

## “Pre and Post-Judgment Interest Awards: A Brief Overview”

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As you can imagine, it is difficult for 50 people to agree on the color of the sky on any given day. Therefore, it should come as no surprise that each of the 50 States have their own unique interpretation of justice when it comes to the awarding of Prejudgment or Post-Judgment interest. The manner in which Pre and Post-Judgment interest is awarded is as unique as the 50 states. In some jurisdictions, the rates are fixed; in others, it can fluctuate on either a monthly or quarterly basis. Some states allow for simple interest, others allow for interest to be compounded, and some states even allow for different rates for Pre and Post-Judgment awards.

Given the widespread disparity, it is important to appreciate your jurisdiction's unique laws concerning both Pre and Post-Judgment interest as early in a dispute as possible. A firm understanding of this area of law can lead to a tactical advantage over one's opponent.

This article offers a brief synopsis of some of the jurisdictions where reinsurance disputes are most likely to be found. However, one should always consult with a licensed attorney from the relevant jurisdiction for further advice. The Pre and Post-Judgment Interest Award Laws for a number of States are as follows:

### 1. Pennsylvania:

#### *a. When contracts are silent, Pennsylvania uses the same rate when awarding Pre and Post-Judgment Interest:*

- i. Pennsylvania utilizes a 6% per annum legal rate of interest, calculated on a simple basis, where a contractual rate of interest is silent. This rate holds true for both the awarding of pre-judgment and post-judgment interest. *See* 41 P.S. § 202. *See also* Widmer Eng'g, Inc. v. Dufalla, 837 A.2d 459 (Pa. Super. Ct. 2003).
- ii. Parties could contractually agree to a higher rate of interest than that provided for in 41 P.S. § 202, in anticipation of non-payment of money due under a contract. In this instance, an 18% rate of interest was permissible. *See* Amerisourcebergen Drug Corp. v. Meier, 2005 U.S. Dist. LEXIS 9653 (E.D. Pa. 2005).

#### *b. When a date of loss is fixed, interest awards are mandatory in Pennsylvania when certain conditions are met:*

- i. Pre-judgment interest in a contract action may be recovered only if: (1) a defendant commits a breach of contract to pay a definite sum of money; or (2) a defendant commits a breach of contract to render a performance, the value of which in money is stated in the contract; or (3) a defendant

commits a breach of contract to render a performance the value of which is ascertainable by mathematical calculation from a standard fixed in the contract; or (4) a defendant commits a breach of a contract to render a performance the value of which in money is ascertainable from established market prices of the subject matter. Black Gold Coal Corp. v. Shawville Coal Co., 730 F.2d 941, 944 (3d Cir. 1984).

1. Recovery of prejudgment interest under this standard is a matter of law, **not of discretion** (emphasis added). *Id.*
- ii. Insurers are entitled to pre-judgment interest calculated starting from when the date of loss occurred. See Rite Aid Corp. v. Liberty Mut. Fire Ins. Co., 2006 U.S. Dist. LEXIS 57094 (M.D. Pa. 2006).

2. New York:

- a. *Pre and Post-Judgment Interest Rates can differ:*
  - i. New York sets a maximum 9% statutory rate of interest, calculated on a simple (not compound) basis. NY CLS CPLR § 5004 (2011)
  - ii. Pre-judgment rate of interest – Contractual parties may agree to a different rate of pre-judgment interest as they see fit. See Citibank, N.A. v. Liebowitz, 110 A.D.2d 615 (N.Y. App. Div. 1985).
  - iii. Post-judgment rate of interest – Shall be calculated as set forth in NY CLS CPLR § 5004.
- b. *New York's legal rate of interest is discretionary:*
  - i. Trial courts are free to determine a fair rate of interest so long as it does not exceed 9%. See Denio v. State, 851 N.E.2d 1153 (N.Y. 2006).
- c. *Pre-judgment interest accrues when an insurance company presents its losses to its Reinsurer:*
  - i. An insurance company was entitled to pre-judgment interest on its award under CPLR § 5001 in action against a reinsurance company from the time of the reinsurance company's anticipatory breach. Where the reinsurance company was found to have improperly failed to indemnify the insurance company for payments made in connection with its settlement...because prejudgment interest is recovered from earliest ascertainable date cause of action existed and, in this case, when the insurance company first made demand on the reinsurance company. See Aetna Cas. & Sur. Co. v Home Ins. Co., 882 F Supp 1328 (S.D. N.Y. 1995).
- d. *Courts will allow interest on confirmed Arbitration Awards:*
  - i. Successful parties in arbitrations are entitled to interest on award from its date of entry of judgment. See East India Trading Co. v Dada Haji Ebrahim Halari, 114 NE.2d 213 (N.Y.S. 1952).

