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## H. 189: A Legislative Expansion of Prejudgment Interest

Elizabeth G. Smith  
*University of Dayton*

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## H. 189: A LEGISLATIVE EXPANSION OF PREJUDGMENT INTEREST

### I. INTRODUCTION

Among the many bills passed in the 114th General Assembly was Amended Substitute House Bill 189<sup>1</sup> which made two changes in Ohio's judgment interest provision. One change raised the interest rate from eight to ten percent.<sup>2</sup> In addition, H. 189 instituted a new computation period for interest in certain civil actions. Prior to the enactment of this bill, interest on civil judgments began to accrue only after the judgment entry was filed.<sup>3</sup> H. 189 permits an injured party, in certain circumstances, to recover interest from the date the cause of action accrues.<sup>4</sup> In short, Ohio has created a statutory right to prejudgment interest. Although the provision may entitle an injured party to hundreds of thousands of dollars in interest which was not statutorily authorized in the past,<sup>5</sup> section 1343.03(C) has not been widely used, and successful prejudgment interest motions have been rare.

This note will explain and analyze the provisions of H. 189. As part of the analysis, the note will focus on the objectives of prejudgment interest in general, examine whether the new provision will achieve those objectives, and compare Ohio's provision with those of other states. Finally, this note will delineate a procedure for enhancing the success of a prejudgment interest claim.

### II. BACKGROUND

Interest, in general, is compensation allowed by law or by agreement between the parties for the use or detention of money.<sup>6</sup> Interest is commonly divided into two categories: conventional interest and inter-

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1. Act of March 23, 1982, 1982 Ohio Legis. Serv. 5-57, 5-58 (Baldwin) (codified at OHIO REV. CODE ANN. § 1343.03 (Page Supp. 1983)).

2. OHIO REV. CODE ANN. § 1343.03(A) (Page Supp. 1983). This ten percent rate will apply to prejudgment interest assessed pursuant to § 1343.03(C) and when money becomes due on any instrument of writing, including a note, bond or bill; upon any book account or settlement between parties; upon all verbal contracts; and upon all contract and tort judgments. *Id.* The rate will not apply if a written contract provides for a different rate of interest for the money owed. *Id.*

3. Cleveland Ry. v. Williams, 115 Ohio St. 584, 587, 155 N.E. 133, 134 (1926).

4. OHIO REV. CODE ANN. § 1343.03(C) (Page Supp. 1983).

5. In one case where prejudgment interest was awarded the amount of the verdict was increased by over three hundred and fifty thousand dollars. Memorandum to Counsel at 5, Holmes v. Lombardo Investment Builders, No. 996531 (C.P. Ct. Cuyahoga County, Ohio January 28, 1983) (on file with University of Dayton Law Review).

6. C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 50 (1935).

est awarded as damages.<sup>7</sup> Conventional interest is that which is paid by agreement between the parties.<sup>8</sup> Interest as damages, on the other hand, is allowed by law when compensation due has been withheld by a party.<sup>9</sup> Prejudgment interest specifically compensates for interest that could have been earned on a claimant's judgment award during the period between accrual of the claim and entry of the verdict.<sup>10</sup>

### A. *The Purpose of Prejudgment Interest in Ohio*

In accordance with generally accepted principles in Ohio, prejudgment interest has been considered an element of damages.<sup>11</sup> Consequently, the primary rationale for awarding prejudgment interest has been to compensate the injured party.<sup>12</sup> Courts have reasoned that when it is necessary to make the injured party whole, prejudgment interest is a proper element of damages.<sup>13</sup> For this reason, prejudgment interest is particularly appropriate when compensation has been delayed for a long period of time.<sup>14</sup>

The extra consideration of delay has prompted courts to articulate another purpose for prejudgment interest. Courts have recognized that, in addition to denying a plaintiff beneficial use of the money, the defendant has profited from the use of this money.<sup>15</sup> In this sense, prejudgment interest has been a form of restitution. The defendant, having been unjustly enriched through the use of plaintiff's money, must compensate the plaintiff for this use.<sup>16</sup>

However, traditional limitations on the assessment of prejudgment interest appear to be in force in Ohio.<sup>17</sup> Although the historical prejudice against the concept of interest has been abandoned,<sup>18</sup> courts have remained reluctant to assess prejudgment interest on unliquidated claims because of the unfairness it is seen to work on the defendant.<sup>19</sup>

7. *Id.*

8. *Id.*

9. *See id.*

10. *See id.*

11. *Lawrence R.R. v. Cobb*, 35 Ohio St. 94 (1878); *Hogg v. Zanesville Canal and Mfg. Co.*, 5 Ohio 410 (1832).

