Prejudgment Interest in Minnesota

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NOTES

PREJUDGMENT INTEREST IN MINNESOTA

Viewing as punitive in nature the award of interest from the date of the injury on damages that are uncertain in amount, Minnesota courts have refused to grant prejudgment interest on unliquidated damages. This Note reviews the current trend in the United States toward awarding prejudgment interest and calls on the Minnesota legislature to provide for prejudgment interest. Until the legislature acts, Minnesota courts should dispense with the liquidated/unliquidated distinction and award prejudgment interest from the date of the injury by using a multi-factor analysis. Thus Minnesota would adequately compensate injured parties and avoid the unjust enrichment that flows from delaying dispute resolution.

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I. INTRODUCTION

Historically, Anglo-American courts have been unwilling to award interest.1 This hesitancy stems from the medieval view that interest is evil2 and courts' reluctance to appropriate an area of law traditionally re-

1. See Laycock v. Parker, 103 Wis. 161, 178-89, 79 N.W. 327, 332-36 (1899); D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 3.5 (1973); C. McCormick, HANDBOOK ON THE LAW OF DAMAGES §§ 51-59 (1935); H. McGregor, McGregor on Dam-

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served for state legislatures.3

Although interest is awarded more frequently now than in the past, state legislatures and courts rarely award interest other than for conventional interest.4 Conventional interest is interest at a rate agreed upon by the transacting parties.5 It is distinguished from the legal interest rate, the rate prescribed by law absent an express explicit agreement.6 Most states have adopted the conventional interest rule7 as an exception embodied within the state statute delineating the legal interest rate.8

State legislatures and courts are particularly slow in recognizing a justiciable claim for interest when interest is asserted as a part of damages.9 The rationale for allowing interest as a part of damages is to compensate


2. See C. McCormick, supra note 1, §§ 51, at 55; T. Sedgwick, supra note 1, at 391-408; see also Comment Prejudgment Interest: An Element of Damages Not To Be Overlooked, 8 Cum. L. Rev. 521 (1977).


4. See D. Dobbs, supra note 1, § 3.5, at 164.

5. See 22 Am. Jur. 2D Damages § 179 (1965); Comment, supra note 2, at 521.

6. See infra notes 7-8.

7. The conventional interest rule allows parties to contract among themselves for a rate of interest different from the legal rate of interest. Most states have adopted usury laws limiting the maximum rate of interest that parties may agree to pay. See 45 Am. Jur. 2D Interest and Usury §§ 4-13 (1969); D. Dobbs, supra note 1, § 3.5 at 170. Minnesota follows the conventional interest rule. See Minn. Stat. § 334.01 (1982); see infra note 8.

8. See Minn. Stat. § 334.01 (1982):

Rate of Interest.

Subdivision 1. The interest for any legal indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than $8 on $100 for one year; and, in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usurious. Contract shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity nor shall it apply to any agreement which extends the maturity date of any contract, note, or instrument, and provides for an increased rate of interest after the original maturity date on the indebtedness then due, provided that any agreement which extends maturity date of any contract, note or instrument shall not provide for an increased rate of interest in excess of $8 on $100 for one year.

Subd. 2. A contract for the loan or forbearance of money, goods, or things in action, in the amount of $100,000 or more, and any extensions, including extensions of installments and related changes in the terms thereof, shall be exempt from the provisions of this chapter and the interest for the indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing.

9. Interest awarded as a part of damages is also called "moratory" interest. See
the injured party and to punish the wrongful detainer of the plaintiff's money. The rules allowing interest awards as part of damages are established by statute or by traditional common-law rules. Interest as a part of damages is not part of the underlying cause of action, but is awarded for the detention of money found to be due.

Conventional interest and interest as a part of damages are forms of prejudgment interest. Prejudgment interest denotes interest on a judgment computed from the time of actual injury or breach of the contract to the date of final judgment. Prejudgment interest is distinguishable from post-judgment interest and interest on the verdict. Post-judgment interest is the common-law rule allowing interest in all claims once the sum is made certain in the form of a judgment. Interest on the verdict statutes allow interest to be computed on the final judgment from the


10. See 22 AM. JR. 2D DAMAGES §§ 179, 183 nn.6-7 (1965).

11. See, e.g., Busik v. Levine, 63 N.J. 351, 357, 307 A.2d 571, 576, appeal dismissed, 414 U.S. 1106 (1973) (court noted interest as part of damages allowed by statute in some states); Hare & Meelheim, supra note 9, at 92.

12. See, e.g., Lightcap v. Mobil Oil Corp., 221 Kan. 448, 468-69, 562 P.2d 1, 16, cert. denied, 434 U.S. 867 (1977); Busik v. Levine, 63 N.J. 351, 357, 307 A.2d 571, 576 (1973), appeal dismissed, 414 U.S. 1106 (the controlling rules have always been and remain judge made in New Jersey); Bond v. City of Huntington, 276 S.E.2d 539, 549 (W. Va. 1981) (interest after the verdict is ordinarily set by statute, whereas interest as compensatory damages is set by the courts).


14. See Comment, supra note 2, at 527-28, 533; Comment, Allowance of Interest, supra note 13, at 83; see also 22 AM. JUR. 2D Damages § 179 at 256-57 (1965); Annot., 96 A.L.R.2d 1104, 1106 n.1 (1964).

15. D. DOBBS, supra note 1, § 3.5, at 164 (1973) (definition of prejudgment interest). See H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 63 (rev. ed. 1961) (damages uncertain in amount need be established by agreement, or by jury, or court, are unliquidated damages).


date of the verdict. A minority of states have enacted interest on the verdict statutes or prejudgment interest statutes. Minnesota has adopted an interest on the verdict statute.