3. Delaware:

*a. Parties to a contract are free to set their own legal rate of interest:*

- i. Post-judgment interest shall now bear interest at the rate in the contract sued upon. Where there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate. *See* 6 Del. C. § 2301(a)(2011).

*b. Courts are given wide discretion to award interest on either a simple or compound basis:*

- i. Pre-judgment interest is discretionary. Delaware law generally holds that a successful plaintiff may be awarded prejudgment interest as a matter of right. This right is not self-executing, however. For the court to grant prejudgment interest, the plaintiff must ask for it by way of at least a general allegation of damages in an amount sufficient to cover actual damages plus interest. The Court also is entitled to grant such relief as the facts of a particular case may dictate. As part of its discretion to fashion an appropriate remedy, this Court has the discretion to award either compound or simple interest." *See Whittington v. Dragon Group L.L.C.* 2011 WL 1457455 (Del. Ch. 2011)

1. Delaware law generally disfavors compounding interest. *See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002). A court generally will not award compound interest absent an express contractual or statutory provision so permitting. *See Charlip v. Lear Siegler, Inc.*, C.A. No. 5178, slip op. at 11, Walsh, V.C. (Del. Ch. 1985).

4. Connecticut:

*a. Parties to a contract in Connecticut are free to set their own legal rate of interest:*

- i. In the absence of an agreed-upon rate, Connecticut law will allow for interest to be awarded at a rate of 8% per annum, calculated on a simple basis from when the principle amount becomes due. *See* Conn. Gen. Stat. § 37-1 (2011).
- ii. Judgment creditors were entitled to judgment interest at the rate of 9%, not as provided in Conn. Gen. Stat. § 37-1, because the parties had agreed on 9% and the statutory rate applied only in the absence of an agreed-upon rate. *See Little v. United Nat'l Investors Corp.*, 280 A.2d 890 (Conn. 1971).

- b. *Connecticut Courts are given discretion to award interest on a simple basis:*
    - i. Post-judgment interest at a maximum rate of 10% per annum **may** be recovered and allowed in civil actions or arbitration proceedings (emphasis added). See Conn. Gen. Stat. § 37-3a (2011)
5. Ohio:
- a. *Ohio Courts are allowed to assess interest on a compounded basis, so long as it does not exceed 8% per annum:*
    - i. Ohio allows for pre-judgment and post-judgment interest at a rate of 8% compound rate. See Ohio Rev. Code Ann. §1343.01 (2011)
    - ii. Trial Courts are allowed to award interest accruing from the date of loss. See Parrish v. Coles, 2007 LEXIS 2973 (Ohio Ct. App. 2007).
    - iii. Parties may stipulate for the payment of interest at any rate not exceeding 8% per annum payable annually (with limited exceptions). See Ohio Rev. Code Ann. §1343.01 (2011)
    - iv. Pre-judgment interest pursuant to Ohio Rev. Code Ann. §1343.01(C) is available on an arbitration award confirmed under Ohio Rev. Code Ann. § 2711.09. Interest begins to accrue from the time the money should have been paid. See Allied Erecting & Dismantling Co. v. Auto Baling Co., 591 N.E.2d 259 (Ohio Ct. App. 1990).
6. Illinois:
- a. *Pre and Post-Judgment Interest Rates can differ:*
    - i. Creditors shall be allowed to receive interest at the rate of 5% per annum for all moneys after they become due on instruments of writing, (reinsurance contract) on money withheld by an unreasonable and vexatious delay of payment." See 815 Ill. Comp. Stat. 205/2 (2011).
    - ii. Pre-judgment interest is awarded at the court's discretion. See Licciardi v. Collins, 536 N.E.2d 840 (Ill. App. Ct. 1989).
  - b. *Illinois Courts are required to award Post-judgment interest when an arbitration panel issues an award:*
    - i. Illinois courts are required by 735 Ill. Comp. Stat. 5/2-1303 (2011) to award post-judgment interest from the date of an arbitration award until the award was paid because the court confirmed the arbitration award against an insurer and entered a judgment in favor of the insured. See Robertson-Ceco Corp. v. Nat'l Union Fire Ins. Co., 292 F. Supp. 2d 1082 (N.D. Ill. 2003).
    - ii. Post-judgment interest shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied. See 735 Ill. Comp. Stat. 5/2-1303 (2011).