12. *Cobb*, 35 Ohio St. at 98-99; Note, *Recovery of Prejudgment Interest on an Unliquidated State Claim Arising within the Sixth Circuit*, 46 U. CIN. L. REV. 151, 154 (1977).

13. *Cobb*, 35 Ohio St. at 98-99.

14. *Id.*

15. *Hogg*, 5 Ohio at 424.

16. *See id.*

17. *See infra* notes 31-35 and accompanying text.

18. Interest was traditionally viewed as a form of usury. C. McCORMICK, *supra* note 6, § 51.

19. *Id.* § 55 at 220-21; Note, *The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases*, 16 U.S.F.L. REV. 325, 325-26 (1982).

Theoretically, because the defendant does not know the amount owed; it is inequitable to charge interest on the debt before it has been determined by the court or jury.<sup>20</sup>

Encouraging settlements is an objective of prejudgment interest which has not yet been articulated in Ohio. Whereas other states have viewed prejudgment interest as an incentive to settle cases,<sup>21</sup> no Ohio court has directly advocated an award of prejudgment interest as an inducement to encourage settlement. However, existing case authority recognizes a duty on the part of a defendant insurance company to make a reasonable offer to settle a case with its insured in order to avoid prejudgment interest.<sup>22</sup> Therefore, it appears that some courts are willing to use prejudgment interest as a vehicle to induce settlements.

### B. *The History of Prejudgment Interest in Ohio*

Historically, a judgment for damages in a negligence action earned interest from the date the judgment was entered on the verdict.<sup>23</sup> The Ohio Supreme Court considered judgment interest a purely statutory right confined to the language of the provision.<sup>24</sup> The court reasoned that a statute authorizing interest when a judgment became "due and payable" could not be regarded as creating a right to interest before the judgment came into existence.<sup>25</sup>

Despite the court's view and the lack of statutory authority, prejudgment interest has been awarded in negligence actions in Ohio: since the 1800's, courts have recognized a common-law right to prejudgment interest.<sup>26</sup> Interest has been allowed as an element of damages as part of an injured party's right to compensation.<sup>27</sup> Tradition-

20. See Note, *supra* note 19 at 325-26. Some courts have been willing to extend the right to prejudgment interest to situations in which, although not technically liquid, the amount owed is capable of ascertainment. C. McCORMICK, *supra* note 6, § 55 at 220. McCormick suggests that even in cases which have traditionally been viewed as subject to a wide range of variation (personal injury cases), if a portion of the award represents "pecuniary" loss such as medical bills, prejudgment interest should be assessed on that portion of the judgment. *Id.* §§ 55, 56.

21. See, e.g., *Laudenberger v. Port Auth.*, 496 Pa. 52, 436 A.2d 147 (1981), *appeal dismissed*, 456 U.S. 940 (1982).

22. *Clevenger v. Westfield Cos.*, 60 Ohio App. 2d 1, 4, 395 N.E.2d 377, 379 (1978) (the insured sued the insurer to recover the amount due under the policy).

23. *Cleveland Ry. v. Williams*, 115 Ohio St. 584, 585-86, 155 N.E. 133, 134 (1926). This was reflected in Ohio's previous interest provision which provided for the accrual of interest beginning when the money became "due and payable." OHIO REV. CODE ANN. § 1343.03 (Page 1979), amended by Act of March 23, 1982, 1982 Ohio Legis. Serv. 5-57 (Baldwin) (codified at OHIO REV. CODE ANN. § 1343.03 (Page Supp. 1983)).

24. *Cleveland Ry.*, 115 Ohio St. at 587, 155 N.E. at 133-34.

25. The court interpreted "due and payable" in the context of judgments as applying to the time of judgment entry. *Id.* at 586-87, 155 N.E. at 133-34.

26. See *Cobb*, 35 Ohio St. at 98-99; *Hogg*, 5 Ohio at 424-25.

ally, the jury has been permitted to consider the loss of use of money to the plaintiff as well as the defendant's ability to benefit from such wrongful use;<sup>28</sup> therefore, the jury could award interest for "withholding the reparation which ought to have been promptly made."<sup>29</sup> By considering prejudgment interest an element of damages, the court was not bound by the judgment interest statute or the judicial construction of the statute. More recently, a court recognized a right to prejudgment interest if a defendant insurance company failed to make a reasonable offer to settle with its insured.<sup>30</sup>

Ohio case law, however, has not been uniform in sanctioning a right to prejudgment interest. The rationales that courts have advanced for disallowing prejudgment interest have also been inconsistent. One court considered prejudgment interest "repugnant" to a personal injury claim for unliquidated damages because "interest *cannot* constitute any part of the judgment whatsoever."<sup>31</sup> In other instances, courts have purported to disallow prejudgment interest, but have sanctioned jury consideration of the lapse of time between injury and verdict in their assessment of damages.<sup>32</sup> To complicate this trend of inconsistency, some courts have simply declined to provide a rationale in support of their decision.<sup>33</sup> Furthermore, other courts have relied upon a liquidated-unliquidated<sup>34</sup> distinction, and the unfairness of charging a defendant with interest for the period of time before the extent of that defendant's liability has been determined.<sup>35</sup> Consequently, because this issue has been left to the discretion of the trial judges, Ohio case law has failed to provide any clear guidance concerning when prejudgment

28. *Hogg*, 5 Ohio at 424.