This Note examines the theories upon which prejudgment interest is awarded or denied in both contract and tort litigation. Part two analyzes the historical development and current status of Minnesota law governing prejudgment interest. Part three examines recent develop-

18. See, e.g., MINN. STAT. § 549.09 (1982) (interest from the date of the verdict statute); W. VA. CODE § 56-5-9 (1981) (interest from the date of the verdict statute). For the current construction of the statute on verdicts and judgments see MINN. STAT. § 549.09 (1982):

**Interest on Verdicts and Judgments.**

Subdivision 1. When the judgment is for the recovery of money, including a judgment for the recovery of taxes, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk as provided in this section and added to the judgment. The interest shall be computed as simple interest per annum. The rate of interest shall be based on the secondary market yield of one year United States treasury bills, calculated on a bank discount basis as provided in this section.

On or before the 20th day of December of each year the state court administrator shall determine the rate from the secondary market yield on one year United States treasury bills for the most recent calendar month, reported on a monthly basis in the latest statistical release of the board of governors of the federal reserve system. This yield, rounded to the nearest one percent, shall be the annual interest rate during the succeeding calendar year; provided, however, that in no event shall the rate of interest be less than eight percent per annum. The state court administrator shall communicate the interest rate to the clerks of court for their use in computing the interest on verdicts.

Subd. 2. During each calendar year, interest shall accrue on the unpaid balance of the judgment from the time that it is entered until it is paid, at the annual rate provided in subdivision 1.

Interest on the verdict statutes are more like post-judgment interest rules than prejudgment interest rules. The interest on the verdict statutes apply the post-judgment interest principles of certainty and ascertainability. The interest on the verdict statutes, however, permit interest to be computed sooner than post-judgment interest statutes but not as soon as the prejudgment interest statutes. See generally authorities cited supra note 15. In the recent West Virginia case of Bond v. City of Huntington, 276 S.E.2d 359, 349 (W. Va. 1981), the court notes that the date of the verdict statute in West Virginia is a "liberal" interest statute. This comment is questionable when the interest on the verdict statutes are compared with the prejudgment interest statutes, because prejudgment interest statutes compute interest from the date of the injury or breach rather than from the date of the verdict. Thus, prejudgment interest statutes give plaintiffs more complete compensation. Compare N.Y. CIV. PRAC. LAW § 5001(a-b) (McKinney 1963) with W. VA. CODE § 56-6-9 (1981).

19. See supra note 18.

20. For statutes on awarding interest from the date suit was commenced or complaint filed, see LA. REV. STAT. ANN. § 13:4203 (West 1968); N.H. REV. STAT. ANN. § 524.1-b (1974); OKLA. STAT. ANN. tit. 12, § 727(2) (West Supp. 1982); R.I. GEN. LAWS § 9-21-10 (Supp. 1982); and W. VA. CODE § 56-6-31 (West Supp. 1982) (special or liquidated damages shall bear interest from the date the right to bring suit accrues; special damages include lost wages and income, medical expenses, damages to tangible personal property, and similar out of pocket expenditures, as determined by the court).

21. See supra note 18.

22. See infra notes 52-125 and accompanying text.
ments of prejudgment interest in other jurisdictions. Part four proposes a "multi-factor analysis" to aid practicing attorneys and judges in construing the conflicting and confusing prejudgment interest cases in Minnesota and other jurisdictions.

II. PREJUDGMENT INTEREST IN MINNESOTA

A. General Overview

Whether a court will award prejudgment interest depends upon three factors. The first factor is the applicable statute, if any, controlling the award of interest. The second factor is the nature of the plaintiff's underlying claim. The third factor is the theory the court adopts in resolving the dispute.

In Minnesota, there is no statute that controls the award of prejudgment interest. Minnesota law, however, adopted an interest on the verdict statute. Minnesota Statutes section 549.09 allows interest to be computed on the final judgment from the date of the verdict but does not preclude the award of interest prior to the verdict as a form of damages or compensation to the injured party.

In Minnesota, the plaintiff's underlying claim is classified as either liquidated or unliquidated. In contrast, the traditional approach was a contract-tort distinction. The court determined whether the cause of action sounded in contract or tort and interest was never awarded if the action sounded in tort, but might be awarded if the action was a contract

23. See infra notes 126-223 and accompanying text.
24. See infra notes 224-262 and accompanying text.
25. See supra note 18.
26. See supra note 18 and accompanying text.
27. The interest on the verdict statute was first enacted when Minnesota was a territory. See Minn. Rev. Terr. Stat. ch. 72, § 8 (1856). In 1909, the language "judgment for the recovery of taxes" was included. See Act of April 22, 1909, ch. 371, § 1, 1909 Minn. Laws 425. The statute remained unchanged until 1980, when the Minnesota legislature enacted a detailed formula for determining the rate of interest applicable on verdicts and judgments. See supra note 18.

From the earliest cases, the Minnesota courts have not interpreted the interest on the verdict statute as applicable to interest being awarded as a form of damages or compensation. See Swanson v. Andrus, 83 Minn. 505, 510, 86 N.W. 465, 467 (1901) (stating the general rules on awarding interest and no mention of the interest on the verdict statute); see also Moosbrugger v. McGraw-Edison Co., 284 Minn. 143, 170 N.W.2d 72 (1969) (court held that amount of liability is not liquidated and Minn. Stat. § 549.09 is applicable).

For recent cases on the interest on the verdict statute see Unique Sys., Inc. v. Zotos Intern., Inc., 622 F.2d 373 (8th Cir. 1980); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 258 N.W.2d 762 (Minn. 1977); McCormack v. Hanksraft Co., 281 Minn. 571, 572-73, 161 N.W.2d 523, 523 (1968).

29. See infra notes 238-43 and accompanying text.
claim. The Minnesota courts have always utilized the liquidated-unliquidated approach, rather than follow the traditional approach.

The general common-law rule distinguishing liquidated from unliquidated damages provides that where the plaintiff's damages are fixed, certain, or readily ascertainable by computation or a generally recognized standard, such as a market value, the damages are liquidated. Where the damages are uncertain until the final judgment is rendered, the damages are unliquidated. A companion common-law rule is that a dispute between plaintiff and defendant about the amount of damages will not make an otherwise liquidated amount unliquidated for purposes of denying prejudgment interest.

