Prejudgment Interest

Seminar Topic: This program examines how to increase your litigated judgment by way of a plea for prejudgment interest.

This program will provide the participant with the knowledge and tools to make you aware of the accepted circumstances (which you may not be aware of) where you can tack on to the judgment, prejudgment interest going back to the time where the money which was owed should have been paid. Further, I hope to encourage some of you to think out of the box and stretch the limits of the existing law to fit other circumstances to the end of making new and exciting law for plaintiff's litigators.

This material is intended to be a guide in general. As always, if you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

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Hello, my name is Lee Phillip Forman and we are here today to review a topic which is near and dear to my heart. How to increase your litigated judgment by way of a plea for prejudgment interest.

For those of you who have not attended any of my former lectures may I introduce myself. I am proud to say that I have just completed my 50th year of practice in Illinois after having been a graduate of the University of Illinois Champaign and De Paul School of law.

I have spent the past ½ century as a litigator both in Law and in Chancery. During that time there have been cases which I have handled where I felt that the amount of money awarded by the jury or from a bench trial did not fully and completely compensate my client for the damages they suffered.

I personally have experienced dealing with certain business people and even attorneys who refuse to pay that which is duly owed on the hopes that they will be sued and that they can settle for less than they owe to avoid a lengthy trial and that they can stretch the obligation out several years and still have use of the money.

What I hope to accomplish in this short hour presentation is to make you aware of the accepted circumstances (which you may not be aware of) where you can tack on to the judgment, prejudgment interest going back to the time where the money which was owed should have been paid. Further, I hope to encourage some of you to think out of the box and stretch the limits of the existing law to fit other circumstances to the end of making new and exciting law for Plaintiff's litigators.

It is rare that I have seen anyone file a lawsuit and ask in the damages for an additional sum of money for prejudgment interest. When you think about that it is strange as we all recognize that money is worth more today than it will be tomorrow and the concept of the "time value" of money is an everyday concept which goes back over a thousand years. Each of us recognizes that when we borrow money the borrower gets the immediate use of the funds for which he should have to pay a premium. The lender of money loses the benefit of the "time value" of the money for which he is entitled to that premium.

We call that PREMIUM, Interest, Vigorish, Vig, Juice, APR, Bank Rate, prime rate, price of money and a load of other Synonyms.

The Salamancans in ancient Spain were the first to conceptualize the fact that money is a commodity which itself can be bought and sold for a premium.

Although the concept is so universal it is surprising to find out that common law does not provide a remedy by which prejudgment interest could be obtained.

In Illinois, today, the authority for prejudgment interest finds itself in the Illinois Interest Act (815 ILCS 205/2) which provides for prejudgment interest in certain specific situations. The act reads:

"§2. Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing *(an insurance policy is in instrument of writing in Illinois)*; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment."

Prejudgment interest is not recoverable in actions for bodily injury, personal injury or property damage.

Let us just take a second to review just what the interest act allows us to seek prejudgment for. It allows an agreed written instrument to contain up to5% per year in prejudgment interest on any instrument where money is passed from one party to another such as a bond, bill , note etc. from the date that the money is due to be paid back until it is in fact paid or reduced to judgment.

The language in the act specifies that where there is money owed which is unreasonably held back or as the law states it, payment is vexatiously delayed the law will allow prejudgment interest from the time it is delayed until judgment.

So simplifying it: the act provides for two cases: One where there is an agreed interest rate and one where there is a vexatious delay in payment.

Interestingly enough, after judgment is final (which is most cases 30 days after judgment where the time for appeal has run) the post judgment interest runs at 9% in Illinois. The Plaintiff has the right to add the judgment and prejudgment interest and run both of them 30 days after final judgment is entered at a 9% rate.

Let's apply what we have learned in a practical sense. Your client who is about to lend money by way of an instrument may not only charge an "interest rate" but include in the instrument under the interest act language that adds additional interest under the interest act in the event of a breach. It is surprising to me how many of you have never done this. In doing so you SHOULD SPECIFY THE AMOUNT OF INTEREST, THE EXACT DATE OR TIME THAT THE MONEY IS DUE AND THE CONTRACT IS BREACHED... The Illinois Courts will recognize this amount as compensatory and not punitive and will not enforce interest obligations that act as penalties. Make certain that your instrument does not specify that the additional interest is punitive.