29. *Cobb*, 35 Ohio St. at 99.

30. *Clevenger*, 60 Ohio App. 2d at 4, 395 N.E.2d at 379.

31. *Goldsmith v. Trans World Airlines, Inc.*, 28 Ohio Op. 2d 241, 191 N.E.2d 855 (C.P. Ct. Montgomery County 1963).

32. *Zipperlein v. P.C. & St. L. Ry.*, 8 Ohio Dec. 587 (Super. Ct. Cincinnati 1898). Although some courts have made this distinction, other courts have viewed the two considerations as one element. See *Cobb*, 35 Ohio St. at 94; *American Gypsum Co. v. Lake Shore & M. S. Ry.*, 7 Ohio App. 145 (1917).

33. *Chupka v. Oshust*, 27 O.L.A. 351 (Ct. App. Butler County 1937) (following *Cleveland Ry.*, 115 Ohio St. 584, 155 N.E. 133 (1926)); *American Gypsum*, 7 Ohio App. at 155 (stating simply that in personal injury cases no prejudgment interest was allowed, but advocating allowance of prejudgment interest if claim was one for property damage); *Zipperlein*, 8 Ohio Dec. at 587.

34. Where the amount of money owed is fixed and known, the amount is termed a liquidated sum. *McCORMICK*, *supra* note 6, § 54. Where the amount to be recovered is subject to a wide range of variation, as in contested cases for personal injuries, the amount is termed unliquidated. *Id.*

35. *Ali v. Jefferson Ins. Co.*, 5 Ohio App. 3d 105, 108, 449 N.E.2d 495, 501 (Ct. App. Williams County 1982); *Finlay v. Parent*, 4 Ohio Op. 3d 191, 192-93 (C.P. Ct. Montgomery

interest will be disallowed.

### III. ANALYSIS OF H. 189

#### A. General Provisions

H. 189 provides statutory recognition of prejudgment interest only in certain cases. As in the past, interest on a judgment begins accruing from the date of the judgment decree.<sup>36</sup> However, section 1343.03(C) provides for a special exception which lengthens the interest computation period in certain civil actions based on *tortious* conduct.

The exception allows interest to be computed from the date of the cause of action if a four-step process is completed. First, the party seeking prejudgment interest (the plaintiff) must petition the court for an award of interest.<sup>37</sup> Second, the court must hold a hearing after the verdict is returned.<sup>38</sup> Third, the court must find that the party required to pay the money (the defendant) failed to make a good faith effort to settle the case.<sup>39</sup> Finally, the court must find that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.<sup>40</sup>

If a plaintiff is able to meet these four requirements, the trial judge "shall" award interest from the date the cause of action accrued.<sup>41</sup> The language "shall" appears to make the provision mandatory in that if the four requirements are met, the judge is bound to award prejudgment interest. However, the determination of whether a plaintiff has proven lack of good faith on the part of the defendant, and shown good faith on his or her own part, is left to the discretion of the trial judge. In this sense, the ultimate decision to award prejudgment interest is left to the trial judge. Therefore, it can be speculated that section 1343.03(C) has done nothing more than codify the common-law rule of prejudgment interest.

#### B. The "Good Faith" Determination

The language "good faith" or lack thereof triggers prejudgment interest and is, therefore, the crux of a plaintiff's case.<sup>42</sup> The statute itself does not define good faith, and this conscious absence of legislative guidance may be a contributing factor to the limited use of the provision thus far. The legislative history of section 1343.03(C) reveals

36. OHIO REV. CODE ANN. § 1343.03(B) (Page Supp. 1983).

37. *Id.* § 1343.03(C).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See OHIO REV. CODE ANN. § 1343.03(C) (Page Supp. 1983).

that the present statute is a compromise.<sup>43</sup> Throughout the legislative process, the strong lobbying efforts of insurance companies led to revisions in the original bill which were necessary to secure its passage.<sup>44</sup> In promulgating such a broad standard, the legislature specifically sought to vest the trial judge with a large amount of discretion.<sup>45</sup>

The language of section 1343.03(C) is, therefore, readily susceptible to development of a judicial standard of good faith. Thus far, only three courts have articulated a concept of "good faith" in the context of prejudgment interest.<sup>46</sup> Two courts consulted *Webster's Dictionary* for the definition of good faith. In each opinion, "honesty and sincerity" as distinguished from "dishonesty and insincerity" indicate good faith.<sup>47</sup> Each opinion also provides judicial guidance to answering the difficult question of when a defendant has failed to make a good faith effort to settle the case.