If the plaintiff's claim is liquidated, the court may or may not, depending upon the jurisdiction, allow prejudgment interest. In some jurisdictions, the award of prejudgment interest on a liquidated claim is a matter of right. On other jurisdictions, it is a matter of discretion for the court or jury. The treatment of claims for prejudgment interest in Minnesota with respect to liquidated damages is uncertain. This uncertainty arises from the cursory treatment given prejudgment interest in recent Minnesota opinions.

30. See Hare & Meelheim, supra note 9, at 82-84; Comment, supra note 2, at 530; see also 22 AM. JUR. 2d Damages §§ 183, 189 (1965) (general discussion of contract-tort distinction); cf. Lovell v. Marianna Fed. Sav. & Loan Ass'n, 267 Ark. 164, 168, 589 S.W.2d 577, 578-79 (1979) (courts disregard the contract-tort distinction).

31. See Lacey v. Duluth, Missabe & Iron Range Ry., 236 Minn. 104, 107, 51 N.W.2d 831, 834 (1952); Swanson v. Andrus, 83 Minn. 505, 510, 86 N.W. 465, 467 (1901) (general rules on prejudgment interest established).

32. See Moosbrugger v. McGraw-Edison Co., 284 Minn. 143, 160, 170 N.W.2d 72, 82 (1969); Lacey v. Duluth, Missabe & Iron Range Ry., 236 Minn. 104, 107, 51 N.W.2d 831, 834 (1952); Swanson v. Andrus, 83 Minn. 505, 510, 86 N.W. 465, 467 (1901). See also Comment, supra note 2, at 522 (delineates general rules on liquidated-unliquidated damages); 22 AM. JUR. 2d Damages § 180-81 (1965) (discussion of general rules on liquidated-unliquidated damages).

33. See infra notes 230-35 and accompanying text.

34. See generally Comment, Judgments: Interest on Judgments—Limitation on Recovery of Prejudgment Interest, 56 MINN. L. REV. 739 (1972) (discusses the confusion in Minnesota with cases on prejudgment interest). For a comparison of seemingly conflicting opinions, compare Hueper v. Goodrich, 314 N.W.2d 828, 831 (Minn. 1982) (disallowing prejudgment interest because amount of liability under policy was not "readily ascertainable") with
There are primarily three theories that courts utilize to allow prejudgment interest: the punitive theory, the compensation theory, and the restitution theory.\(^{39}\)

Under the punitive theory, prejudgment interest is awarded where the defendant has unlawfully detained plaintiff's property or money,\(^ {40} \) wrongfully converted plaintiff's property,\(^ {41} \) or unreasonably and vexatiously delayed the just resolution of plaintiff's action.\(^ {42} \) Unreasonable delay may result from vexatiously postponing payment of damages due, excessively prolonging the length of pretrial discovery, or refusing to settle.\(^ {43} \) The punitive theory is the only theory of recovery based on defendant's fault or wrongful acts.\(^ {44} \)

The objective of the compensatory theory is to make the plaintiff whole.\(^ {45} \) The compensatory theory does not require a mistake or willful detention of plaintiff's money or property as does the punitive theory.\(^ {46} \) All that is required is plaintiff be deprived of the use of his property or money. To fully compensate him, judgment includes interest from the
date of detention.47 As long as the plaintiff is awarded a money judgment as compensation to make the injured plaintiff whole, prejudgment interest should be included to fully restore the plaintiff to his original position.48

The restitution theory awards interest to the plaintiff from the date of injury or breach, where defendant would otherwise be unjustly enriched at the plaintiff's expense.49 The restitution theory is a counterpart to the

47. See supra note 46. Notably, Minnesota has long recognized that prejudgment interest on a condemnation award, from the time of possession until the time of payment, is an element of just compensation. See, e.g., Ford Motor Co. v. City of Minneapolis, 143 Minn. 392, 395, 173 N.W. 713, 715 (1919) (just compensation for "taking" of property); Warren v. First Div. St. P. & Pac. R.R., 21 Minn. 424, 427 (1875) (just compensation for "taking" of property).

The recent case of State v. Carney affirms the award of prejudgment interest in a condemnation proceeding. See State v. Carney, 309 N.W.2d 775 (Minn. 1981). In affirming the award of prejudgment interest the Carney court relied on the constitutional principle of no taking without just compensation. Id. at 776. There was an eight-year period between the date of the condemnation and the date of judgment. The Carney court required interest to be included in the verdict from the date of the taking as required by the Minnesota Constitution. See id. at 776 (citing MINN. CONST. art. I, § 13). The standard used to determine the rate of interest to be paid the landowner was "the market value of the property at the time of taking contemporaneously paid in money." Id. The Carney court included interest as if the landowner had made a reasonable and prudent investment.

The Carney Court allowed interest to be computed at a rate in excess of the legal rate of interest statute. See MINN. STAT. § 334.01(1) (1980). The just compensation approach adopted by the Carney court to award prejudgment interest is unique to the property condemnation field. Therefore, the constitutional just compensation approach based on MINN. CONST. art. I, § 13 should be distinguished from the equitable just compensation approach. For a discussion of the just compensation approach in equity, see Minneapolis Harvester Works v. Bonnallie, 29 Minn. 373, 375, 13 N.W. 149, 151 (1882). See also Comment, supra note 38, at 742 n.21, 746 (equitable just compensation).

48. See supra note 45.

49. See D. Dobbs, supra note 1, at § 3.5 (a right of restitution); C. McCormick, supra note 1, at § 59; Comment, supra note 2, at 528 (unjust enrichment theory).

