiff’s debt incurred as a result of the medical treatment. However, at trial, the plaintiff is permitted to present evidence of the \$100,000 “billed” or “retail” amount, not the amount actually paid by the health insurer and accepted by the health care providers for those services, \$40,000. The jury’s ultimate award in the event the plaintiff prevails will assume that \$100,000 amount.

Post-trial, the court will reduce the amount of the judgment to the amounts which have been paid by the insurer for the benefit of the plaintiff. But absent an itemized verdict form in which the jury identifies which of the medical expenses are to be compensated as damages and are thus subject to prejudgment interest, the court cannot determine what of, say, the \$90,000

damages award (as shown in the attached sample verdict form) rendered based on evidence of \$100,000 in past medical bills is appropriately subject to prejudgment interest. The jury-itemized verdict would list the retail amounts; the court would have to separately determine the true amounts for prejudgment interest calculations. The jury's pages and pages of listing amounts and dates becomes irrelevant; the court would have to redo all the amounts.

As a practical matter, plaintiffs seldom pay these bills—insurers do. The insurer has undertaken the contractual obligation to pay these bills, collecting an often hefty premium from the insured every month as part of that bargain. Insurers determine the prices of their plans factoring in issues such as whether they will be able to obtain reimbursement in the event the insured is injured by a tortfeasor.

Often, plaintiffs are not truly responsible for these medical expenses for another reason. Under a letter of protection, a patient/plaintiff, through his or her attorney, will enter into an agreement with a physician which allows the patient/plaintiff to receive medical care in exchange for a promise to pay for the services directly out of a settlement or judgment. With a letter of protection in place, the plaintiff has not lost the time value of his or her money because the plaintiff has not yet paid any medical bills. If prejudgment interest begins to accrue from the date the medical service was rendered, the plaintiff would receive a windfall because they neither paid it, nor were they truly “responsible” for it pending resolution by settlement or judgment.

### *Noneconomic Damages*

Mandating the award of prejudgment interest on noneconomic damages is even more concerning. The bills would invalidate the well-established common law rule that prejudgment interest may only be awarded for an ascertainable, out-of-pocket loss that occurs on a fixed date. *See Alvarado*, 614 So. 2d at 499; *see also Lipsig v. Ramlawi*, 760 So. 2d 170, 192 (Fla. 3d DCA 2000) (describing it as “well settled that prejudgment interest is not available on non-economic damages”). Even the few courts that have awarded prejudgment interest on noneconomic damages have only done so when the jury has fixed the noneconomic damages amount in the verdict, and thus prejudgment interest begins to accrue on the date of the verdict and not from some ill-defined date on which a claim is made. *See Budget Rent-A-Car Sys., Inc. v. Castellano*, 764 So. 2d 889, 891 (Fla. 4th DCA 2000).

Requiring an award of prejudgment interest on noneconomic damages also invades the province of the jury. The trial judge asks the jury, via standard jury instructions and a verdict form, to award an amount that reasonably compensates the plaintiff for pain and suffering in the past and then separately an amount in the future. To then award additional amounts on top of what the jury awards is to add to the decision of the jury—and to add to it in a way that gives additional money to the plaintiff for pain and suffering from the date of the claim—which would necessarily be prospectively awarding interest on pain and suffering before the injury impacted the plaintiff. Importantly, noneconomic damages are not reduced to present value the way that economic losses are. If the law mandates the award of prejudgment interest on noneconomic losses, then it would serve to reason that there should be a reduction in future pain and suffering damages to present value so that the benefit of interest is equal to both parties.

Like economic damages, requiring the award of prejudgment interest on noneconomic damages also presents practical difficulties. Again, a verdict form simply asks the jury to award a singular amount of money for a plaintiff's pain and suffering, mental anguish, or other similar nonfinancial loss; sometimes the verdict form may seek both an amount for past pain and suffering and future pain and suffering. SB 334 unhelpfully states that prejudgment interest should begin to accrue on noneconomic damages "from the date of the claim made by the plaintiff," but does not explain what is meant by that language. For prejudgment interest to be applied, each "component" of noneconomic damages would have to be listed on the verdict form and considered by the jury—if the court is going to apply prejudgment interest to each component of noneconomic damages, it must know the date of the "claim made by the plaintiff" as to that component, which determines the applicable interest rate, as well as the specific amount for each day. When combined with the difficult calculations described above for economic damages, the trial court's job to calculate all the prejudgment interest required under this proposed legislation becomes nearly unmanageable.