In *Perry v. Baltimore & Ohio Railroad Co.*, the Common Pleas

43. The original bill proposed lengthening the period for which judgment interest was computed for all civil actions. Interest would have been computed from the date the complaint was filed up to the date the money was paid. There were several exceptions to this lengthened time-period. Most notable was the exception applying to cases in which a defendant made an offer of settlement which the plaintiff refused. If three requirements were met, interest would have been computed from the date of the judgment decree to the date the money was paid. These three requirements put the burden on the defendant to establish that: (1) prior to the judgment, defendant had made a written offer of settlement; (2) plaintiff did not accept the offer; and, (3) the amount of the verdict was equal to or less than the amount offered by the defendant to settle the case.

The two versions considered by the legislature differed in certain important aspects, however. The original (House) version made prejudgment interest the general rule and postjudgment interest the exception, while the final version maintained postjudgment interest as the general rule but created a special exception for prejudgment interest in "settleable" actions. These frameworks produced different burdens of proof. The original version placed the burden of proof on the defendant to meet an objective test measured by the amount of the verdict and the amount of the settlement offer. In contrast, the later (Senate) version placed the burden on the plaintiff to establish a lack of good faith to the judge's satisfaction. In short, the original version proposed *less* interest for a plaintiff who failed to settle a case which could have been settled, while the final (Senate) version proposed *more* interest for a plaintiff who made efforts to settle a case which could have been settled but for an uncooperative defendant. The enacted version makes it more difficult for a plaintiff to recover prejudgment interest because the plaintiff has the burden of meeting a subjective test before prejudgment interest will be assessed. Under the original version, a plaintiff would have been automatically entitled to prejudgment interest unless a defendant could meet certain objective requirements. Summary and Comparison of the Senate Passed and House Passed Versions of H.B. 189 (on file with University of Dayton Law Review).

44. Interview with Rep. Dana Deshler, Ohio State representative (March 6, 1984) [hereinafter cited as Deshler interview] (on file with University of Dayton Law Review).

45. *Id.*

46. Dailey v. Nationwide Demolition Derby, Inc., No. CA-84-7, (Ct. App. Muskingum County, Ohio June 28, 1984) (available on LEXIS, States library, Ohio file); Perry v. Baltimore & O.R.R., No. 25782 (C.P. Ct. Defiance County, Ohio June 10, 1983) (on file with University of Dayton Law Review); Holmes v. Lombardo Investment Builders, No. 996531 (C.P. Ct. Cuyahoga County, Ohio January 28, 1983) (on file with University of Dayton Law Review).

Court of Defiance County defined good faith under section 1343.03(C) by analogizing the duty imposed under that section to the duty of good faith imposed on an insurance company when negotiating on behalf of its insured.<sup>48</sup> The court implicitly adopted the definition of good faith applicable in insurance cases which equates a lack of good faith with "bad faith."<sup>49</sup> Because the court could not conclude from the facts of the case that the defendant acted in "bad faith" in negotiating, the motion for prejudgment interest was denied.<sup>50</sup> The court based its conclusion on several factors: the liability of the defendant was doubtful; the defendant cooperated with the plaintiff (the plaintiff made only one demand for settlement); and, there was no indication of any ill will between the parties or their attorneys.<sup>51</sup>

The Muskingum County Court of Appeals rejected the notion that the language "failed to make a good faith effort" required a showing of bad faith. Recognizing that an effort to settle could be less than a "good faith" effort but not be so egregious as to constitute a bad faith effort, the court held that a "good faith effort" required "an honest, purposeful effort, free of malice and the design to defraud or to seek an unconscionable advantage."<sup>52</sup> Applying this standard, the court upheld the trial court's award of prejudgment interest.<sup>53</sup>

In *Holmes v. Lombardo Investment Builders*, the Common Pleas Court of Cuyahoga County did not set forth a standard test, but did raise some relevant questions. For example, did a party intend to delay a determination of the proceedings? Did the defendant sincerely question his or her liability? Was there a failure to cooperate at any stage of the proceeding? Was there some animus between the parties or between counsel? Ultimately, the court was clear in stating that the motion should be decided on everything which had come to the attention

48. *Perry*, No. 25782, slip op. at 3.

