

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/CS/SB 334

INTRODUCER: Rules Committee; Judiciary Committee; and Senator Steube

SUBJECT: Prejudgment Interest

DATE: March 30, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Davis</u>	<u>Phelps</u>	<u>RC</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 334 generally codifies principles from case law that authorize a plaintiff to recover prejudgment interest on awards of economic damages and on any costs awarded as part of the judgment.

II. Present Situation:

Civil justice is guided by the principle that an injured person should be compensated and restored to the same position that he or she was in before the injury occurred. This compensation is awarded to a plaintiff in the form of damages. Over the centuries, several forms of damages have evolved with varying degrees of acceptance. Prejudgment interest is one form of damages that was once rejected in most American jurisdictions but has now gained acceptance in a growing number of states.^{1,2}

¹ Historically, many religious groups believed that charging interest was immoral and a form of usury prohibited by religious law. Therefore, interest was awarded sparingly and in a limited number of cases, but only at the discretion of the jury. By the 1800s, this prohibition began to recede and American courts awarded interest on a small group of claims, but only when the amount of the claim was certain and when it was payable on a specific date. See Aric Jarrett, *Comment: Full Compensation, Not Overcompensation: Rethinking Prejudgment Interest Offsets in Washington*, 30 SEATTLE U. L. REV. 703, 707 (Spring, 2007).

² Email from Heather Morton, Program Principal, National Conference of State Legislatures (Feb. 9, 2017) (on file with the Senate Committee on Judiciary) and Florida Justice Association, *Prejudgment Interest in Tort Cases, A Question of Fairness and Efficacy*, 12 (Feb. 2017) (on file with the Senate Committee on Judiciary). The reports are not in complete agreement, perhaps because different research methodologies or search terms were employed. Both surveys agreed that Alabama, Arizona, Arkansas, Florida, and Kansas do not currently have statutes permitting prejudgment interest. The surveys agreed on

Prejudgment Interest

Prejudgment interest is the interest on a judgment which is calculated from the date of the injury or loss until a final judgment is entered for the plaintiff. In contrast, post-judgment interest is interest on a judgment which is calculated from the date of the final judgment until the plaintiff collects the award from the defendant. Prejudgment interest is an additional award that compensates a plaintiff for the loss of the use of his or her money from the time the claim accrues until the final judgment.³ Post-judgment interest is designed to encourage the prompt payment of damages and to compensate for the inability to use the award while an unsuccessful appeal is resolved.

Under English common law, prejudgment interest was permitted for claims that were “liquidated” but not for claims that were “unliquidated.” A liquidated claim is a claim for an amount that can be determined or measured back to a fixed point in time. It is not speculative or intangible. An unliquidated claim, in contrast, is one that is based on intangible factors and is generally disputed until a jury determines the amount. In personal injury law, examples of unliquidated damages include damages for pain and suffering, mental anguish, loss of enjoyment of life, and permanent injury.

In assessing prejudgment interest, a claim becomes liquidated when a verdict has the effect of fixing damages as of a prior date.⁴

Florida law generally prohibits the award of prejudgment interest for plaintiffs in personal injury⁵ and wrongful death claims, but does allow it in some tort areas.⁶ The theory for denying prejudgment interest is that damages in personal injury cases are too speculative to liquidate before a final judgment is rendered. An exception to that rule occurs when a plaintiff can establish that he or she suffered the loss of a vested property right, such as a negligently destroyed building.⁷ Prejudgment interest has historically been allowed in this state for actions based on contract and the interest accrues from the date the debt is due.⁸

Two theories of prejudgment interest have developed over time. Under the “loss theory,” prejudgment interest is not awarded to penalize the losing party but to compensate the claimant for losing the use of the money between the date he or she was entitled to it and the date of the judgment.⁹ The Florida Supreme Court follows this theory wherein the loss, itself, is the

some specific states that do allow prejudgment interest. Beyond that point, the surveys often disagreed as to which additional states do not permit prejudgment interest. Perhaps some states do not explicitly provide for pre-judgment interest by statute but may permit limited forms of pre-judgment interest awards through case law.

³ 44B AM. JUR. 2D INTEREST AND USURY s. 39 (2016).

⁴ *Argonaut Insurance Company, et al., v. May Plumbing Company, et al.*, 474 So. 2d 212 (Fla. 1985).

