James F. Ludlow

Indiana's Tort Prejudgment Interest Statute– How To Make It Work For Your Client

An unfortunate reality in personal injury litigation is that it often takes years for a case to get to trial. While a claimant's attorney cannot deduct for income tax purposes the expenses they have advanced on a pending case, a liability insurer may deduct the expected cost of a claim when a claim reserve is established, even though nothing has yet been paid to the claimant. The insurer can also continue to earn interest income on this reserve until the claim is actually paid.

It should be no surprise then that many insurers are quite content to delay the payment of legitimate claims for as long as possible since they have already deducted for tax purposes what they eventually expect to pay on the claim, and yet can still earn interest on this money while the claim is pending.

The question then is how may a claimant's attorney make the inevitable delays that are involved with litigation more profitable for their client and less so for the liability insurer. In this regard, Indiana's Tort Prejudgment Interest Statute can be beneficial.

Prior to the enactment of this Statute, prejudgment interest was rarely available in personal injury cases. Specifically, prejudgment interest was only proper when the damages in a case were ascertainable in accordance with fixed rules of evidence and accepted standards of valuation, and where only a simple mathematical computation was required to determine these damages. *Bopp v. Brames*, 713 N.E. 2d 866, 871 (Ind. Ct. App. 1999). Moreover, prejudgment interest was unavailable for damages that were the subject of a good faith dispute. *Id.*

However, Indiana's Tort Prejudgment Interest Statute, which can be found from Indiana Code 34-51-4-1 through 34-51-4-9, provides "tort claimants with a new substantive right to recover prejudgment interest as a component of compensatory damages." *Indiana Erectors, Inc. v. Trustees of Ind. Univ.*, 686 N.E. 2d 878, 882 (Ind. Ct. App. 1997). Since the trial court has discretion under this Statute to award up to 10% simple annual interest on a judgment for a period of up to four (4) years, such interest can be substantial, especially when a significant judgment is involved.

As to the basic provisions of this Statute, I.C. 34-51-4-1 provides that it only applies to civil actions that arise from "tortuous conduct". However, since even an uninsured motorists claim arises from the "tortuous conduct" of an uninsured motorist, this Statue has broad applicability in personal injury litigation.

It is also important to recognize that I.C. 34-51-4-7 provides that a court "*may* award prejudgment interest as part of a judgment" (emphasis added). Thus, whether to make an award of prejudgment interest is within the trial court's discretion, *provided* that certain provisions of the Statute are satisfied.[1] However, the mere fact that issues at trial are contested is not a consideration under the Statute. *Van Winkle v. Nash*, 761 N.E. 2d 856, 860-861 (Ind. Ct. App. 2002).

If the presence of disputed issues were to make this Statute inapplicable, "defendants would have an incentive to manufacture token disputes of liability or damages in order to avoid prejudgment interest." Id. This would conflict with the purpose of the Statute, which is "to encourage settlement and to compensate the plaintiff for the lost time value of money." *Id.*[2]

In my experience, most trial court judges understand that the liability insurer has been earning interest and/or investment income on the money it has set aside to pay a claim – often for several years before a judgment is rendered. Therefore, they usually are willing to grant an award of prejudgment interest, provided that the prerequisites of the Statute have been satisfied.

As to what must be done to be eligible for an award of prejudgment interest, I.C. 34-51-4-6 provides that the claimant must have (1) made a written offer or demand for settlement within one year after the lawsuit was filed or any longer period which the court finds necessary upon a showing of good cause, (2) this written offer must provide for the payment of the settlement within sixty (60) days after the offer is accepted, and (3) the amount of the offer cannot exceed one and one-third of the amount of the actual judgment.

In my practice, I have found that the easiest portion of this Statute to overlook is the requirement of I.C. 34-51-4-6 that a **written settlement demand must be made within one year after a lawsuit is filed.** Thus, whenever I file a lawsuit, I always calendar the one-year post-filing date carefully so that I am sure to make a written demand within this one-year period.

However, even if one neglects to make this demand within one year after filing suit, I.C. 34-51-4-6 provides that for good cause shown, the trial court may extend the period in which a prejudgment interest settlement demand can be made. In a recent pleading that I have included with this article, a trial court permitted me to make a prejudgment interest settlement demand three years after the filing of the lawsuit. Thus, if one has a credible argument as to why the value

[1] Even when the provisions of this Statute are not satisfied, prejudgment interest may be available under the aforementioned common law, such as in contract cases.