If there is no written agreement a plaintiff who is deprived of his or her money because of a vexatious delay in payment is also entitled to prejudgment interest.

What is vexatious delay? This is a very, very important point. Unreasonable and vexatious delay are not just any delay in payment nor is it just a refusal to pay a debt. If the debtor can raise a reasonable and honest dispute over the repayment of the debt then such delay is not vexatious.

It is wise to lay the tracts of vexatious and unreasonable delay before filing suit by means of letters, emails, texts and the like trying to extract any

reasonable and honest dispute from the debtor. In absence of the same one may easily conclude that the delay was done on purpose and vexatious.

This brings to mind a certain Plaintiff's attorney in Illinois who solicits other attorneys to refer large cases to him for trial on a referral basis of 1/3 of the fee. When the case is settled or tried to verdict and paid the attorney did not notify the referring attorney and allowed him or those to find out from the client long after the judgments were paid. There is no statute of limitations which will run where the facts concerning payment are concealed and the statute will run for 10 years on a written contract and 5 years on an oral agreement when the knowledge is gained or when the Plaintiff should reasonably have known that the debt was not paid.

This Plaintiff's attorney did this on a regular basis and most all cases were settled for less than he owed making him a very wealthy but disliked person.

I gained my insight into this area of the law in a case I handled in DuPage County Illinois and in the Second Appellate District of the Appellate Court of Illinois.

The case was PRIGNANO V PRIGNANO which can be easily cited as decided on August 9, 2010.

The actual facts on which the case was decided were lengthy and convoluted. I am going to try to make the facts simplified and more interesting relative to our subject matter. You are encouraged to read the opinion in full as it is a treasure of law in the areas of breach of contract, statute of limitations, timeliness of pleading oral contracts, setoffs, evidence, unjust enrichment as well as prejudgment interest.

George Prignano was a young man when he was first divorced. The divorce cost him dearly so that when he remarried he wanted to take some type of action keeping the marital assets and his personal estate out of the reach of his second wife Nancy. George and his brother Louis operated a business called Sunrise Homes whereby the two partners built and

remodeled houses in the Chicago Suburbs. To this end, George and Louis kept all their assets in the name of Sunrise Homes Inc.

However, both realized that if one or the other would die that the Stock in Sunrise Homes would go to the widow and in George's case, to Nancy. To provide for this event the brothers purchased $600,000.00 of insurance each for the purpose of buying out the interest in the business from the surviving widow.

Again, simplifying the facts, George died at the young age of 51 in July of 2000 leaving Nancy a widow with two children. Nancy and George had a home, a car and other assets but the Value of Sunrise Homes was set at around $1,200,000.00. (which ½ of the value would be the $600,000.00) Louis, the surviving brother and partner was also the administrator of the estate and passed 40,000 in cash and title to the home to Nancy and $5,000.00 cash each to the children. He then tried to collect upon the $600,000.00 in insurance with the stated objective of paying Nancy for her resulting share of the business.

The insurance company found out that George had more habits than his girlfriends. He was a smoker which was not stated in the insurance application. The insurer refused to pay the $600,000.00 and Louis retained attorneys to file suit against the insurer enlisting Nancy's help to convince a court that George was not a smoker. The litigation went on from late 2000 to early 2004. Nancy was told from time to time that the litigation was on going. She was a rather naïve person and had no reason to question her brother in law.

However, one day in early 2004 her sister in law ask her at a bowling event what she was doing with "all that money" that she had recovered from the insurance law suit. Nancy questioned Louis and for the first time found out that the case had settled in late 2000 for $450,000.00 which was the amount the insurance company would have paid a smoker for the same premium that Sunrise had paid for the policy.

Louis however, once the money was in hand never told Nancy even though in the eyes of the law he was a "constructive trustee" and in fact under the

will an appointed trustee and as the Administrator of the Estate had a fiduciary relationship to Nancy and her children.

Nancy hired my firm to collect and a demand was sent out to Louis in various forms indicating the existing law and making a demand of $450,000.00 which was later reduced to $300,000.00 to save the cost and time of litigation.

Louis steadfastly denied that there had been any agreements to use the insurance proceeds for the purpose of buying out Nancy but the facts and the law were grossly on the side of Justice and Nancy and her children.

