



April 15, 2021

The Honorable JB Pritzker
Governor of Illinois
207 State House
Springfield, IL 62706

Re: Illinois Senate Bill No. 72

Dear Governor Pritzker:

We write to you on behalf of the Federation of Defense & Corporate Counsel, an organization of attorneys who represent businesses and professionals in civil litigation with many Illinois members. We write to express the strong opposition of our organization and its Illinois members to Senate Bill No. 72. This Bill was passed with little time for meaningful analysis and debate. Senate Bill No. 72 is less objectionable than its predecessor, House Bill No. 3360, but remains problematic. The Senate Bill was passed at a time when many businesses in Illinois, large and small, remain under severe and continuing economic and other pressures due to the Covid-19 pandemic, and it is extraordinarily harmful to Illinois businesses and their employees. We believe this legislation is unfair, ill-advised, and will only serve to worsen the business climate in Illinois.

We have several concerns with this Bill:

The pre-judgment interest award provides for interest on future damages that have not yet been incurred by a plaintiff in civil litigation, such as claims for future medical care expenses and future lost wages and benefits. There is no equitable or legal justification to award interest on money that a plaintiff has not yet spent or for expenses not yet incurred. The pre-judgment interest award will include interest for non-economic damages, such as claims for pain and suffering and loss of normal life. Again, there is no justification in the law (or economics for that matter) for awarding interest on intangible and uncertain non-economic damages claims.

Pre-judgment interest has historically not been available in our jurisprudence in personal injury lawsuits because the nature and extent of damages cannot be readily calculated in advance. This fact is still true if this Bill is signed and adopted into law. Defendants ordinarily have only limited ability to determine the nature and extent of their potential liability, if any, at the outset of a civil case. In most cases the question of whether a defendant may be liable in tort for the injuries and damages claimed is not easily determined and requires the discovery process to either confirm or challenge the merits of the damages asserted. In most litigated matters, interest is appropriate and awarded only when liability is clear, and the amount of damages readily determined.

If there is to be prejudgment interest in tort cases, then such rate should be tied to the U. S. Treasury Bill, as has been proposed in New York. Further, there is no legitimate basis for having a higher prejudgment interest rate for tort cases than exists for contract and other cases – and even in those cases, the opportunity to recover prejudgment interest is narrowly defined. This Bill provides for neither and, therefore, imposition of pre-judgment interest is patently unfair.

The six percent interest rate is substantially higher than the interest that either plaintiffs or defendants could earn on undetermined damages claims if an award was paid to them immediately. The six percent rate is also markedly higher than the interest rates in most other states and well beyond what is paid by the Federal Reserve. Such a sum is also higher than the pre-judgment interest available currently under Illinois law, which is set at five percent, and awarded only in those matters where damages can be readily determined. The interest rate is entirely arbitrary and does not reflect economic reality.

There have been considerable delays in litigated matters and trials this past year since the onset of the Covid-19 pandemic. Such delays in the litigation process and the continuation of trials is not the fault of either plaintiffs or defendants or the Courts. It is unjust to penalize defendants through awards of pre-judgment interest as a consequence of the health catastrophe confronting our state and nation. This Bill will substantially increase the cost for businesses, professionals, medical providers and hospitals, to either obtain insurance coverage or provide self-insurance which would, of course, cause the cost of services to consumers to be increased to cover those costs. It will be extraordinarily challenging and expensive to attempt to calculate policy premiums or to transparently budget the costs of those proposed additional expenses given the uncertainties surrounding this legislation.

Prejudgment interest in tort cases is not an appropriate or balanced measure of damages and the Senate Bill moreover penalizes defendants, but not plaintiffs, for exercising their constitutional right to trial. Moreover, we respectfully believe that the imposition of these additional damages constitutes a violation of a defendant's due process rights under both the state's and federal constitutions.

Senate Bill No. 72 does not comport with the preferences you outlined in your March 25, 2021 veto message of House Bill No. 3360. As set forth in your veto message, prejudgment interest should not apply at all to claims for future damages, as such damages are reduced to present value and are not certain to be incurred. However, Senate Bill No. 72 does exactly that. The stated purpose of prejudgment interest is to compensate the injured party for the loss of the time value of money. Prejudgment interest should also not apply to non-economic damages or to medical bills satisfied for less than what was billed. The former has no rational relationship to the purpose of prejudgment interest and the latter yields a windfall.

The limitation to five years of interest would cap interest at no more than 30% on those parts of the award subject to prejudgment interest. This provision will only encourage plaintiffs to extend litigation to maximize recovery when the goal should be to incentivize all parties to resolve cases expeditiously.

The tolling of interest in the event of voluntary dismissal is a good and necessary change, but there are other delays in litigation not caused by defendants. The failure of plaintiffs to timely

answer written discovery, appear for deposition, and disclose experts, to say nothing of delays incurred in obtaining depositions of independent witnesses, all lead to delays in litigation, and are not due to the fault of defendants. Such delays should not result in the imposition of interest and a punitive penalty awarded against the defendant.

The mechanism including a settlement offer provision is welcomed but insufficient. The only penalty for a plaintiff who recovers damages less than the amount of the defendant's settlement offer is to forfeit prejudgment interest. The defendant by contrast (who had to incur the expense of proceeding to trial even though a reasonable settlement proposal was made) recovers nothing. A defendant ought to be entitled to seek its attorney's fees and costs in this situation. In its current iteration, the Legislature has distorted the means by which a civil defendant can advance the process by making an Offer of Judgment. We would recommend the state adopt the provisions of the Federal Rules of Civil Procedure, Rule 68, in order to provide further uniformity and predictability to civil litigants – on all sides.

The change whereby interest runs from the date of filing and not the date of accident is better than what was proposed with House Bill No. 3360. Interest should only run from the date that liability is fixed. This rule not only would comport with the purpose of prejudgment interest but also encourage plaintiffs to seek judgment on liability early in a case which would tend toward case resolution. Further, it would far better yield to the assuring equal justice under law for all parties.

Vetoing Senate Bill No. 72 will allow for a full discussion among all concerned about implementing procedures fair to all litigants and that incentivize resolution of civil matters and thereby address the ever-growing backlog of civil cases. The failure to have robust hearings, earnest debate, and full transparency in the development of this legislation further erodes confidence in Illinois government. We urge you, on behalf of our organization and its many Illinois members, for the reasons outlined above, to veto this ill-considered and inequitable Bill. Thank you for your consideration.

Yours respectfully,



Michael T. Glascott
President – Federation of Defense
& Corporate Counsel
Buffalo, NY



Daniel W. McGrath
Illinois State Representative
Federation of Defense &
Corporate Counsel
Chicago, IL