49. *Id.* The court relied on the standard for lack of good faith established in the insurance context by *Slater v. Motorist Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962). The court stated in the syllabus:

A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

*Id.* at 148. Presumably, the court analogized good faith in the insurance context with good faith under section 1343.03(C) because of the similarities between them. In both contexts, the defending party is alleged to have breached a duty to negotiate a settlement of a claim. *Slater*, 174 Ohio St. at 150, 187 N.E.2d at 48; OHIO REV. CODE ANN. § 1343.03(C) (Page Supp. 1983).

50. *Perry*, No. 25782, slip op. at 4.

51. *Id.*

52. *Dailey*, No. CA-84-7.

53. *Id.*



of the court during the course of the pending lawsuit.<sup>54</sup> Relying upon the stated factors, but without enumerating specific facts, the court awarded prejudgment interest.<sup>55</sup>

The factors enumerated in *Holmes* and *Perry* place a heavy burden on the moving party. Under the reasoning of *Perry*, the moving party must establish "bad faith" that essentially requires proof of some type of malicious intent.<sup>56</sup> Although the standard under *Holmes* is not as onerous, each fact cited by the court contains an element of intentional, unjustified behavior.<sup>57</sup> Under either court's reasoning, a mere refusal to settle would not be enough to expose a defendant to prejudgment interest. Conversely, where the failure to negotiate is blatantly unreasonable and oppressive, a court should readily find that the defendant failed to act in good faith.<sup>58</sup> Logically, under both *Perry* and *Holmes*, if a defendant believes he or she is justified in not settling, the belief may not be arbitrary or capricious but must be based on circumstances which furnish reasonable justification for the refusal to settle. Yet the moving party bears the burden of establishing a lack of good faith and, under *Perry* and *Holmes*, without proof of some type of intentional, unjustified refusal to negotiate, that party is at the whim of the court and is likely to lose.

The *Dailey* opinion is a more logical approach to the issue of when a party has failed to make a good faith effort to settle a case. Because of the difference between failing to act in good faith and acting in bad faith, a court imposes a higher burden than the statute mandates by requiring proof of bad faith. Additionally, the opinion is more tailored to the language and purpose of the statute because it specifically considers a good faith *effort* to settle a case. Developing a standard of good faith by consideration of the context in which it is used is more logical than simply adopting a standard of good faith promulgated in another context.<sup>59</sup>

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54. *Holmes*, No. 996531, slip op. at 4.

55. *Id.*

56. See *Slater*, 174 Ohio St. at 148, 187 N.E.2d at 45.

57. See *Holmes*, No. 996531, slip op. at 3.

58. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 277, 452 N.E.2d 1315, 1320 (1983).

An indication of oppressive behavior is the economic vulnerability of the injured party and the corresponding superior bargaining position of the defendant. *Id.* See also *Ali v. Jefferson Ins. Co.*, 5 Ohio App. 3d 105, 107, 449 N.E.2d 495, 498 (Ct. App. Williams County 1982). In the *Ali* case, the insurance company was aware of the importance of repairing the damaged tractor as quickly as possible. The insurance company was also aware of the lien held on the tractor and the possibility of repossession. *Id.*

59. Under Ohio law the definition of good faith varies depending upon the context in which it is used. For example, the good faith required of a merchant in the commercial context not only requires honesty, but also mandates observance of commercial standards of fair dealing in the trade. *Ohio Rev. Code Ann.* § 1302.01(A)(12) (Page 1979). Also, where an entity manufactures

As a corollary to the interpretive difficulties, a further problem with the "good faith" standard is that it may be too vague. Thus, if a court is unable to ascertain with any degree of certainty what the legislature intended, the statute may be declared void.<sup>60</sup> A common pleas court held that section 1343.03(C) did not meet the vagueness standard.<sup>61</sup> Consequently, the statute was declared unconstitutional.<sup>62</sup> The court recognized the use of good faith in other contexts but concluded it was "unable to determine with any degree of exactness what the legislature intended by 'good faith.'"<sup>63</sup>

### *C. A Comparison to the Prejudgment Interest Provisions of Other States*

By enacting section 1343.03(C), Ohio has followed the nationwide trend of statutory recognition of prejudgment interest. Several states have enacted provisions which mandate accrual of interest from the date the action is filed.<sup>64</sup> In states where prejudgment interest is mandatory, it is generally recognized that the purpose of prejudgment interest is compensation.<sup>65</sup>

Although no state has a provision identical to Ohio's statute, Michigan's prejudgment interest statute most closely resembles Ohio's provision. The Michigan statute provides for a general computation period for interest and an exception in cases where settlement negotiations fail to produce settlements.<sup>66</sup> It also provides, as a general rule, that interest on judgments accrues from the date the complaint is filed.<sup>67</sup> There is an exception, however, which limits accrual if two requirements are met. If a bona fide written offer of settlement was made by the defendant, and this settlement was "substantially identical or substantially more favorable" to the plaintiff, then the court "may" order that interest shall not be allowed beyond the date the written offer

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or distributes alcoholic beverages under the terms of a franchise agreement, acting in good faith includes acting in a manner which guarantees freedom from coercion. *Id.* § 1333.82(E).