On July 18th 2008 after a very lengthy trial the court found that Nancy was entitled to her own home, car and personal possessions and that she was entitled to receive the proceeds of the $450,000.00 insurance policy.

Admittedly, for the first time, after hearing the judgment pronounced I felt that Nancy and the children should be entitled to the loss of the use of her money from 2000 when it was paid by the insurer to the date of judgment in 2008. I filed a motion to "amend the complaint post judgment" to add prejudgment interest to the verdict under the interest act with a motion sounding in unreasonable and vexatious delay in payment as well as citing that the funds were held by a constructive and actual trustee and should have produced interest for the benefit of Nancy and her children and not Louis.

The court allowed the motion to amend the complaint. I'll bet some of you out there are listening more closely now. How can you amend a complaint…after judgment? Section 735 ILCS 5/2-616 (c) permits pleadings to be amended at any time, before or after judgment to conform the pleadings to the proofs upon just terms. The Appellate Court justified the amendment and affirmed the lower court by saying that…the question is "will the defendant be surprised" or prejudiced. The court opined that certainly Louis knew the money belonged to the beneficiaries under the will or in the alternative he had made an oral agreement to exchange the money in 2000 for the stock in Sunrise. There was neither a surprise nor a prejudice in amending the complaint to add the interest act requesting additional damages. The Appellate court opined that prejudgment

interest need NOT be pled before judgment just so the facts entitling the party to such are in evidence before the judgment. Actually there is a case which indicates that a request for prejudgment interest will be "read into the complaint although not specifically pled, where the facts justify it. Kehoe v Wildman Harrold Allen and Dixon 387 Ill App3d 454. The courts justify this by saying where the facts proven are in evidence that the failure to request prejudgment interest at best is innocent error.

Well in the Prignano Case, the court entered a $450,000.00 verdict for the Plaintiff and $165,324.50 in prejudgment interest bringing the verdict to $615,324.50 plus costs. The defendant appealed and 2 years ran on the judgment 9% plus costs of the appeal bring the total to over $750,000.00 for a case which could easily have been settled for between $300,000 and $450,000.00.

Just as a matter of education, should the post judgment interest be charged against a local government, a school district, a community college or other governmental entity the rate is only 6%.

The trial court was in equity and as such had a discretion as to what amount of prejudgment interest he could award. In the case of Wernick 127 Ill2d at 88 equity dictated an award equal to the average prime rate during the non-disclosure period. The lower court and the Appellate court affirmed the use of 5% as an average even though by 2009 the prime rate had dropped below 5%.

The Interest Act excludes personal injury and property damage. However, I feel that someday, one of you listening to this lecture will undertake to attack that paragraph as being unconstitutional. People who lose the use of their car or lose time from business or work or lose the pleasure of everyday experiences also lose the use of money which are additional damages. There are insurance companies out there which I will not name, that purposely refuse to pay claims until a judgment is entered against them where the facts are clear and defined and that there is no reasonable justification for not paying out on the claim other than being vexatious.

In 2009, Senate Bill 184 was rejected as an amendment to the Illinois Rules of Civil Procedure which would have allowed recovery of prejudgment

interest on unliquidated claims including personal injury. The amendment offered as a solution the need for a Plaintiff to give a defendant notice of the claim and the reasons for settlement and if a judgment was entered against the defendant they would pay 2% over the treasury rate. The defendant could abrogate their liability by paying within 120 days of the date which they were to answer the complaint.

The powerful insurance industry stated objections being that the bill as worded would also allow prejudgment interest on "future damages" which seemed incongruous. However, we of the Plaintiff's bar know that the reason is "where the case is a dead bang loser, the insurance company would rather pay its attorneys to babysit the case for years instead of paying the same and the savings would become evident.

I think that prejudgment interest should be an item on the jury instructions and know that someday it will be if one of you work hard enough on it.

CONCLUSION;

Start looking at all your litigation cases with an eye to Prejudgment interest. Equity cases, contract cases and cases over money debt are all subject to the Illinois Interest Act and those dead beats who, on purpose, with the thought in mind to make it as hard to collect a legitimate debt as they can for the purpose of getting the Plaintiff to settle for less are in fact putting themselves right in the gunsights of the Illinois Interest Act.