

Alert | Litigation



June 2022

Illinois Court Declares State's Pre-Judgment Interest Statute Unconstitutional

This GT Alert covers the following:

- The recent Amendment to 735 ILCS 5/2-1303, which allowed prejudgment interest to accrue at 6% from the time the lawsuit was filed, was declared a violation of the Illinois Constitution.
- The phrase “as heretofore enjoyed” under the Illinois Constitution means the right of trial by jury as it existed under the common law, which includes the right of the jury to determine damages, not the Illinois General Assembly.
- The Amendment does not survive strict scrutiny or rational basis scrutiny under the Illinois Constitution’s prohibition against special legislation.

On May 27, 2022, the Circuit Court of Cook County found Illinois’ 6% prejudgment interest statute unconstitutional as a violation of the right of trial by jury and the prohibition against special legislation. This decision has important implications for personal injury and wrongful death litigation in Illinois, as it invalidates a far-reaching and potentially onerous imposition of prejudgment interest broadly applicable to such cases.

In 2021, Illinois passed an amendment to 735 ILCS 5/2-1303 (Interest on judgment) into law, allowing interest to accrue commencing at the time of initiating all actions seeking damages for personal injury or wrongful death caused by negligence, willful and wanton misconduct, intentional conduct, or strict liability (the Amendment). Beforehand, interest only accrued from the date of judgment.

The Amendment was controversial from the outset due to the high rate of interest (9% under the Amendment's original proposal), atypical application compared to other states' laws, and practical effects that incentivize delayed litigation. Greenberg Traurig was one of the first law firms to highlight the controversial Amendment; see [New Nine Percent Prejudgment Interest](#) (Jan. 23, 2021), and Gov. Pritzker eventually vetoed the bill as originally proposed. The Illinois General Assembly subsequently revised the bill to address several of the criticisms, including reducing interest from 9% to 6%, and SB 0072 was eventually signed into law.

In *Hyland v. Advocate Health and Hospitals Corporation, et al.* (Case No. 2017-L-003541) (Cook County, Ill.), the defendants filed a "Motion to Declare Senate Bill 0072, Which Amended 735 ILCS 5/2-1302 Invalid Under the Illinois Constitution." The motion alleged the Amendment violated numerous provisions of the Illinois Constitution, including (1) the right to a jury trial and (2) the prohibition against special legislation. The court agreed.

Article I, § 13 of the Illinois Constitution of 1970 provides "the right of trial by jury as heretofore enjoyed shall remain inviolate." This language has been interpreted to secure the right of jury trial as it existed at common law. See *Kakos v. Butler*, 2016 IL 120377, ¶¶ 13-14 ("This court has long interpreted the phrase 'as heretofore enjoyed' to mean 'the right of trial by jury as it existed under the common law and as enjoyed at the time of the adoption of the respective Illinois constitutions.'") (quoting *People v. Lobb*, 17 Ill. 2d 287, 298 (2010)). The court in *Hyland* confirmed "[o]ne of those characteristics being the right of the jury to determine damages- an inviolate right- and not an issue for the Legislature." (*Hyland* Memorandum Order, p. 4). "[I]t is the jury's right and duty to assess damages to compensate a plaintiff and the Amendment violates the fundamental right to jury trial as it improperly strips the function and role of the jury in assessing all issues, including damages, and instead requires an award of prejudgment interest after verdict." *Id.*

The difference between prejudgment interest and post-judgment interest is important. For the former, it is the duty of the jury to award a plaintiff compensation to make him or her whole. The *Hyland* court cited authority showing Cook County juries already have been awarding plaintiffs "increased awards over and above inflation ... at the rate of 3.7% per year from the time between injury and trial." (*Id.*, pp. 4-5) (citing Michael S. Knoll, *A Primer on Prejudgment Interest*. Post-judgment interest, by contrast, "measures the time after a finding of liability by the jury." (*Hyland* Memorandum Order, p. 5). The jury has no control over future damages via post-judgment periodic payments as opposed to the traditional lump sum procedure.

Additionally, the *Hyland* court found the Amendment a violation of the Illinois Constitution's prohibition against special legislation. The Illinois Constitution provides: "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter of judicial determination." Ill. Const. 1970, Art. IV, § 13. The purpose of the special legislation prohibition, as stated by the Illinois Supreme Court, "is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis." *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 391 (1997). With respect to the Amendment, the legislation was the product of lobbying by the plaintiffs' bar and one of the last bills passed under Mike Madigan's 36-year run as Illinois House Speaker.

Because the *Hyland* court found the Amendment violates the fundamental and substantial right to trial by jury, its constitutionality under the special legislation prohibition must survive a strict scrutiny analysis. That means “the court must conclude that the means employed by the legislature to achieve a stated goal were necessary to advance a compelling state interest.” (Hyland Memorandum Order, p. 6). Also, “the statute must be tailored narrowly as the legislature must use the least restrictive means consistent with the attainment of the legislative goal.” *Id.* at p. 7 (citing *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54 (1990)). The court found the purpose of the Amendment “cannot be construed to advance any compelling State interest.” *Id.* “The requirement that prejudgment interest be added to a jury’s award removed the jury from determining questions of fact as to what is reasonable and just compensation for a party’s injuries and conditions a defendant’s right to a jury trial on the payment of a penalty.” *Id.* In fact, the court found that even if the Amendment were analyzed under the rational basis test, it nevertheless “discriminates in favor of personal injury and wrongful death plaintiffs alone by granting a substantial benefit upon them while excluding all other similarly situated tort plaintiffs.” *Id.* at p. 8. The court agreed that “all tort cases cause congestion of the courts and using an arbitrary classification of only personal injury plaintiffs to receive prejudgment interest would not encourage early settlements or relieve congestion for all other tort actions.” *Id.*

Ultimately, the *Hyland* court held the Amendment “divides tort parties into two groups: parties to personal injury and wrongful death actions who are subject to prejudgment interest, and all other tort parties who are not. It clearly and arbitrarily favors personal injury and wrongful death plaintiff and is not rationally related to any State interest.” *Id.* at p. 9. Therefore, the Amendment to 735 ILCS 5/2-1303 was deemed “unconstitutional and invalid.” *Id.* at p. 10.

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