For a discussion of the interweaving of the compensation and restitution theories of recovery of prejudgment interest, see Lightcap v. Mobil Oil Corp., 221 Kan. 448, 562 P.2d 1, cert. denied, 434 U.S. 867 (1977), where the court summarizes:

The general rule followed by some authorities is that interest as damages cannot, in the absence of any statutory provision therefor, be recovered as a matter of right in an action of contract upon an unliquidated claim. In a growing number of jurisdictions, however, the allowance of interest on such unliquidated claims is discretionary with the court, and interest will be allowed where required to give full compensation. . . .

[citations omitted]. This type of reasoning was employed to award prejudgment interest on an unliquidated claim in Brooklyn Union Gas Co. v. Transcontinental Gas P.L. Corp., 201 F. Supp. 679 (S.D. Tex. 1960), aff'd 299 F.2d (5th Cir. 1962). . . .

The court treated the matter as one of restitution, and found that interest should be allowed under Restatement, Restitution, § 156. It also found that "the district courts are vested with considerable discretion in the awarding of interest damages upon restitutory sums. Considerations of fairness and traditional equitable principles are to guide the exercise of this discretion."

Id. at 468-69, 562 P.2d at 16. The Lightcap opinion was adopted by a later Kansas case,
compensatory theory of recovery. To fully compensate the plaintiff, the defendant will often be precluded from being unjustly enriched or benefitting from the defendant's use of plaintiff's money or property.\textsuperscript{50} The restitution theory is applicable in situations where the punitive theory would allow the defendant to forego paying interest because the defendant's actions do not justify punishment.\textsuperscript{51}

In examining the recent developments in Minnesota and other jurisdictions, it is important to note which theory is used by the court awarding prejudgment interest.

\textbf{B. Minnesota Cases on Prejudgment Interest}

The first Minnesota case to summarize the common-law prejudgment interest rules was \textit{Swanson v. Andrus}.\textsuperscript{52} The \textit{Swanson} court stated the general rule:

Whatever is, or may have been, the rule in other jurisdictions as to allowing [prejudgment] interest by way of damages, this court has so allowed it as a matter of law, even in cases where the demand was unliquidated, provided its pecuniary amount did not depend upon any contingencies, and was ascertainable by computation, or by reference to generally recognized standards, such as market value.\textsuperscript{53}

The \textit{Swanson} court also summarized the common-law rule on the exclusion of unliquidated damages as a part of prejudgment interests:

On the other hand, interest has not been allowed where the damages claimed were not only unliquidated, but could not be ascertained by reference to any generally recognized standard, or were, any part of them, prospective or contingent, or the amount thereof depended in whole or in part upon the discretion of the jury. Actions for personal injuries, seduction, libel, slander, and false imprisonment fall within this classification.\textsuperscript{54}

To summarize these prejudgment interest rules, the \textit{Swanson} court drew from various cases that analyzed the award of interest in the con-
text of conversion\textsuperscript{55} or destruction of personal property.\textsuperscript{56} In \textit{Swanson}, the Minnesota Supreme Court adopted the common-law rules on prejudgment interest developed in America, rather than the narrower rules followed in England.\textsuperscript{57}

The Minnesota Supreme Court reaffirmed the liquidated-unliquidated distinction in \textit{Lacey v. Duluth, Missabe & Iron Range Railway Co.}\textsuperscript{58} The \textit{Lacey} court awarded interest from the date of demand because damages could be ascertained by a recognized standard.\textsuperscript{59} The lack of liquidated damages did not deter the court from awarding prejudgment interest because the amount claimed by plaintiff could be determined with reference to a reasonable standard of value for labor and equipment.

\begin{itemize}
\item \textsuperscript{55} See, e.g., \textit{Nesbitt v. St. Paul Lumber Co.}, 21 Minn. 491 (1875) (wrongful conversion of timber); \textit{Derby v. Gallup}, 5 Minn. 119 (Gil. 85) (1860) (conversion of personal property).
\item The common-law rule on trover allowed interest to be computed on the value of the goods at the time of conversion as the normal and usual measure of recovery. See F. Harper & F. James, \textit{The Law of Torts} § 2.36 (1974). In accord with this common-law rule of trover the court in \textit{Derby v. Gallup} stated:
\begin{quote}
[I]t would be gross injustice to allow the party who has been proved guilty of a wrongful taking and conversion of property, to have the use of the same during, perhaps, years of litigation, and then escape with paying the rightful owner the bare value of the property at the time of the taking, if the jury should choose so to find. Such a rule would amount to scarcely less than the offering of a premium for the commission of a wrong, since, under the law at present, he would not even suffer the trifling inconvenience of paying his adversary's costs.
\end{quote}
5 Minn. 119, 138 (Gil. 85, 103) (1860).
\item \textsuperscript{56} See \textit{Swanson v. Andrus}, 83 Minn. 505, 510, 86 N.W. 465, 467 (1901). See, e.g., \textit{Varco v. Chicago, M & St. P. Ry.}, 30 Minn. 18, 13 N.W. 921 (1882) (defendant negligent in duty to repair fence where plaintiff's chattel was destroyed by train).
\item \textsuperscript{57} See \textit{Swanson v. Andrus}, 83 Minn. at 510, 86 N.W. at 467. \textit{See also} \textit{Varco v. Chicago, M. & St. P. Ry.}, 30 Minn. 18, 22, 13 N.W. 921, 922 (1882) (citing \textit{Sedgwick on Damages}).
\item The rules on prejudgment interest in England have been relaxed in recent years to conform more with the trend in America of awarding prejudgment interest in personal injury and liquidated tort claims. See e.g. \textit{Interest on Damages}, 114 Solic. J. 612 (1970); \textit{Walker, Interest on Damages}, 120 New L.J. 237, 308 (1970); \textit{see also} Hare & Meelheim, supra note 9, at 92 n.56 (discusses present status of prejudgment interest in England noting statutory allowance for prejudgment interest and reversing earlier common-law).
\item \textsuperscript{58} 236 Minn. 104, 51 N.W.2d 831 (1952).
\item \textsuperscript{59} Id. at 108, 51 N.W.2d at 834. In allowing plaintiff to recover interest from the date of completion of the well, the \textit{Lacey} court focused on a breach of contract to furnish labor and materials for well-drilling operations. The plaintiff used expert testimony to establish the reasonable value of the services and equipment rented. \textit{Id.} at 108, 51 N.W.2d at 831. \textit{Accord Clements Auto Co. v. Service Bureau Corp.}, 444 F.2d 169 (8th Cir. 1971) (plaintiff itemized claims and was awarded interest on those items that were not discretionary); \textit{Polaris Indus. v. Plastics, Inc.}, 299 N.W.2d 414 (Minn. 1981) (plaintiff made a compelling case for obtaining prejudgment interest because it kept detailed records that could be a reasonable measurement for ascertaining the amount of damages claimed). \textit{See also} \textit{Iten Leasing Co. v. Burroughs Corp.}, 684 F.2d 573, 576 (8th Cir. 1982) (computer leasing damages); \textit{Taylor v. Raygo, Inc.}, 680 F.2d 1223, 1224 (8th Cir. 1982) (computer leasing damages dispute); \textit{Strouth v. Wilkison}, 302 Minn. 297, 300, 224 N.W.2d 511, 513 (1974) (breach of contract suit by homeowner against contractor).
\end{itemize}
It is significant that the dispute in *Lacey* centered on the amount of damages claimed by plaintiff, rather than whether the defendant was liable, because the Minnesota Supreme Court is more willing to award prejudgment interest to plaintiff when the defendant has conceded liability.