60. *Beverstock v. Board of Educ.*, 75 Ohio St. 144, 78 N.E. 1007 (1906).

61. *Mills v. City of Dayton*, No. 80-1040 (C.P. Ct. Montgomery County, Ohio Oct. 14, 1983) (on file with University of Dayton Law Review).

62. *Id.* slip op. at 5.

63. *Id.* slip op. at 2-3.

64. *See, e.g.*, COLO. REV. STAT. § 13-21-101 (1973 & Supp. 1983); OKLA. STAT. ANN. tit. 12 § 727 (West Supp. 1983); R.I. GEN. LAWS § 9-21-10 (Supp. 1983) (interest computed from date cause of action accrued).

65. *Nichols v. T.I.M.E.-D.C., Inc.*, 373 F. Supp. 811 (E.D. Okla. 1973); *Houser v. Eckhardt*, 35 Colo. App. 155, 532 P.2d 54 (1974), *aff'd sub. nom.*, *Security Ins. Co. v. Houser*, 191 Colo. 189, 552 P.2d 308 (1976); *Isserlis v. Director of Public Works*, 111 R.I. 164, 300 A.2d 273 (1973).

66. MICH. COMP. LAWS ANN. § 600.6013(5) (West Supp. 1983).

67. *Id.* § 600.6013(4).

was made.<sup>68</sup>

The Michigan provision is similar to section 1343.03(C) in several ways. Settlements are encouraged by the creation of exceptions which penalize the uncompromising party in settleable actions. More significantly, in both states, the final determination is placed within the judge's discretionary power.<sup>69</sup> Conversely, the Michigan provision differs from section 1343.03(C) in three ways. First, in Michigan, prejudgment interest is the general rule and the shorter period of accrual is the exception. The second difference is that the benefit of this exception inures to the defending party because he or she may not be required to pay interest beyond the date of the written offer of settlement if a bona fide settlement offer has been made but rejected by the plaintiff. This, in turn, shifts the burden to the defending party to demonstrate a bona fide offer before interest will be limited. Finally, the Michigan provision provides a benchmark by which a judge may decide whether or not to invoke the exception. The language "substantially identical or substantially more favorable," although not binding on the judge, provides objective guidance as to when the legislature intended the exception to be invoked.

*D. Does Section 1343.03(C) Achieve the Intended Goal of Prejudgment Interest?*

If the goal of section 1343.03(C) is to compensate the injured party, it may be argued that its present framework is an inadequate method of achieving that goal. Under the present provision, the right to prejudgment interest is contingent upon the conduct of the defendant. The plaintiff has the burden of establishing that the defendant failed to act in good faith in order to recover.<sup>70</sup> Inasmuch as it is the defendant's behavior that triggers the plaintiff's award, compensation of the plaintiff would appear to be subordinate to regulating the defendant's behavior. However, the compensatory aspect of prejudgment interest has traditionally been balanced against the corresponding unfairness to the defendant in charging him with interest on an amount which is uncertain until the date of the judgment.<sup>71</sup> Consideration of section 1343.03(C) in light of this limitation reveals that the provision attempts to shift this balance in favor of the plaintiff without completely depriving the defendant of the protection traditionally afforded. Arguably, by tendering the required proof of defendant's failure to make a

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68. *Id.* § 600.6013(5).

69. Deshler interview, *supra* note 44. *Cf.* MICH. COMP. LAWS. ANN. § 600.6013 (comment to 1980 amendment) (West Supp. 1983).

70. *See* OHIO REV. CODE ANN. § 1343.03(C) (Page Supp. 1983).

71. *See supra* notes 18-20 and accompanying text.

good faith effort to settle, the plaintiff has demonstrated that the defendant *did* know that the debt was owed. Hence, the amount owed was capable of being made certain,<sup>72</sup> and it is equitable to require the defendant to compensate the plaintiff for the loss of use of that sum. In fact, the equities in favor of a plaintiff are stronger because the defendant, by failing to negotiate in good faith, has unjustly withheld the judgment amount from the plaintiff.<sup>73</sup>

The sponsor of the bill maintains that the goal of section 1343.03(C) is to encourage settlements.<sup>74</sup> In this respect, the provision may be viewed as a bargaining chip which a plaintiff may use in his or her negotiations with a defendant. Hopefully, a defendant will offer to settle a settleable case in order to avoid prejudgment interest.