⁵ *Parker v. Brinson Construction Company and Florida Industrial Commission*, 78 So. 2d 873 (Fla. 1955).

⁶ *Alvarado v. Rice*, 614 So. 2d 498, 500 (Fla. 1993). The Court held that a claimant in a personal injury action is entitled to prejudgment interest on past medical expenses when a trial court finds that the claimant had made actual, out-of-pocket payments on the medical bills at a date before the entry of judgment.

⁷ *Amerace Corporation v. Stallings*, 823 So. 2d 110 (Fla. 2002).

⁸ *Lumbermens Mut. Casualty Co. v. Percefull*, 653 So. 2d 389 (Fla. 1995).

⁹ *Kearney v. Kearney*, 129 So. 3d 381, 391 (Fla. 1st DCA 2013) rehearing denied January 17, 2014.

wrongful deprivation. The second theory, which is not followed in Florida, is the “penalty theory” where prejudgment interest is awarded to penalize the defendant.¹⁰

Proponents who seek prejudgment interest assert that it promotes fairness by allowing a plaintiff to be fully compensated for his or her injury, including the time span that litigation took place, particularly if the litigation is protracted. Opponents assert that prejudgment interest provides over-compensation and encourages premature settlements.

Economic Damages

Economic damages are damages that can be computed from records or documents. They generally include past and future medical bills, loss of past wages and future earning capacity, funeral expenses, and damage to someone’s personal or real property.¹¹

Noneconomic Damages

Non-economic damages are the subjective intangible items that cannot be measured with certainty. Those items generally include physical pain and suffering, mental anguish, and the loss of enjoyment of life. Unlike economic damages, which are defined in chapter 768, pertaining to negligence, noneconomic damages are not defined there.¹²

Attorney Fees

The Florida Bar regulates fees that an attorney may charge and collect.¹³ In addition to setting out factors that should be considered when determining what a reasonable fee is, the bar’s Rules of Professional Conduct also establish the particulars that must be contained in a contingency fee agreement as well as the percentages that may be charged. Contingency fee agreements are generally used in personal injury cases. If the plaintiff prevails, the plaintiff’s attorney receives a predetermined percentage of the fees plus litigation costs, but if the plaintiff loses, the attorney does not recover fees and costs.

Courts are authorized to award prejudgment interest on awards of attorney fees at least when the right to attorney fees is established by statute or contract.¹⁴ According to the Florida Supreme Court, the failure to award prejudgment interest on attorney fees would amount to a penalty on the prevailing party for the for other party’s delay in payment.¹⁵ “Interest accrues from the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination, even though the amount of the award has not yet been determined.”¹⁶

¹⁰ *Bosem v. Musa Holdings, Inc.* 46 So. 3d 42, 45 (Fla. 2010).

¹¹ See s. 768.81(1)(b), F.S., for a more detailed list of economic damages.

¹² Noneconomic damages are defined in ch. 766, Medical Malpractice and Related Matters, as “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 to the extent the claimant is entitled to recover such damages under general law,” Section 766.202, F.S.

¹³ Rules Regulating the Florida Bar, Rules of Professional Conduct, Rule 4-1.5.

¹⁴ *Quality Engineered Installation v. Higley S.*, 670 So. 2d 929 (Fla. 1996); *Weiderhold v. Weiderhold*, 696 So. 2d 923 (Fla. 4th DCA 1997).

¹⁵ *Quality Engineered* at 930.

¹⁶ *Id.* at 930-31.

Costs

If a plaintiff prevails in an action, he or she is entitled to recover some of the costs involved in the litigation. Pursuant to the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, the burden of proof is on the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case when the action was taken. The guidelines are advisory only, and the taxation of costs decision is within the broad discretion of the court.¹⁷

The Uniform Guidelines list three categories of costs—litigation costs that should be taxed, litigation costs that may be taxed as costs, and litigation costs that should not be taxed as costs.

Litigation costs that should be taxed include certain costs relating to depositions; documents and exhibits; expert witnesses; witnesses; court reporting costs; and reasonable charges incurred for requiring special magistrates, guardians ad litem, and attorneys ad litem.

Litigation costs that may be taxed as costs include certain mediation fees and expenses, reasonable travel expenses, and electronic discovery expenses.

Litigation costs that should not be taxed as costs includes the costs of long distance telephone calls, expenses relating to consulting non-testifying experts, travel time, travel expenses of attorneys, and the costs of privilege reviews of documents.