After the *Lacey* decision, the Minnesota Supreme Court denied prejudgment interest in five cases using the liquidated-unliquidated rules. In *Moosbrugger v. McGraw-Edison Co.*, *Alley Construction Co. v. State*, and *Keegan v. Fischer Construction Co.*, the court disallowed prejudgment interest.

60. 236 Minn. 103, 108, 51 N.W.2d 831, 834 (1952).

61. *Id.* The *Lacey* court adopted a compensatory theory of recovery in stating that "[w]here interest is considered solely in the light of compensation for the use by one of another's funds, it should be more readily awarded." *Id.* For a discussion of the *Lacey* court's comment that a bona fide dispute as to the amount of damages claimed should not bar accrual of interest from the date of demand, see *id.* at 108, 51 N.W.2d at 834. See also supra note 34 and accompanying text.


63. 284 Minn. 143, 160, 170 N.W.2d 72, 82 (1969) (buyer's action against seller for breach of express and implied warranties, for negligent manufacturing, and for selling faulty machines).

In *Moosbrugger* the Minnesota Supreme Court denied prejudgment interest because the exact amount of damages owed could be ascertained only by a jury. *Id.* at 160, 179 N.W.2d at 83.

64. 300 Minn. 346, 353, 219 N.W.2d 922, 926-27 (1974) (construction contract). In *Alley* all but a small portion of the damages were disputed and final computation of the amount of damages owed could not be readily ascertained prior to rendition of the verdict. *Id.* at 352-53, 219 N.W.2d at 926.

*Alley* is also important because the liquidated-unliquidated rules on prejudgment interest were made applicable to the Minnesota statute on payment of interest to contractors who work for the state highway system, MINN. STAT. § 161.322 (1982). 300 Minn. 346, 291 N.W.2d 922 (1974). The *Alley* court stated:

We cannot interpret the Minn. Stat. § 161.322 statute as narrowly as the state contends [i.e. that the statute contemplates payment of interest only upon the amount the state admits it owes]. It is not their decision to admit liability for an obligation which imposes the statutory interest obligation. Neither can we construe the statute to say that any subsequent litigation automatically imposes the interest obligation of the statute to the benefit of a successful litigant. We hold that the statutory interest obligations apply only where the damages were readily ascertainable by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion.

*Id.* at 353, 219 N.W.2d at 926-27 (emphasis added).

65. 302 Minn. 519, 223 N.W.2d 141 (1974) (construction contract). In *Keegan* the jury had to determine the proper method of calculating the amount of balance due for the removal of gravel. *Id.* at 519, 223 N.W.2d at 142. The *Keegan* opinion implies that if the parties had stipulated in their contract the standard of measurement or method of calculation to be used to determine the damages owed for a breach of the contract, the court would have allowed prejudgment interest. *Id.* The *Keegan* Court pointed out that "there was evidence in the course of the trial indicating a dispute as to the proper method of calculating the amount of the balance due for the removal of the gravel." *Id.* It was for the jury to resolve this issue of fact and, accordingly, the court held that the claim was unliquidated. *Id.*
Prejudgment Interest

Because the dispute could be resolved only as a fact question by the jury; therefore, the amount was unliquidated. In Moosbrugger, Alley, and Keegan, the defendant could not know how much he had to pay until the jury had assessed the damages. In Potter v. Hartzell Propeller, Inc. and Bonhiver v. Graff, the court denied prejudgment interest because the amount owed could not be determined with reference to any generally recognized standard of measurement. Both Potter and Bonhiver emphasize the element of ascertainability under the liquidated-unliquidated rules.

In Potter the court denied prejudgment interest because the amount owed by defendant was not ascertainable by reference to any generally recognized standard of measurement. The Potter court reasoned that:

[Although in both cases plaintiff actually suffers loss of use of his money from the date of the wrongful act, for which loss he theoretically should be compensated, it would nevertheless be unreasonable to require the defendant to compensate plaintiff for this loss where defendant could not have readily determined the amount of damages himself either by computation or reference to generally recognized standards such as market value.]

