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LEGISLATURE CONSIDERS BILLS THAT WOULD INCREASE TORT COSTS

BRIEFLY

Tort costs are a competitiveness issue for the Washington State economy. Both 2ESSB 6508 and ESB 6764 will increase tort and insurance costs for businesses and thus are steps in the wrong direction. In addition 2ESSB 6508 will increase tort costs for state, county and city governments, which are under severe financial stress at the present time.

Tort costs are a competitiveness issue for Washington's economy. The state stands at 27 in the U.S. Chamber of Commerce's rankings of state legal climates (1st is best) and is even lower, 37, in the Pacific Research Institute's U.S. Tort Liability Index rankings.

Two bills that would make things worse by raising the costs of defendants in tort lawsuits are still alive in the current legislative session. The first, Second Engrossed Substitute Senate Bill (2ESSB) 6508, would broaden the class of people who could recover damages in wrongful death actions. The second, Engrossed Senate Bill (ESB) 6764 will increase the rate at which interest accrues during the appeals process on damages awarded to plaintiffs in tort cases.

2ESSB 6508

2ESSB 6508 modifies Washington's "survival of actions" statutes. The House bill report provides this background on survival of action:

At common law, a person's cause of action for personal injuries did not survive the person's death, and there was no right of recovery for the wrongful death of a person. The Legislature has provided for such actions through interrelated statutes governing four types of wrongful death and survival actions: (1) general wrongful death; (2) wrongful death of a child; (3) general survival; and (4) special survival.

Wrongful death statutes provide a new cause of action on behalf of specified beneficiaries for damages they suffer as a result of the decedent's death. In contrast, survival actions do not create a new cause of action; rather they allow for the continuation of any causes of actions that the decedent could have brought had he or she survived. Under the general survival statute, any cause of action that the decedent could have brought prior to death may be brought by the decedent's personal representative. The special survival statute allows for the continuation of actions for personal injuries resulting in death (HBR).

The basic survival of actions statutes are in RCW 4.20. Provisions specific to minor children are in 4.24.10.

Beneficiaries. The House Bill Report summarizes the current law with respect to beneficiaries in this way:

Beneficiaries under the general wrongful death statute and the special survival statute are separated into two tiers. The primary beneficiaries are the spouse or domestic partner and children. The secondary beneficiaries are the parents and siblings and they are entitled to recover only if: there are no primary beneficiaries; they were dependent on the decedent for

support; and they resided within the U.S. at the time of the decedent's death.

An action under the general survival statute is for the benefit of, and passes through, the decedent's estate. However, the personal representative may recover the decedent's non-economic damages only on behalf of the two tiers of beneficiaries described above.

2ESSB 6508 broadens the set beneficiaries in two ways. First, parents who are not financially dependent on the decedent will nevertheless be beneficiaries so long as they had significant involvement in the decedent's life. Second, the requirement that parents and siblings be residents of the U.S. is removed. The expansion in the set of beneficiaries increases the likelihood that noneconomic damages will be recovered.

An additional change separates parents and siblings into distinct tiers, with parents prioritized before siblings.

Damages. The House Bill Report summarizes the current law with respect to recoverable damages in this way:

The general wrongful death statute does not specify the types of damages that are recoverable. However, case law has established that actual pecuniary losses may be recovered. "Pecuniary losses" include not only actual monetary losses, but also intangible losses such as the loss of the decedent's support, services, love, affection, care, companionship, society, and consortium.

The general survival statute provides that the personal representative may only recover the decedent's non-economic damages for pain and suffering, anxiety, emotional distress, and humiliation on behalf of the statutory beneficiaries. Under case law, recoverable damages for the estate are the pecuniary losses to the estate such as loss of earnings, medical and hospital expenses, and funeral and burial expenses.

The special survival statute does not specifically list the damages that may be recovered. Under case law, damages include the decedent's lost earnings; medical and funeral expenses; and the pain and suffering, anxiety, emotional distress, and humiliation suffered by the decedent.

In each of these three cases 2ESSB 6508 clarifies that the beneficiaries can recover both economic and noneconomic damages.

Joint and several liability. The bill provides a narrow limitation on joint and several liability. With respect to actions where the beneficiary is a parent who was not financially dependent on the decedent but did have significant involvement in the adult child's life, 2ESSB 6508 specifies that liability of state or local government defendants shall be several but not joint. For all other beneficiaries and all other defendants, liability remains joint and several.

Cost. This bill will significantly increase tort costs (and therefore liability insurance costs) for individuals, businesses, and state and local government.

In the fiscal note for the bill, analysts from the Attorney General's Office (AGO) estimated that "for each case affected by this proposal, the State would likely be subjected to at least an additional \$1,000,000" in liability. Citing an analysis by the Milliman Group of a "substantially similar" bill (HB 1873) that was considered by the legislature in 2008, AGO states that "an additional \$9 million in payouts per year may result from this change

in the law.” AGO further estimates that AGO litigation costs would rise by a bit more than \$800,000 per year.

