Property Insurance Law
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Prejudgment Interest Awards in First-Party Property Claims

A developing trend in Illinois property insurance law is the award of prejudgment interest to prevailing policyholders in underlying coverage litigation. Such awards sound under the Illinois Interest Act (Interest Act) (815 ILCS 205/0.01, *et seq.*), which provides in relevant part that:

> 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; 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. 815 ILCS 205/2.

This article provides an overview of recent cases in which prejudgment interest awards were at issue. It also provides guidance for coverage practitioners on best practices for counseling their carrier-clients on exposure to prejudgment interest awards under the Interest Act, and how best to avoid them.

Prejudgment Interest Not Awarded When Amount Payable Not Readily Ascertainable

In a recent and well-reasoned decision, the Appellate Court of Illinois, Second District, held that an insured was not entitled to prejudgment interest on the payment of an appraisal award where the damages caused by a storm were not readily ascertainable. *Greater New York Mutual Insurance Co. v. Galena at Wildspring Condominium Association*, 2022 IL App (2d) 210394. Greater New York Mutual Insurance Company (GNY) filed a declaratory judgment action to determine its liability under a property insurance policy issued to its insured, Galena at Wildspring Condominium Association (Galena). *Greater New York Mutual Insurance Co.*, 2022 IL App (2d) 210394, ¶ 1.

The dispute arose out of an insurance claim made by Galena for damage to its 33-building condominium complex caused by a 2017 storm. *Id.* ¶ 3. GNY investigated the damage and determined that portions of the buildings—windows, siding, gutters and vents—sustained damage caused by hail and its consultant estimated the cost of repair at $730,396.30. *Id.* ¶ 4. GNY determined that the roofs of the building did not sustain damage from wind or hail. Based on its assessment, GNY issued an actual cash value payment to Galena in the amount of $527,879.68, "which reflected the cost to repair or replace, less prior payments and recoverable depreciation." *Id.* Shortly thereafter, Galena submitted a sworn statement in proof of loss which valued the damages at $5,020,438.90, which included the value of replacing all roofs; Galena also demanded appraisal of its claim under the terms of the policy, which GNY rejected. *Id.* GNY filed its declaratory judgment complaint, and Galena filed a counterclaim for declaratory judgment and breach of contract. *Id.* ¶ 6. During litigation, GNY and Galena agreed to submit the claim to appraisal to assess the property damage. *Id.* ¶ 7. The parties agreed that the scope and amount of damages would be determined with finality through the appraisal and that GNY would pay any appraisal award within 30 days. *Id.* The policy itself also contained language stating that GNY will pay

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for covered loss within 30 days after receiving the sworn statement in proof of loss, if “we have reached agreement with you on the amount of loss” or “an appraisal award has been made.”

In February 2021, the appraisal panel returned an award with an Actual Cash Value based on the July 2017 date of loss of $1,676,304.46, and a Replacement Cost Value of $2,184,771.03. The 2021 Replacement Cost Value was $2,634,946. *Id.* ¶ 9. Shortly after the award, Galena filed a motion for summary judgment on its counterclaim for declaratory judgment, seeking an award based on the 2021 RCV and 5% interest effective 30 days after its proof of loss was filed in February 2018. *Id.* ¶ 10. GNY argued that Galena was not entitled to prejudgment interest accruing after the filing of the proof of loss, but that any interest would begin to accrue 30 days from the final appraisal award. *Id*. ¶ 11. The trial court found that no prejudgment interest was due because the loss suffered by Galena was not readily ascertainable. *Id.* ¶ 13. Galena appealed. *Id.* ¶ 14.

On appeal, Galena maintained that it was entitled to 5% prejudgment interest accruing 30 days after it filed its proof of loss with GNY in February of 2018. *Id.* ¶ 16. A decision on whether to award prejudgment interest is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Id.* ¶ 17. The Interest Act provides that “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.” *Id.* ¶ 18. An insurance policy is an “instrument of writing” and therefore falls within the purview of the Interest Act. As such, “prejudgment interest may be recovered from the time that money becomes due under the insurance policy.” *Id.* However, the court notes that in order to recover prejudgment interest, “the sum must be liquidated or subject to easy determination by calculation or computation.” *Id*. ¶ 19 (citing *Couch v. State Farm Insurance Co*., 279 Ill. App. 3d 1050, 1054 (1996)).