The Potter court reiterated one of the major principles underlying the liquidated-unliquidated distinction: one who cannot ascertain the amount of damages for which he might be held liable cannot be expected to tender payment and thereby stop the running of interest. The court was unwilling to adopt the compensatory theory of recovery and include interest as a measurement of the plaintiff's loss of use of his money, even though the Potter court expressly recognized that its hold-

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67. 291 Minn. 513, 189 N.W.2d 499 (1971).
68. 311 Minn. 111, 248 N.W.2d 291 (1976).
69. Bonhiver, 311 Minn. at 132-35, 248 N.W.2d at 304-05; Potter, 291 Minn. at 518, 189 N.W.2d at 504-05. The issue in Potter did not revolve around the defendant's liability per se, rather it focused on the exact amount of damages that the defendant owed the plaintiff. Id.; cf. Hueper v. Goodrich, 314 N.W.2d 828, 831 (Minn. 1982) (automotive personal injury damages).

Where the issue of liability has been conceded, either by stipulation or admission, the only issue in the case is the measurement of the damages. In this situation, the case for allowing prejudgment interest to compensate the plaintiff for loss of the use of his money is very strong. See infra notes 205, 219-35 and accompanying text.

70. 291 Minn. at 519, 189 N.W.2d at 504. The issue of prejudgment interest in Potter did not revolve around the defendant's liability per se, rather it focused on the exact amount of damages that the defendant owed the plaintiff. Id.
71. 291 Minn. at 518, 189 N.W.2d at 504. See also Comment, supra note 38 (general discussion and critique of the Potter court's reasoning).
72. See 291 Minn. at 518, 189 N.W.2d at 504.
ing would result in an injustice to the plaintiff. 74 

The Bonhiver court ostensibly relied on the Potter rationale to determine if prejudgment interest should be allowed. The Bonhiver court stated that "[t]he question is not whether the parties agreed on the amount of damages but whether the defendant could have determined the amount of his potential liability from a generally recognized objective standard of measurement such as a readily ascertainable market value." 75 

The Moosbrugger, Alley, and Keegan cases underline the contingency element of jury discretion under the liquidated-unliquidated rules. 76 The Potter and Bonhiver cases emphasize the contingency element of unascertainability of damages under the liquidated-unliquidated rules. 77 Hence, if the claim is contingent, the damages are considered unliquidated and interest does not accumulate prior to the date of the verdict. 

More recently, the Minnesota Supreme Court has been willing to award prejudgment interest. In ICC Leasing Corp. v. Midwestern Machinery Co. 78 and Polaris Industries v. Plastics, Inc. 79 the court found that the plaintiffs could recover prejudgment interest because their damages could be ascertained by reference to a recognized standard of measurement. 80 

In ICC plaintiff sued for default on written agreements to purchase certain equipment leased to the defendant. 81 The terms of the agreement were specifically detailed and fixed to enable the defendant to determine its obligation to pay the principal balance owed as of the date of

74. 291 Minn. at 518, 189 N.W.2d at 504.
75. Bonhiver v. Graff, 311 Minn. 111, 135, 248 N.W.2d 291, 305 (1976). In Bonhiver the plaintiff, a receiver who represented the rights of creditors, sued accountants who negligently failed to discover fraud on the part of former corporate officers. Id. at 113-16, 248 N.W.2d at 294-96. The court summarized the general rules that Minnesota courts adopt in dealing with the issue of prejudgment interest. See id. at 134-35, 248 N.W.2d at 304-05. The amount of damages owed in Bonhiver was determined "to be that amount by which the balance due and owing on allowed claims against the receivership exceeded the assets of the receivership." Id. at 135, 248 N.W.2d at 305. The figure the receiver could garnish from the defendant's assets was unascertainable until the total of allowed claims was determined and the receiver had determined in what amounts those claims exceeded his assets. Id.

The Bonhiver case involved a fraudulent misrepresentation that caused the plaintiffs to be deprived of the use of their money, whereas neither the Potter case nor its progeny dealt with the divesting of the plaintiff's use of money through fraud.

78. 257 N.W.2d 551 (Minn. 1977).
79. 299 N.W.2d 414 (Minn. 1981).
81. 257 N.W.2d 551, 552-53 (Minn. 1977).
default. The ICC court held that, although the amount owed was for an unliquidated amount, the claim could be "readily ascertained by computation or by reference to a generally recognized objective standard of measurement." The claim, therefore, was liquidated and prejudgment interest was proper. The ICC court's holding is premised on the compensatory theory for recovery of prejudgment interest.

The defendant in ICC argued that interest should be limited to the legal rate of interest under the Minnesota statute to make the amount certain. The ICC court agreed and reaffirmed the rule that if the parties do not call for a higher rate of interest in their written agreement, the legal rate of interest will be imposed.

In the recent case of Polaris Industries v. Plastics, Inc., the Minnesota Supreme Court reversed the trial court's findings that prejudgment interest should be denied because the damages were unliquidated and readily ascertainable before trial. The trial court cited both the Alley and Potter opinions for support in denying interest. The Minnesota Supreme Court found that the plaintiff made a "compelling case for obtaining prejudgment interest." The Polaris court noted that the jury's award reflected item by item, the exact amount of out-of-pocket expenses Pola-