The local government section of the fiscal note similarly concludes that the bill would have “a substantial (more than \$1,000,000 per year) but indeterminate impact on individual cities, counties and special districts Impacts would result both from an increase in cases and allowing for additional damages” The Washington Counties Risk Pool estimates an increase of \$580,000 per case where noneconomic damages are awarded due to the change. The Association of Washington Cities Risk Management Services Agency indicates that “increasing the number of claimants could have the effect of doubling or tripling the average annual payments. The Washington Cities Insurance Authority estimates “a doubling or more” in awards.

The percentage increase in tort costs for individuals and businesses should be comparable to that experienced by the state, counties and cities.

ESB 6764

ESB 6764 will increase the interest accrued to tort judgments while they are under appeal by either defendants or plaintiffs, when the defendants are individuals, or large (50+ employees) businesses, nonprofit organizations or charities.

RCW 4.56.110 specifies how interest on judgments is determined for parties other than the state, while RCW 4.56.115 specifies how interest is determined on judgments against the state. RCW 4.56.110 reads:

Interest on judgments shall accrue as follows:

- (1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts
- (2) All judgments for unpaid child support ... shall bear interest at the rate of twelve percent.
- (3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.
- (4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered....

RCW 19.52.020 in turn specifies:

(1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills

Paragraph 4.56.110(3), setting the interest rate on tortious judgments at the 26-week bill rate plus 2 percent was added to the RCW in 2004 (HB 2485). Prior to that time, the rate on tortious judgments was the rate set in RCW 19.52.020—the greater of 12 percent and the 26-week bill rate plus 4 percent.

As it passed the Senate on February 16, ESB 6764 would rewrite subsection 3 to read:

(3) Judgments founded on the tortious conduct of a nonprofit or charitable organization employing fewer than fifty people, a business employing fewer than fifty people, or a "public agency" as defined in RCW 42.30.020 shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

For individuals, for nonprofit and charitable organizations with 50 or more employees, and for businesses with 50 or more employees the situation would revert to what it was before the 2004 legislation: the interest rate they bear on judgments would be the greater of 12 percent or the 26-week bill rate plus 4 percent. This effectively means a rate of 12 percent. The last month for which the 26-week bill rate plus 4 percent exceeded 12 percent (i.e. for which the bill rate exceeded 8 percent) was May 1989.

Subsection (3) of ESB 6764 was subsequently amended by the House Judiciary Committee to read:

(3) (a) Judgments founded on the tortious conduct of ((individuals or other entities, whether acting in their personal or representative capacities,)) a "public agency" as defined in RCW 42.30.020 shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills....

(b) Except as provided in subsection (3)(a) of this section, judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as published by the board of governors of the federal reserve system In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

With this amendment, the post-judgment interest rate for the state and public entities would be 26-month bill rate plus 2 percent, as is currently the case, while the rate for private defendants would be the prime rate plus 2 percent. Over the last 20 years, the prime rate has exceeded the 26-week bill rate by 3.1 percent, on average.

A Brigham Young University Law Review article identifies two purposes for post-judgment interest:

There are two discernible purposes for post-judgment interest: (1) compensation to the judgment creditor for not having use of the money owed; and (2) punishment of the judgment debtor to encourage him or her to pay the judgment without undue delay... (Miller 1994, p. 609).

While a judgment is under appeal, the purpose of interest should be compensation of the creditor, not punishment of the debtor.

If the purpose of post-judgment interest is to compensate the judgment creditor for the time during which he or she does not have use of the money, then statutes which provide a rate of interest nearest the market rate ... best fulfill that purpose (Miller 1994, p. 6.12).

Post judgment interest rates that greatly exceed the market rate unduly discourage defendants from pursuing high merit appeals while unduly encouraging plaintiffs to pursue low-merit appeals. In both ways, high interest rates increase tort costs.

The currently specified interest rate, the 26-week bill rate plus 2 percent, is a good approximation to what a creditor would earn in a safe short-term investment. In February the average rate for newly issued 26-week treasury bills was 0.18 percent; the post-judgment interest rate is therefore 2.18 percent. The prime rate is now 3.25 percent, which would give an post-judgment interest rate of 5.25 percent under ESB 6764 as amended by the House Judiciary Committee. This rate, while significantly less than the 12 percent specified in the version of ESB 6764 that passed the Senate, is well in excess of current market rates for risk free investments and therefore too high. The 12 percent rate of interest specified by the Senate is in Bernie Madoff territory.

COMMENT

As we said in the introduction, tort costs are a competitiveness issue for Washington State. Both 2ESSB6508 and ESB 6764 will increase tort and insurance costs for businesses and thus are steps in the wrong direction. In addition 2ESSB 6508 will increase tort costs for state, county and city governments, which are under severe fiscal stress at the present time.

REFERENCES

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