From a purely economic standpoint, the statute's potential as an inducement to settle cases is minimal. Assuming that people will act in the manner which maximizes their own self-interest, it is recognized that people will respond to incentives which provide a more efficient way to use their resources.<sup>75</sup> Therefore, the incentive to avoid prejudgment interest produced by such a provision will be effective only to the extent that it will permit use of the defendant's resources where their value is greatest. Applying this principle to Ohio's provision, the percentage of interest assessed against a defendant under section 1343.03(C) must be equal to or greater than the amount which the defendant can earn on the judgment amount in the open market. Section 1343.03(C) provides for assessment of interest at ten percent.<sup>76</sup> At the very least, if the prevailing interest rate is higher than ten percent, settling to avoid prejudgment interest would not be the most efficient use of the defendant's money. Settlement is more unlikely under the present framework because section 1343.03(C) does not guarantee that a defendant will be forced to pay prejudgment interest. Consequently, although enactment of section 1343.03(C) provides more inducement to settle than under prior law, its impact is uncertain and is tied to the prevailing market interest rate, and the perceived attitude of the courts toward awarding prejudgment interest.

The good faith standard also makes restitution a theoretically achievable objective. The need for restitution is particularly apparent when one considers that a defendant who refuses to settle a settleable case has the temporary use of the plaintiff's money and to that extent,

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72. Debts capable of being made certain should be subject to prejudgment interest. See *supra* note 20.

73. C. McCORMICK, *supra* note 6, § 57.

74. Deshler interview, *supra* note 44.

75. R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 1 (1972).

76. OHIO REV. CODE ANN. § 1343.03(A) (Page Supp. 1983).

the defendant is unjustly enriched. Section 1343.03(c) rectifies this situation by mandating that prejudgment interest is to be awarded when the defendant fails to settle a settleable case.

Another potential objective of the statute, given its language and structure, is to penalize a defendant for failing to act in good faith. Although the sponsor of the bill maintains that imposition of a penalty was not an objective of section 1343.03(C),<sup>77</sup> one case has interpreted the section in that way.<sup>78</sup> Additionally, section 1343.03(C) has been challenged as a violation of due process because it penalizes parties for exercising their right to a jury trial.<sup>79</sup> The court rejected this argument by construing the section as a restriction on the powers of the court to grant prejudgment interest in situations in which the defendant has made a good faith effort to settle the case.<sup>80</sup> The court concluded that section 1343.03(C) conferred a benefit on those defendants who acted in good faith.<sup>81</sup>

One ramification of a judicial construction of section 1343.03(C) as a penalty may be a finding that the section must be applied prospectively only. The Ohio Constitution prohibits passage of retroactive laws.<sup>82</sup> The Ohio Supreme Court, however, has declared that the constitutional restraint applies only when the new statute affects substantive as opposed to procedural rights.<sup>83</sup> A substantive law is one which "creates duties, rights, and obligations, while [a] procedural or remedial law [is one which] prescribes methods of enforcement of rights or obtaining redress."<sup>84</sup> The supreme court has specifically held that a statutory penalty of treble damages under the Consumer Sales Practices Act could not be retroactively applied.<sup>85</sup> Consequently, if section

77. Deshler interview, *supra* note 44.

78. *Mills*, No. 80-1040, slip op. at 4.

79. *Hardiman v. Zep Mfg. Co.*, Nos. 46566, 47259, slip op. at 12 (Ct. App. Cuyahoga County, Ohio Mar. 15, 1984) (on file with University of Dayton Law Review).

80. *Id.* slip op. at 13. The court assumed (and the parties to the litigation conceded) that the legislature could constitutionally impose prejudgment interest in all tort cases. Therefore, the section enacted was construed as a restriction on the power to grant prejudgment interest in all cases. The court stated that section 1343.03(C) affected only those who chose to abuse the trial process by proceeding to trial when the case should have been settled. *Id.* slip op. at 13-14.

81. *Id.* slip op. at 14.

82. OHIO CONST. art. II, § 28.

83. *Wilfong v. Batdorf*, 6 Ohio St. 3d 100, 451 N.E.2d 1185 (1983); *State ex rel. Holdridge v. Industrial Comm'n*, 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967).

84. *Holdridge*, 11 Ohio St. 2d at 178, 228 N.E.2d at 623.

85. *Osai v. A&D Furniture Co.*, 68 Ohio St. 2d 99, 428 N.E.2d 857 (1981). The court appeared to base its holding on the fact that the section was a penalty, with the finding that it affected substantive rights merely adding further support for prospective application. The court reaffirmed the idea that a penalty is *per se* substantive in *French v. Dwiggin*, 9 Ohio St. 3d 32, 458 N.E.2d 827 (1984). The court stated that a penalty statute controls "an individual's course of affairs" and was therefore distinguishable from a remedial statute. *Id.* at 36, 458 N.E.2d at 831.