82. Id.
83. The amount of indebtedness was in controversy and the defendant argued that the sum was unliquidated. Id. at 555-56. The ICC court agrees that the sum is unliquidated but the readily ascertainable exception is applicable. Id. at 556. The ICC court also reiterates the general principle underlying liquidated-unliquidated prejudgment interest rules, that "[a] bona fide dispute as to the amount of damages should not bar the accrual of interest in all circumstances or a plaintiff's right to interest would depend merely upon the reasonableness of the defendant." Id.
84. Id. The ICC court was quoting the prejudgment interest formulation of Moosbrugger v. McGraw-Edison Co., 248 Minn. 143, 170 N.W.2d 72 (1968).
85. See supra notes 52-57, 110-127, and accompanying text for the liquidated-unliquidated rule formulation in Minnesota.
86. 257 N.W.2d at 556 ("Mere difference of opinion as to the exact amount of damages was not sufficient to excuse Midwestern from compensating ICC for loss of the use of its money from July 1970 until judgment in 1975." (emphasis added)).
87. MINN. STAT. § 334.01 (1982). See supra note 8.
88. 257 N.W.2d 551, 556 (Minn. 1977).
89. Id. Compare the ICC court's holding, however, with the recent property condemnation case of State v. Carney, 309 N.W.2d 775 (Minn. 1981), where the Carney court did not limit the recovery to the legal rate of interest but awarded the plaintiff interest as if the landowner had made a reasonable and prudent investment. Id. at 776. See MINN. STAT. § 334.01 (1981).
90. 299 N.W.2d 414 (Minn. 1980). The underlying claim in Polaris focused on negligence and breach of expressed and implied warranties of merchantability and fitness. Id. at 416-17. The plaintiff's negligence resulted in the failure of more than 23,000 tanks of which the plaintiff replaced 17,897. Plaintiff sought compensation for replacement and shipping costs. Id. at 417-18.
91. Id. at 418.
92. Id. at 417.
93. Id.
ris incurred in replacing the defective product. The only apparent difference between allowing prejudgment interest in Polaris and denying prejudgment interest in Alley and Potter is that Polaris kept records of the expenses it incurred. The plaintiff in Polaris also drafted submissions to the jury for a specific amount that paralleled plaintiff's bookkeeping records. Therefore, when the jury returned its verdict, the amounts rendered were close enough to the plaintiff's actual out-of-pocket expenses that the Polaris court found that the damages were liquidated and permitted prejudgment interest to be included.

The Polaris court distinguished its factual situation from Alley and Keegan:

In Alley and Keegan there were numerous issues which required the jury to resolve uncertain fact questions and to exercise considerable independent discretion in arriving at its award. In the instant case, although the liability of defendant was by no means clear cut before trial, the computation of damages was relatively uncomplicated, and in our opinion, meets the test of being "readily ascertainable by computation."

The Polaris court cited Alley and Keegan as cases involving jury discretion. The court distinguished the Polaris situation as involving a computation or ascertainability issue. Significantly, the Polaris court overlooked Potter and Bonhiver which focused directly on the issue of whether the damages were "readily ascertainable by computation." This omission is especially noteworthy because the trial court specifically analyzed the Polaris situation in light of the Potter decision.

In both Potter and Polaris the exact amount of damages owed was not fixed before trial because the jury, within its discretion, could vary the amount that the plaintiff could recover. The only substantial difference between Potter and Polaris is that in Polaris the expenses incurred by

94. Id. at 418.
96. Polaris, 299 N.W.2d at 416-18.
97. Id. at 418.
98. Id. See supra notes 64-66 and accompanying text.
99. See supra notes 67-77 and accompanying text.
100. Polaris, 299 N.W.2d at 417. The Polaris court omitted analysis of the Potter case which most closely parallels the Polaris factual and legal situation. This omission exemplifies the analytic difficulty of the prejudgment interest area. The consequence of the omission is a confusing and conflicting analysis.
101. See Potter, 291 Minn. at 518, 189 N.W.2d at 504 (the amount of loss could not be ascertained until the jury had determined it); Polaris, 299 N.W.2d at 418 (court acknowledges possibility of substantial imprecision in fixing an amount prior to trial that accurately reflects out-of-pocket damages).
the plaintiff were actual bookkeeping items, whereas, in Potter the estimates of damages made by plaintiff's and defendant's experts varied from $90,000 to $95,000, although the jury assessed damages at $66,000. In Polaris the defendant could not know exactly how much he owed the plaintiff until after the jury verdict was rendered. Nonetheless, a rough approximation could have been made using the plaintiff's records. The Polaris court conceded "[t]here is merit to the concern expressed by the trial court in attempting to weigh the results reached by the jury against the possibility of substantial imprecision, in fixing prior to trial an amount which accurately reflects [plaintiff's] out-of-pocket damages." The Polaris court's willingness to overturn the trial court's findings and award prejudgment interest where the Minnesota Supreme Court could have readily denied interest, reflects a more liberal application of the liquidated-unliquidated rules. Plaintiffs can be forewarned by the Polaris decision that prejudgment interest may be allowed if a plaintiff can present persuasively precise records and dates.

As the Minnesota case law on prejudgment interest illustrates, Minnesota uses a liquidated-unliquidated analysis. When a Minnesota court examines prejudgment interest under the liquidated-unliquidated analysis, the facts of the case must fall into one of the four combinations involving liability and certainty of damages.

First, plaintiff may seek damages that are liquidated where the defendant concedes liability. Under these circumstances, plaintiff will be entitled to the amount of damages claimed. Defendant will be liable for prejudgment interest from the date the claim became liquidated. The date of liquidation is either the date of the loss, breach, or injury, or the date plaintiff sought compensation. The argument for an award of prejudgment interest is strongest in this situation because plaintiff is deprived of a fixed amount from the date of the injury and the defendant could readily ascertain the amount owed the plaintiff. The defendant knows the exact amount of damages he owes and is capable of tendering

102. See Polaris, 299 N.W.2d at 418 (Minn. 1981).
103. Potter, 291 Minn. at 519, 189 N.W.2d at 504 (jury based its verdict on the market value for the aircraft).
104. Polaris, 299 N.W.2d at 417-18.
105. Id. at 418.
106. The Polaris court was not willing to recognize how closely the facts in Polaris paralleled the facts in Potter despite the trial court's perception of this fact.
107. The Polaris opinion illustrates the Minnesota Supreme Court's case-by-case approach to the prejudgment interest issue.
108. See D. DOBBS, supra note 1, § 3.5, at 166; C. MCCORMICK, supra note 1, at § 54; Comment, supra note 2, at 521-23.
109. See C. MCCORMICK, supra note 1, at § 58; Comment, supra note 2, at 521-23.
110. See Comment, supra note 2, at 522-23 (citing Spalding v. Mason, 161 U.S. 375 (1896)).
damages on the date of request. Minnesota courts have agreed that where the defendant concedes liability and the amount of damages sought by plaintiff is liquidated, the defendant owes plaintiff prejudgment interest.  