The main issue on appeal was at what point the monies became due for purposes of prejudgment interest. *Greater New York Mutual Insurance Co.*, 2022 IL App (2d) 210394, ¶ 20. GNY argued that the amount was not easily ascertainable. *Id*. The court agreed, finding, “Although the proof of loss may have provided GNY with the information it needed to determine the amount due, that does not necessarily establish that the amount due was easily ascertainable.” *Id.* ¶ 20. The court found support for this because of the wide variations in valuations, with GNY valuing the repairs at roughly $700,000, Galena valuing repairs at $5 million, and the appraisal valuing repairs at between $1.6 million and $2.6 million for ACV and RCV, respectively. *Id.* ¶ 21. As a result of the great disparity between the amounts suggested by parties and the amounts awarded by the appraisal panel, the trial court’s determination that the amount due was “not ascertainable” was not an abuse of discretion. *Id*. This conclusion is also consistent with the policy language itself, which provided that payment would be issued within 30 days of the parties’ agreement on the amount of damages or an appraisal award. *Id*. ¶ 22. There was never an agreement on the loss prior to the appraisal and, once an award was made, GNY paid the sums within 30 days. *Id*. As such, no prejudgment interest was owed. *Id*.

Prejudgment Interest Awarded When Dispute is Strictly a Coverage Issue

In the discussion of an award of prejudgment interest to a prevailing policyholder under the Interest Act, we turn to *Old Second National Bank v. Indiana Insurance Co.*, 2015 IL App (1st) 140265. In *Old Second*, the insurer denied coverage after vandals broke into the insured’s property and stole copper pipes and other personal property. *Old Second National Bank*, 2015 IL App (1st) 140265, ¶ 9. The trial court granted summary judgment in favor of the insured and awarded prejudgment interest from the date that the insurer denied coverage. *Id.* ¶ 1.

The dispute in *Old Second* began in 2009, where vandals broke into the insured’s building, “severely damaging the structure and stealing copper pipes, wiring, fixtures and other equipment” causing approximately $2.27 million in damages. *Id.* ¶ 9. Old Second provided Peerless (the insurer) with notice of the loss and, on July 15, 2010, Peerless

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informed the parties that it had determined that the building had been “vacant” since 2005, and denied coverage based upon the vacancy provision in its policy. *Id.* As a result of the denial, Old Second (and others involved in the loss) sued a number of defendants, including Peerless, on theories of breach of contract and estoppel. *Id.* ¶ 10.

The circuit court granted summary judgment in favor of Old Second, concluding that, as a matter of law, Old Second was entitled to coverage under the policy’s mortgagee clause. *Id.* ¶ 10. The court entered judgment against Peerless in the amount of $1,455,697.92, which was later reduced to $816,833.13. *Id.* “The circuit court awarded Old Second prejudgment interest pursuant to the Interest Act from July 15, 2010, the date Peerless denied coverage, until December 16, 2013.” *Id.* ¶ 16. The circuit court denied all post-trial motions and “modified the award of prejudgment interest in favor of Old Second to run from July 15, 2010, until July 23, 2013.” *Id*. Peerless appealed.