1343.03(C) was deemed a penalty, it would be given prospective application only. In other respects, however, judicial construction of the section as a penalty has no practical significance.

#### IV. HOW TO MAKE A CASE FOR PREJUDGMENT INTEREST

As the language of section 1343.03(C) indicates, a plaintiff has the burden of proof on the prejudgment interest issue.<sup>86</sup> Although the motion and hearing are made at the end of the trial, a plaintiff must prepare his prejudgment interest case before that time, preferably before suit is filed.<sup>87</sup> For this reason, a plaintiff carries the burden<sup>88</sup> throughout the entire case.<sup>89</sup> In order to prevail on such a motion, a plaintiff must provide the court with written documentation illustrating defendant's failure to make a good faith effort to settle.<sup>90</sup> Failure to do so will preclude a plaintiff from meeting his or her burden of proof because mere subjective claims of lack of good faith will likely be insufficient.<sup>91</sup>

If a plaintiff begins preparing his prejudgment interest claim before suit is filed, his prejudgment interest file should include a copy of the original settlement demand. When a suit is filed, plaintiff should attach the demand to the complaint along with a notice that he or she plans to seek prejudgment interest.<sup>92</sup> Plaintiff should also note any failure of correspondence by defendant throughout the suit<sup>93</sup> in order to provide the court with documentation of defendant's actions.

A plaintiff's duty to act in good faith gives rise to the further requirement that he or she make a reasonable demand which is substantiated by facts and figures.<sup>94</sup> A defendant's failure to settle after being presented with a reasonable, substantiated offer is more likely to be viewed as a failure to make a good faith effort to settle. For this reason,

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86. See OHIO REV. CODE ANN. § 1343.03(C) (Page Supp. 1983).

87. Deshler interview, *supra* note 44.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* One court has already noted the evidentiary problem presented when the only support plaintiff provides is "assertions by counsel as to what occurred during pretrial negotiations." *Mills v. City of Dayton*, No. 80-1040, slip op. at 2 (C.P. Ct. Montgomery County, Ohio Oct. 14, 1983) (on file with University of Dayton Law Review).

92. Deshler interview, *supra* note 44.

93. *Id.*

94. *Id.* The courts which have reviewed prejudgment interest motions have emphasized the requirement that the plaintiff actively negotiate, and have denied awards where the plaintiff's efforts were equal to or less than the efforts of the defendant. *Szuch v. Doskas*, No. 3609 (Ct. App. Lorain County, Ohio June 20, 1984) (available on LEXIS, States library, Ohio file); *Hardiman v. Zep Mfg. Co.*, No. 46566, 47259, slip op. at 14 (Ct. App. Cuyahoga County, Ohio Mar. 15, 1984) (on file with University of Dayton Law Review).

if a plaintiff produces such a demand and notifies the defendant of his or her intention to seek prejudgment interest, the defendant is more likely to actively pursue negotiations. Conversely, the availability of a prejudgment interest award should induce a plaintiff to make a substantiated demand. Ultimately, these factors should facilitate the desired goal of shifting parties toward settlement and away from trial.<sup>95</sup>

## V. CONCLUSION

In general, a prejudgment interest provision has potential as a plaintiff's bargaining chip in negotiations with a defendant. Yet, Ohio's prejudgment interest provision has remained a little known and rarely used remedy. Its limited appreciation is not surprising considering the framework of section 1343.03(C). The language of the provision is broad and provides a litigant with little guidance in asserting a successful prejudgment interest claim. The statute requires the plaintiff to prove that the defendant has failed to make a "good faith effort" to settle the case. This is a heavy burden because no objective benchmark has been provided to guide the judge's decision. Moreover, the economic feasibility of the section is primarily dependent upon the prevailing interest rate.

Despite its infirmities, section 1343.03(C) is capable of yielding beneficial results. If a plaintiff documents a defendant's reluctance to negotiate, two results should occur. First, the documentation should make a concrete case of failure to act in "good faith," thereby narrowing the judge's discretion in denying an award of prejudgment interest. Second, and perhaps most noteworthy, a carefully prepared prejudgment interest case should induce a defendant to negotiate more actively and seek settlement instead of litigation.

When the potential benefits are considered, it is apparent that section 1343.03(C) is of value to a litigant. Although the statute has several shortcomings, legislative history reveals that in the face of opposition, the proponents of the bill accomplished all that was possible. Section 1343.03(C) is certainly a boost to the vitality of prejudgment interest in Ohio.

*Elizabeth G. Smith*

**Code Section Affected:** To amend section 1343.03.

**Effective Date:** July 5, 1982.

**Sponsor:** Deshler (H)

**Committees:** Civil & Commercial Law (H)  
Judiciary (S)