7. Texas:

- a. *Texas applies a high rate of interest toward insureds for both Pre and Post-Judgment Interest for Contract Disputes:*
  - i. If an insurer is liable for a claim under an insurance policy, the insurer is liable to pay the holder of the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18% a year as damages. *See* Tex. Ins. Code Ann. § 542.060 (2011).
  - ii. A money judgment earns post-judgment interest at a rate equal to the lesser of:
    - (1) the rate specified in the contract, which may be a variable rate; or
    - (2) 18% a year. *See* Tex. Finance Code Ann. § 304.002 (2011).
- b. *The awarding of Pre-judgment interest is mandatory when the date of loss is firmly established:*
  - i. Prejudgment interest is recoverable **as a matter of right** when an ascertainable sum of money is found due and payable at a definite date before judgment (emphasis added). Jarrin v. Sam White Oldsmobile Co., 929 S.W.2d 21, 24 (Tex. App. 1996).

8. California:

- a. *Parties to a contract in California are free to set their own pre-judgment legal rate of interest provided it does not exceed 10% per annum.*
  - i. Pre-judgment Interest- Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, **in its discretion**, fix, but in no event earlier than the date the action was filed (emphasis added). *See* Cal. Civ. Code § 3287 (2011).
  - ii. Pre-judgment interest in California Courts is a matter of discretion. *See* Cal. Civ. Code § 3288 (2011).
  - iii. California looks toward the certainty of the damages in determining whether pre-judgment interest is mandated. An award of pre-judgment interest is intended to make the plaintiff whole "for the accrual of wealth which could have been produced during the period of loss." Levy-Zentner Co. v. Southern Pac. Transportation Co., 74 Cal. App. 3d 762, 795 (Cal. Ct. App. 1977). *See also* Cal. Civ. Code § 3287 (2011).

- iv. If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10% per annum after a breach. *See* Cal. Civ. Code § 3289 (2011).
  - b. Post-judgment interest accrues at a rate of 10% per annum, calculated on a simple basis, until the judgment is satisfied. *See* Cal. Civ. Code Proc. § 685.010 (2011).
- 9. Florida:
  - a. With regard to Pre and Post-Judgment Interest, The Chief Financial Officer of Florida sets the rate of interest that shall be payable on judgments for the calendar quarter beginning January 1 and adjusts the rate quarterly on April 1, July 1, and October 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 400 basis points to the averaged federal discount rate. *See* Fla. Stat. § 55.03(3) (2011).
    - i. The current judgment rate of interest as of October 1, 2011 is 4.75%.
  - b. The interest rate is established at the time a judgment is obtained and such interest rate shall be adjusted annually on January 1 of each year in accordance with the interest rate in effect on that date as set by the Chief Financial Officer until the judgment is paid. *See* Fla. Stat. § 55.03(3) (2011).
    - i. Pre-judgment interest was computed pursuant to Fla. Stat. §§ 687.01 and 55.03, with the interest rate to be computed separately for each year utilizing the applicable statutory rate in effect during the period that the interest was charged. *See* Talking Walls, Inc. v. Hartford Cas. Ins. Co., 2005 U.S. Dist. LEXIS 46089 (N.D. Fla. 2005).
    - ii. Pre-judgment interest at the statutory rate calculated from the date of the breach. *See* Naples Med. Ctr., P.A. v. ProMedCo Mgmt. Co. (In re ProMedCo of Las Cruces, Inc.), 2002 Bankr. LEXIS 1975 (Bankr. N.D. Fla. 2002).