[2] It must be pointed out that in Lumbermens Mutual Casualty Company v. Combs, 873 N.E. 2d 692, 724 (Ind. Ct. App. 2007), the Court of Appeals declined to follow the Van Winkle precedent, finding instead that prejudgment interest was only available where a simple mathematical computation was required, and that prejudgment interest was not permissible when damages were the subject of a good faith dispute. This of course was the common law prior to the enactment of the Tort Prejudgment Interest Statute. However, given the fact that it is not entirely clear from the Lumbermens' opinion that this Statute was applicable, and as previous case law, specifically Indiana Erectors, Inc. v. Trustees of Ind. Univ., 686 N.E. 2d 878, 882 (Ind. Ct. App. 1997), held that this Statute was intended to provide tort claimants with a new substantive right to recover prejudgment interest as a component of compensatory damages, I would consider Van Winkle to be precedent that is likely to be followed in future decisions.

of the case has changed over time, a failure to make a prejudgment interest demand within the aforementioned one-year period can be overcome. It would also appear that this section may be used to petition a court for permission to modify an existing prejudgment interest settlement demand.

With reference to the form of a prejudgment interest settlement demand, the second prerequisite of I.C. 34-51-4-6 is that the settlement demand must provide for payment of the demand within sixty (60) days after it is accepted. However, as illustrated by the example of a prejudgment interest settlement demand that I have included at the end of this article, the actual form of the demand can be simple.

As to the "60 day" language contained in I.C. 34-51-4-6, in *Cahoon v. Cummings*, 734 N.E. 2d 535 (Ind. 2000), our Supreme Court found that an offer to settle "now" was an offer to settle by payment within sixty days, and thus met the requirement of this chapter even though the words "60 days" did not appear in the demand letter.

The third condition of I.C. 34-51-4-6 is that the amount of the settlement demand cannot exceed one and one-third of the amount of the actual judgment. Thus, if a settlement offer or demand is less than or equal to the amount of the actual judgment, one is obviously eligible for a prejudgment interest award. However, one may be eligible for such an award *even if the judgment is less than the settlement demand, provided* that the demand does not exceed one and one-third of the amount of the judgment.

To illustrate this point, if a settlement demand of $95,000 is made, a claimant is eligible for an award of prejudgment interest if the judgment is equal to or greater than $95,000. If the demand had been for $95,000, but a judgment of only $75,000 were awarded, the plaintiff would still be eligible for an award of prejudgment interest because the settlement demand did not exceed one and one-third (1 1/3rd) of the amount of the judgment.

In this example, one and one-third (or 1.33) multiplied by the judgment amount of $75,000 equals $99,750. Because the $95,000 settlement demand does not exceed $99,750, prejudgment interest is still available even though the judgment is $20,000 less than the settlement demand.

Conversely, if the demand for settlement had been $100,000 and the judgment was for $75,000, the Statute would not apply since 1.33 multiplied by $75,000 is $99,750. Because the settlement demand of $100,000 is $250 more than one and one-third of the amount of the actual judgment, the plaintiff would not be eligible to collect prejudgment interest.

As to other aspects of this Statute, I.C. 34-51-4-3 provides that it does not apply to awards of punitive damages. I.C.34-51-4-4 states that the Statute does not apply to claims against governmental entities. The Statute *does* apply to judgments against health care providers. *Cahoon v. Cummings*, 734 N.E. 2d 535 (Ind. 2000). However, I.C. 34-51-4-2 provides that in the context of medical malpractice litigation, the Statute does not apply to claims against the Patients' Compensation Fund.

I.C. 34-51-4-5 provides that a defendant may avoid an award of prejudgment interest if within nine (9) months after the lawsuit was filed or any longer period which the court finds necessary upon a showing of good cause, a defendant makes a written settlement offer which states that the payment of the settlement will be made within 60 days after acceptance of the offer, and the amount of the offer is at least two-thirds of the amount of the judgment award.

Thus, if a defendant were to offer $75,000 prior to judgment within the aforementioned time period, and the judgment that was eventually rendered was $100,000; no prejudgment interest would be permitted because the offer was at least two-thirds of the judgment. However, if the offer was $65,000 and the judgment was $100,000, then the defense could not avoid payment of prejudgment interest because two-thirds of the judgment would be $66,666 and the offer was less than that amount.