### *Summary*

Under current law, Florida courts have discretion to award prejudgment interest in cases in which the plaintiff's economic damages are easily calculated and where the award is equitable, such as in the rare instance a plaintiff actually pays her own medical bills. Legislation mandating the award of prejudgment in every action would remove that discretion. A jury would be required to complete a complicated, itemized verdict form to determine the dates of loss and which of potentially hundreds of medical expenses are appropriately compensated as economic damages resulting from the defendant's negligence. A court would be required to perform the detailed analysis described above for each "component" of economic damages, measured from each specific date of loss. Often the court would have to change the numbers to the real amounts paid. The court may also have to conduct an additional set of calculations to identify what if any co-payments were made by the plaintiff. The court would have an even harder task in determining the dates upon which the plaintiff made claims of noneconomic damages in order to calculate the prejudgment interest to apply to those damages.

A court would be forbidden from considering whether an award of prejudgment interest would be inequitable, punitive, or impractical, particularly where there is a legitimate legal dispute at issue or when the plaintiff was the one to cause the delay by delaying filing suit. If the plaintiff seeks and obtains three different continuances of trial over the defendant's objection, and the plaintiff wins, the plaintiff would be rewarded and the defendant penalized for that delay through a larger prejudgment interest award. As another consequence, defendants may be forced to settle unmeritorious claims in order to avoid the potentially high costs of prejudgment interest.

Such proposals are also fundamentally unfair in applying prejudgment interest on litigation costs only in favor of a prevailing plaintiff and not a prevailing defendant. Absent some other basis to assess prejudgment interest, a defendant that is forced to litigate a frivolous claim and who ultimately prevails is not entitled to the benefit of prejudgment interest tacked on to its costs for defending that frivolous claim. The same arguments that support allowing a plaintiff to collect prejudgment interest to compensate the plaintiff for the lost time value of his claim would support compensating a defendant for the lost time value of the money it was forced to expend defending itself against a non-meritorious claim.



Proposals mandating prejudgment interest awards would again make Florida a state that allows the assessment of prejudgment interest as an unreasonable penalty rather than to make the plaintiff whole. Florida's common law, which allows the award of prejudgment interest subject to the trial court's discretion, presents the better course for ensuring plaintiffs are made whole. The foundation for our laws should be common sense. This legislation is the antithesis of common sense.

**SAMPLE VERDICT FORM**

IN THE CIRCUIT FOR THE  
xxTH JUDICIAL CIRCUIT IN  
AND FOR ANY COUNTY,  
FLORIDA

CASE NO: ABCD12-34567

PAUL PLAINTIFF,

Plaintiff,

v.

XYZ COMPANY; and  
123 COMPANY

Defendant

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**VERDICT**

**We, the jury, return the following verdict:**

- 1. Was there negligence on the part of XYZ Company which was legal cause of injury or damage to Paul Plaintiff?**

YES   x                        NO \_\_\_\_\_

- 2. Was there negligence on the part of 123 Company which was legal cause of injury or damage to Paul Plaintiff?**

YES   x                        NO \_\_\_\_\_

If your answer to Question **1 and 2** are NO, your verdict is for defendants, and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If you answer to questions **1 and 2** is YES, please answer question **3**.

- 3. Was there negligence on the part of Paul Plaintiff which was a legal cause of her injury or damage?**

YES \_\_\_\_\_                      NO   x

If your answer to question 3 is YES, please answer question 4. If you answer to question 3 is NO, skip question 4 and answer questions 5, 6, 7, and 8.

**4. State the percentage of negligence or fault, which was a legal cause of injury or damage to Paul Plaintiff that you charge to:**

<b>XYZ Company</b>	<u>50</u> %
<b>123 Company</b>	<u>50</u> %
<b>Paul Plaintiff</b>	<u>0</u> %

**Total must be 100%**

By answering the following questions, you will determine the damages, if any, that Paul Plaintiff sustained as a result of the incident in question. In determining the amount of damages, do not make any reduction because of the negligence, if any, of Paul Plaintiff. If you find that Paul Plaintiff was negligent or at fault, the court in entering judgment will make an appropriate reduction in the damages awarded.

- 5. What is the amount of damages sustained in the past for medical expenses?** \$ 90,000
- 6. What is the present money value of any damages to be sustained in the future for medical expenses?** \$ 110,000
- 7. What is the amount of any damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity for the enjoyment of life?**
- a. In the past? \$ 30,000
- b. In the future? \$ 60,000
- 8. What is the total amount of Paul Plaintiff's damages, if any, for lost earnings?**
- a. In the past? \$ 15,000
- b. In the future? \$ 55,000
- TOTAL DAMAGES OF PAUL PLAINTIFF:** \$ 360,000  
(ADD LINES 5, 6, 7a, 7b, 8a, and 8b)

SO SAY WE ALL, this 4th day of March, 2014

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**FOREPERSON**