

Remote Trials Can Control Prejudgment Risk

Litigation Alert | July 20, 2020

By: Robert G. Devine, Victor J. Zarrilli and Kimberly M. Collins

While courts across the country are largely unavailable to litigants demanding a jury trial, pre-judgment interest rules present an increasing penalty risk to a defendant wanting its day in court and may not always make a plaintiff whole. The COVID-19 pandemic has altered the manner in which people and industries operate across the board. In light of the need to maintain social distancing whenever possible, the use of technology to replace in-person appearances is becoming more commonplace. As more attorneys become comfortable with the remote platform, the willingness to consider a remote trial grows.

With in-person jury trials suspended until further notice, it is important for attorneys and parties to consider the attendant consequences of the indefinite delay in waiting for a traditional jury trial. Aside from general inconvenience, continued delays may have a substantial financial impact, particularly with regard to the accumulation of pre-judgment interest.

Prejudgment interest is essentially additional money the court can award to the prevailing party based on the interest that the judgment would have earned over the course of the litigation. A number of factors influence the amount a court may award in prejudgment interest, including what the interest rate is, when interest begins to accrue, and the type of dispute. Moreover when the prejudgment interest attaches varies and may not always compensate for having had access to the funds during the litigation. A sampling of how prejudgment interest is treated in different contexts illustrates the impact these factors have on the ultimate judgment.

In Pennsylvania, for instance, a plaintiff in a tort action may seek delay damages calculated at “the prime rate” as listed by *The Wall Street Journal*, for each year the damages are sought, plus 1%. Pa..R.Civ.P. 238(a)(3). In other actions, unless otherwise specified, the legal rate of interest is calculated at 6% annually. 41 P.S. § 202. For New Jersey tort actions, judgments not exceeding the monetary limit of Special Civil Part at the time of entry will earn annual interest at “the average rate of return,” and for those cases exceeding the monetary limit, an additional 2% annually. N.J. Court Rules, R. 4:42-11. The amount awarded in contract matters in New Jersey remains in the court’s discretion.

The fluctuations in prejudgment interest rates are important to consider when assessing the resolution of a case under any circumstance. The backlog of trial-ready cases, however, is increasing as the pandemic continues, prompting the need to reevaluate the best outcome for clients. This is particularly true in jurisdictions that impose a particularly high rate of interest. In New York, for example, prejudgment interest is set at 9% in certain circumstances unless otherwise provided by statute. N.Y. C.P.L.R. § 5004. As an example, in a New York wrongful death action, the application of this rate resulted in an additional \$1,190,747 awarded to the plaintiff. See *Toledo v. Iglesia Ni Cristo*, 18 N.Y.3d 363 (2012). Moreover, a number of jurisdictions impose interest rates of up to 12% in certain actions. Our chart outlines the different

rules on prejudgment interest among the states. Given the likelihood of increased costs as well as delay in ultimate resolution if parties opt to await a time when in-person jury trials resume, parties would do well to consider alternatives not otherwise requiring consideration. Although previously not the norm, summary trials, shorter trials with relaxed rules of evidence, may become more prevalent. Another option may be to forgo a jury trial in favor of a bench trial. Summary trials, where rules of evidence may be relaxed to permit the expert's opinion to be introduced through a report reconfigured as a PowerPoint presentation, as well as bench trials, where additional flexibility is typical in regard to presentation of proof, can be conducted remotely. An overview of these options and others were recently explored in our articles "Evaluating Alternative Avenues to Verdict in the COVID-19 Legal Atmosphere" and "Virtual Jury Trials: The Next Wave of Remote Legal Practice." Considering formats available in the more immediate future compared to awaiting a traditional trial can promote earlier resolution and control the pre-judgment interest risk.

For questions or further information, please contact Robert Devine (deviner@whiteandwilliams.com; 856.317.3647), Victor Zarrilli (zarrilliv@whiteandwilliams.com; 856.317.3672), Kimberly Collins (collinsk@whiteandwilliams.com; 856.317.3655) or another member of the Litigation Group.

As we continue to monitor COVID-19, White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.