As to the length of time for which prejudgment interest may be awarded, I.C. 34-51-4-8 provides that a **court may award up to 48 months of prejudgment interest, which begins to accrue on the latest of the following dates:**

(1) 15 months after the cause of action accrued;

(2) 6 months after the claim is filed in court if a negligence claim against a qualified health care provider is not involved, or

(3) 180 days after a medical review panel is formed to review a medical malpractice claim.

I.C. 34-51-4-8(b) also provides that the "court shall exclude from the period in which prejudgment interest accrues any period of delay that the court determines is caused by the party petitioning for prejudgment interest". Thus, it would seem that if a claimant had requested a number of continuances of a trial date, a defendant may able to shorten the period of time for which prejudgment interest may be awarded by arguing that a delay in obtaining a judgment was caused by the claimant.

On the other hand, plaintiff's counsel should point out that while the claim was pending, the defendant or their insurer continued to enjoy the time value of their money regardless of who was responsible for any delay in actually getting the case to trial.

Lastly, I.C. 34-51-4-9 states that a trial court may assess prejudgment interest at a simple rate of interest of not less than 6% and not more than 10% per year. Although defendants invariably argue that 6% is appropriate because yields on certificates of deposit have been low, I have been successful in arguing that the 10% figure should apply because the cost at which the plaintiff had to borrow money or incur debt because of the injury was at least 10%, if not more.

Thus, if one can show that the plaintiff had to borrow money on their credit card to pay medical or household expenses as a consequence of their injury, justice requires that the tortfeasor be responsible for the higher cost. Even if the client did not incur expenses on their credit card because of the accident, one could also argue that if the demand had been paid when it was made, the plaintiff could have paid off pre-existing debt that was accruing interest at a rate greater than 10%.

In practical terms, given the fact that I.C. 34-51-4-8 states that **prejudgment interest cannot begin to accrue until six (6) months after a lawsuit is filed or fifteen (15) months after the injury, whichever date is later**, the best practice on a substantial claim is to file suit and make a prejudgment interest settlement demand no later than nine (9) months after the injury occurs. This is because fifteen (15) months after the accident is the earliest time at which prejudgment interest can begin to accrue, but only if a lawsuit was filed six (6) months earlier.

In combination with a timely Qualified Settlement Offer by the

plaintiff as permitted by I.C. 34-50-1-6, the use of a prejudgment interest settlement demand can help compensate our clients for the time delay that is invariably associated with litigation, and also provide an incentive for the defendant's insurer to pay now rather than later.

Sample Prejudgment Interest Settlement Demand Letter

May 18, 2007 VIA FACSIMILE & U.S. MAIL

Bradley D. Pippin, Esq.
Law Offices of the Progressive Group of Insurance Companies
5975 Castle Creek Parkway, Suite 450
Indianapolis, IN 46250

RE: Jane v. Doe

Dear Brad:

Pursuant to Indiana's Tort Prejudgment Interest Statute, please be advised that my client's demand for the settlement of this case prior to a verdict is the present payment of $100,000. The payment of this settlement may be made within 60 days after the offer is accepted. Of course, if you have any questions regarding the foregoing, please feel free to contact me.

Thank you for your attention to this matter.

Sincerely,

James F. Ludlow

MOTION FOR LEAVE TO ENLARGE TIME IN WHICH TO MAKE PRE-JUDGMENT INTEREST SETTLEMENT DEMAND

COMES NOW, the Plaintiff, John Doe, by counsel, and pursuant to Indiana Code 34-51-4-6, herein respectfully moves this Court to enlarge the time in which to make a written settlement demand to the Defendant in this cause. In support thereof, the Plaintiff would respectfully show the Court the following:

1. Indiana Code 34-51-4-1 et seq. addresses the circumstances in which a plaintiff in a tort civil claim may recover pre-judgment interest. For the convenience of this Court, true and accurate copies of these statutes are attached to this Motion.
2. Of relevance to this Motion, I.C. 34-51-4-6(1) provides that in order to qualify for pre-judgment interest, a plaintiff must make a written demand for settlement within one year of a lawsuit being filed, **or alternatively within "any longer period determined by the court to be necessary upon a showing of good cause."** (Emphasis added).
3. In the present case, this legal action was filed on 01/11/02.
4. Thereafter, the Defendant had filed a bankruptcy petition and an automatic stay in this cause was imposed, with said stay not being lifted until 2/25/03.
5. In a letter of 3/31/05, Plaintiff submitted a written demand for settlement to Defendant.
6. Mediation was held in this cause on 2/20/06, but was unsuccessful.
7. During the course of this litigation, Defendant requested that a physician named Joe Pfeiffer, M.D. conduct a records review of Plaintiff's medical records and state his opinion regarding Plaintiff's alleged injury.
8. Dr. Pfeiffer never physically examined or treated Plaintiff, but rather is an expert who has been hired by Defendant to testify on his behalf.
9. Dr. Pfeiffer's report concerning Plaintiff was made available to Plaintiff on or about 2/1/06.
10. On 08/03/06, pursuant to Indiana Trial Rule 37(A), Plaintiff filed a Motion to Compel Discovery regarding the production of prior reports that Dr. Pfeiffer had created in the context of a Indiana Trial Rule 35 examination.
11. A hearing was held on this issue on 9/20/06 at which time the Court denied Defendant's Motion to Quash, and in an Order of 10/17/06 directed Dr. Pfeiffer to produce the requested discovery within 21 days of said Order or be subject to sanctions that are permitted by Indiana Trial Rule 37.
12. However, as reflected by a letter of 5/3/07 from defense counsel, a copy of which is attached hereto, these reports were not provided to Plaintiff's counsel until approximately 6 months later.
13. Dr. Pfeiffer's deposition was then taken on 05/17/07.
14. As mentioned in a letter from Plaintiff's counsel to defense counsel of 2/15/07, a true and accurate copy of which is attached hereto, there has been considerable difficulty in scheduling the deposition of Defendant Walker.
15. However, on 02/23/07 the deposition of Defendant Walker was finally taken.
16. Since the filing of this cause, Plaintiff has continued with medical care that is alleged to be causally related to Plaintiff's accident, and will likely continue this treatment for the remainder of his life.
17. In view of the foregoing discovery which has continued to date, including but not limited to the disclosure of the opinions of Defendant's expert during his deposition in May of this year, Plaintiff has shown good cause as to why he should be permitted to make a pre-judgment interest settlement demand as permitted by I.C. 34-51-4-6(1).

WHEREFORE, the Plaintiff, John Doe, by counsel, respectfully prays that this Court grant him leave to make a written settlement demand upon the Defendant as permitted by I.C. 34-51-4-6(1) within 15 days from the date of this Order, and for all further relief which is just and proper.

Respectfully submitted,

JAMES F. LUDLOW (13711-49)

ORDER GRANTING ENLARGEMENT OF TIME TO MAKE PRE-JUDGMENT INTEREST SETTLEMENT DEMAND

COMES NOW the Plaintiff, John Doe, by counsel, and having filed his Motion For Leave To Enlarge Time In Which To Make Pre-Judgment Interest Settlement Demand, said Motion appearing in the following words and figures, to-wit:

(H.I.)

And the Court having examined said Motion and being duly advised in the circumstances, now finds that Plaintiff's Motion should be GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that pursuant to I.C. § 34-51-4-6(1), Plaintiff is granted an enlargement of time of 15 days from the date of this Order in which to make a written settlement demand upon Defendant in this cause.

SO ORDERED this _____day of _____, 2007.

_____
JUDGE THEODORE M. SOSIN
Marion County Circuit Court

JAMES F. "Jay" LUDLOW (Member) born Corydon, Indiana, November 18, 1959; admitted to bar, 1987, Indiana and U.S. District Court, Southern District of Indiana.

Education: Indiana State University (B.S., with honors, 1982; M.B.A., with honors, 1984); Indiana University School of Law (J.D., cum laude, 1987).

Member: Indianapolis, Indiana State and American Bar Associations; Associations of Trial Lawyers of America; Indiana Trial Lawyers Association.

Practice Areas: Automobile Accidents and Injuries; Catastrophic Injury; Products Liability; Truck Accidents; Explosions; Aviation Accidents; Severe Burns; Wrongful Death.

Indiana Trial Lawyers Association