The Florida Supreme Court has not addressed whether prejudgment interest is authorized for litigation costs in all cases in which costs are awarded. However, the principles the Court set forth in *Boulis v. DOT*¹⁸ and *Quality Engineered v. Higley S.*¹⁹ indicate that prejudgment interest generally applies to expenses paid by a party before the entry of a judgment from the date those expenses are paid once the trial court determines reasonable entitlement.²⁰

III. Effect of Proposed Changes:

This bill generally codifies principles from case law that authorize a plaintiff to recover prejudgment interest on awards of economic damages and on any costs awarded as part of the judgment.

¹⁷ Fla. R. Civ. P. Taxation of Costs. The costs that should be taxed generally include costs associated with certain depositions, documents and exhibits, expert witnesses, witnesses, court reporting costs other than for depositions, and reasonable charges incurred for requiring special magistrates, guardians ad litem, and attorneys ad litem. Litigation costs that may be taxed as costs include mediation fees and expenses, reasonable travel expenses, and electronic discovery expenses. Litigation costs that should not be taxed as costs include the cost of long distance telephone calls with witnesses, any expenses relating to consulting but non-testifying experts, cost incurred in connection with any matter which was not reasonably calculated to lead to the discovery of admissible evidence, the travel time of attorneys and experts, travel expenses of attorneys, and the cost of privilege review of documents, including electronically stored information. See the guidelines for more specific criteria, available at

[https://www.floridabar.org/TFB/TFBResources.nsf/0/10C69DF6FF15185085256B29004BF823/\\$FILE/Civil.pdf](https://www.floridabar.org/TFB/TFBResources.nsf/0/10C69DF6FF15185085256B29004BF823/$FILE/Civil.pdf) at 347-349.

¹⁸ *Boulis v. DOT*, 773 So. 2d 959 (Fla. 1999).

¹⁹ *Quality Engineered Installation v. Higley S.*, 670 So. 2d 929 (Fla. 1996).

²⁰ *Boulis*, 773 So. 2d at 962.

Specifically, the bill directs courts to include in the final judgment interest on each component of economic damages. This interest accrues from the date of the loss of an economic benefit or a payment made by the plaintiff. Interest accrues on costs beginning on the first day of the month immediately following the month in which the costs were paid. The applicable interest rate is the same interest rate that applies to interest on judgements, which is currently 4.97 percent and is scheduled to increase to 5.05 percent on April 1, 2017.²¹

The bill takes effect July 1, 2017, and applies to causes of action that accrue on or after July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Plaintiffs who are successful in their claims and entitled to prejudgment interest will benefit financially from this bill by awards of receive prejudgment interest. Defendants may have an incentive to settle lawsuits to avoid the accrual of prejudgment interest.

C. Government Sector Impact:

The Office of the State Courts Administrator has not yet provided a Judicial Impact Statement for SB 334. However, in an analysis of a similar bill from 2015, the Office of the State Courts Administrator noted that the fiscal impact of the legislation could not be accurately determined due to the unavailability of data needed to establish the effects on judicial time and workload resulting from the bill's provisions.²² However, it appears unlikely that the bill will result in significant workload to the court system.

²¹ Office of the Chief Financial Officer, Judgment Interest Rates, <http://www.myfloridacfo.com/Division/AA/Vendors/> (last visited Mar. 30, 2017).

²² Office of the State Courts Administrator, *2015 Judicial Impact Statement for SB 794* (March 31, 2015) (on file with the Senate Committee on Judiciary).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 55.035, Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Rules March 29, 2017

The committee substitute no longer authorizes prejudgment interest on noneconomic damages or attorney fees as provided in the underlying bill.

CS by Judiciary on February 21, 2017:

The committee substitute differs from the underlying bill in the following ways:

- Prejudgment interest for noneconomic damages accrues from the date that the defendant receives notice of a claim by the plaintiff.
- Prejudgment interest on attorney fees or costs begins to accrue on the date of the entitlement of the award which is fixed through an agreement, arbitration award, or court determination.
- Language is deleted which states that interest may not accrue on prejudgment interest that was awarded in the final judgment.
- Language is added to clarify that the bill does not affect prejudgment interest to the extent that it is currently authorized by statute or common law.
- The bill has no retroactive application, and only applies to causes of action that accrue on or after July 1, 2017.

- B. **Amendments:**

None.