On appeal, Peerless argued that the circuit court abused its discretion in awarding interest to Old Second. *Id.* ¶ 34. Among the arguments raised by Peerless regarding the award of prejudgment interest was Peerless’ contention that “the circuit court erred by fixing July 15, 2010, the date coverage under the mortgage clause was denied, as the commencement date for the accrual of prejudgment interest owed to Old Second,” and that “no money became due to Old Second until December 16, 2013, the date upon which the circuit court entered a ‘final’ judgment on the jury’s verdict resolving the remaining claims of the other Plaintiffs.” *Id.* ¶ 36. Peerless supported this argument by citing to the policy language that, similar to the policy in *Galena*, which “states that it will pay a covered loss within 30 days after receiving a sworn proof of loss, provided all of the terms of the policy have been complied with and an agreement as to the amount of the loss has been reached or an appraisal award has been made.” *Id.* Peerless argued that there was no agreement on the amount of the loss until after the final judgment, and therefore no money became due until after that date. *Id.*

In dismissing Peerless’ argument, the court noted that the Interest Act permits an award of prejudgment interest of 5% per year for all moneys after they become due. *Id.* ¶ 38. If the amount due is determinable, interest can be awarded pursuant to the statute even when liability and the amount due require legal ascertainment. *Id.* Importantly, Peerless did not argue that the amount due to Old Second was not easily ascertainable, and therefore forfeited the ability to argue it on appeal. *Id.* ¶ 39. Further, Peerless completely denied coverage. *Id.* ¶ 40. As the court noted, “[w]hen an insurance carrier breaches its policy by denying coverage, the amount due under the policy is payable within the time fixed after tender of the proof of loss and will bear interest from that date.” *Id.* (citing *DiLeo v. U.S. Fidelity & Guaranty Co.*, 109 Ill. App. 2d 28 (1st Dist. 1969)); *Schulze & Burch Biscuit Co. v. American Protection Insurance Co.*, 96 Ill. App. 3d 350, 352–53 (1981)). Because Peerless completely denied coverage, the amount due to Old Second became due 30 days after Old Second submitted its sworn proof of loss, or on July 25, 2010. *Id.*

Conclusion

Although the loss provision in *Galena* and *Old Second* policies are similar, the court in *Galena* declined to award prejudgment interest, while the court in *Old Second* awarded interest from the date of the proof of loss. In *Galena*, the court noted that the reasons for the court’s award of prejudgment interest in *Old Second* had no bearing on the facts in *Galena*. *Galena*, 2022 IL App (2d) 210394, ¶ 25. First, in *Old Second*, the insurer completely denied coverage, essentially negating the loss provision and forfeiting the argument of whether the amount due was determinable. *Id*. Additionally, in *Galena*, the insurer did not completely deny coverage, but instead filed a declaratory judgment action after a dispute arose as to the amount of damages. *Id.* ¶ 6. As such, the insurer in *Galena* did not forfeit the issue of whether the amount due under the policy was easily determinable. *Id.* ¶ 26.

In other words, where the parties in *Galena* disputed the amount owed as a result of the loss, in addition to coverage, the parties in *Old Second* strictly disputed whether there was coverage under the policy at all, not the amount of loss

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owed. A policy's loss provision—which requires payment 30 days after the parties' agreement on an amount of loss, or entry of an appraisal award or final judgment—only applies to toll the running of prejudgment interest where there is a dispute as to the amount of a covered loss and where the amount of loss is not easily determinable. To avoid the award of prejudgment interest pursuant to the Interest Act, it is best practice to advise your insurer-clients to document, early and often, all disputes with the policyholder as to the amount of loss. Such disputes should be documented in the claim file and in correspondence with the policyholder and their counsel. It should be supported by competent evidence. If done correctly, such preemptive actions will serve as a compelling argument against an award of prejudgment interest in future litigation because the amount due under the policy was not easily determinable.

Coverage practitioners would be well-advised to inform their clients of the availability of 5% per annum prejudgment interest to prevailing policyholders. Depending on the procedural posture of the litigation, prejudgment interest awards can often be tied to a policyholder's submission of a sworn proof of loss. Due to the nature of protracted coverage litigation in Illinois, the submission of a sworn proof of loss occurs during the initial adjustment of a claim, often years prior to any appraisal award or entry of final judgment. Prejudgment interest awards represent an emerging and substantial potential exposure to Illinois insurers, in addition to the contractual and statutory remedies available to policyholders under Section 155 of the Illinois Insurance Code.

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