From: Florida Justice Reform Institute
Date: March 8, 2015
Re: Senate Bill 794 – An Act Relating to Prejudgment Interest

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This memorandum addresses: (1) the rationales underlying both prejudgment interest—which Senate Bill 794 would mandate in all cases in which damages are awarded—and post-judgment interest; and (2) the implications of retroactive application.

Rationales Underlying Prejudgment Interest and Post-judgment Interest

Both prejudgment interest and post-judgment interest are awarded to make the injured plaintiff "whole." The purpose of post-judgment 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). Post-judgment interest makes sense. The amount owed to the plaintiff has been concretely determined. Every day the judgment is not paid the plaintiff is losing the value of her judgment. And the defendant should be financially responsible as the defendant is most often the one to cause the delay by appealing the 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 plaintiff for a concrete monetary loss rather than to penalize the defendant. *See Argonaut*, 474 So.2d at 214-15.

If passed, Senate Bill 794 will reintroduce the concept of prejudgment interest to contexts in which Florida courts have rejected its application and penalize defendants. Proponents of prejudgment interest will say that awarding prejudgment interest fully compensates the plaintiff for losses, encourages early settlements, and reduces delay in the disposition of cases. The practical effects will be over-compensating plaintiffs, faulting defendants for delays they may not have caused, and impeding settlements. And it would be wholly contrary to the long line of Florida authority declining to award prejudgment interest in most tort cases where the damages are too speculative to liquidate before final judgment. *See Bosem*, 46 So.3d at 46. Furthermore, the bill

as written leaves no room for judicial discretion. Regardless of whether there is legitimate legal dispute at the center of the case or whether the plaintiff actually caused the delay in prosecuting the action, the defendant will be financially responsible for prejudgment interest. *Cf., e.g.*, *Hewitt v. Hunter*, 432 F. Supp. 795, 800 (W.D. Va. 1997) ("[A]wards of prejudgment interest are sometimes inappropriate in cases involving a bona fide dispute on the merits."), *aff'd*, 574 F.2d 182 (4th Cir. 1978); *see also General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 657 & n.11 (1983) (Under statute permitting prejudgment interest awards in patent cases, "it may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit.").

Retroactivity

The proposed law's retroactivity poses additional problems. Constitutional due process rights protect individuals from the retroactive application of a substantive law that adversely affects or destroys a vested right, imposes or creates a new obligation under or in connection with a preexisting transaction, or imposes new penalties. *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n*, 127 So.3d 1258, 1272 (Fla. 2013). For the retroactive application of a law to be constitutionally valid, the Legislature must express a clear intent that the law apply retroactively, and the law must be procedural or remedial. *Id.* Remedial statutes operate to further a remedy or confirm rights that already exist, and procedural statutes provide the means and methods for the application and enforcement of existing duties and rights. *Id.* On the other hand, "a substantive law prescribes legal duties and rights and, once those rights and duties are vested, due process prevents the Legislature from retroactively abolishing or curtailing them." *Id.*

Permitting the recovery of prejudgment interest in all pending cases imposes a new penalty on defendants. Until now, defendants have only been obligated by statute to pay post-judgment interest. Consequently, Senate Bill 794, if passed, would attach new legal consequences to events completed before its enactment. *See Menendez v. Progressive Express Ins. Co.*, 35 So.3d 873, 877 (Fla. 2010). As an example, the Florida Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Laforet* held that a statute which altered the damages available in bad faith actions against insurers could not be applied retroactively "because it [was], in substance, a penalty." 658 So.2d 55, 61 (Fla. 1995). Even if the payment of interest on judgments is considered an "existing" penalty and prejudgment interest is argued to simply increase that existing penalty, in *Bitterman v. Bitterman*, the Florida Supreme Court stated that the Legislature may not increase an existing penalty as to a set of facts after those facts have occurred. 714 So.2d 356, 363-64 (Fla. 1998). In short, the retroactive application of a law mandating prejudgment interest may be unconstitutional.