Second, defendant may concede liability but the damages owed may not be readily ascertainable by an objective standard of measurement. The common-law rule adopted by the Minnesota courts is that where defendant could not tender payment and halt the running of interest, he should not be required to pay interest on the claim until a jury or court has determined the precise amount owed. Under these circumstances, Minnesota does not award prejudgment interest. Other courts, using the compensatory theory, award prejudgment interest because the defendant has conceded that he is liable for whatever amount is owed and the plaintiff is deprived of the use of his money or his property. The fact that the defendant cannot tender payment does not eliminate the plaintiff's deprivation of the use of his money or property. If Minnesota courts adopt the compensatory theory of recovery for prejudgment interest, interest would be included regardless of whether the defendant could tender or not.

Third, defendant may deny all liability but the trier of fact may hold him liable for prejudgment interest if the amount owed is certain. Courts, both in Minnesota and in other jurisdictions, uniformly view this combination as a liquidated claim and award prejudgment interest if there is liability. The general rule is that a bona fide dispute about whether the debt is actually owed will not render an otherwise liquidated claim unliquidated.

Fourth, defendant may deny liability and contend that damages are

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111. This is known as the tender rule. See Cox v. McLaughlin, 76 Cal. 60, 67-72, 18 P. 100, 104 (1888); Comment, supra note 38, at 743 n.24 (discussing tender rule in Potter).

112. See D. Dobbs, supra note 1, § 3.5 at 165; C. McCormick, supra note 1, at § 56 (1935); 22 Am. Jur. 2d Damages § 185 (1965).

113. See Moosbrugger v. McGraw-Edison Co., 284 Minn. 143, 160, 170 N.W.2d 72, 82 (1969); Comment, supra note 38, at 743. See also D. Dobbs, supra note 1, § 3.5, at 165 (general rule).

114. See Moosbrugger v. McGraw-Edison Co., 284 Minn. at 160, 170 N.W.2d at 82.

115. See supra notes 45-48 and accompanying text.


119. See id.

120. For cases stating that a bona fide dispute does not bar a recovery for a liquidated
not fixed, certain, or readily ascertained by reference to an objective standard.\textsuperscript{121} Jurisdictions that adhere strictly to the liquidated-unliquidated distinction disallow prejudgment interest in this situation because the question of liability and the amount of liability are uncertain. Courts base their rationale on the tender argument\textsuperscript{122} or the punitive theory of recovery.\textsuperscript{123} If ultimately the defendant is found liable for plaintiff's damages from the date of the injury or breach, the plaintiff has been deprived of just compensation from the date of the injury or breach. Where there is no award for prejudgment interest, the defendant is unjustly enriched, while the plaintiff is only partially compensated.\textsuperscript{124}

Minnesota trial courts should analyze a prejudgment interest case on its individual factors and not on a rigid application of the common-law liquidated-unliquidated distinction that can result in unjust, partial recoveries.\textsuperscript{125}

\section*{III. Recent Developments in Other Jurisdictions}

\textit{A. Introduction}

Other jurisdictions have approached the issue of prejudgment interest without following the liquidated-unliquidated distinction. During the past decade, the trend toward allowing prejudgment interest was evidenced by three significant legislative and judicial developments.\textsuperscript{126} State legislatures have enacted statutes which require interest to be included in damages as a matter of law.\textsuperscript{127} Courts have moved toward a more lenient interpretation and application of prejudgment interest common-law rules and statutes.\textsuperscript{128} The New Jersey and Pennsylvania

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\textsuperscript{121} See Broward County v. Sattler, 400 So. 2d 1031, 1033 (Fla. Dist. Ct. App. 1981). See also C. McCormick, supra note 1, § 54, at 215 (dispute does not bar liquidated claim). \\
\textsuperscript{122} See supra note 1, § 3.5 at 165-66; C. McCormick, supra note 1, at §§ 56-57; 22 Am. Jur. 2d Damages §§ 181, 185, 189 (1965). \\
\textsuperscript{123} See supra note 111. \\
\textsuperscript{124} See supra notes 40-44 and accompanying text. \\
\textsuperscript{127} See generally Hare & Meelheim, supra note 9; Loggans, Aviation Litigation: The Case for Prejudgment Interest, 17 Trial, Jan. 1981, at 26. \\
supreme courts promulgated rules which award prejudgment interest in certain circumstances. Each of these developments will be examined briefly.

Ten states have enacted statutes that allow the award of prejudgment interest in contract and tort actions. At least two states award prejudgment interest as a matter of right. Two more states leave the issue of interest to the jury's discretion. The trend toward the enactment of prejudgment interest statutes coincides with progressive activity in the courts in awarding interest, which occurs frequently in torts and unliquidated contract actions. The Alaska case of State v. Phillips and the West Virginia case of Bond v. City of Huntington exemplify this current court activity.

B. Prejudgment Interest Awarded under a Statutory Analysis Approach

Alaska is one of the first jurisdictions to address the need for updating and renovating the narrow common-law rules regarding the award of prejudgment interest in tort actions. In 1965 the Alaska legislature amended the interest statute applicable to actions against the state.

9 Mich. App. 381, 398-400, 157 N.W.2d 445, 453-54 (1968) (where the Michigan Court of Appeals held that interest may be recovered as an element of damages whenever necessary to provide adequate compensation). The Bass and Banish opinions addressed the judicial/administrative issue of unnecessary delays that cost the plaintiff. The courts were concerned also with fully compensating the plaintiff for loss of use of his money or property. See Bass, 522 F. Supp. at 1354.

In Hawaii, the supreme court adopted a rule which allows prejudgment interest because there was no statute expressly forbidding prejudgment interest. See Lucas v. Leggitt & Myers Tobacco Co., 51 Hawaii 346, 350, 461 P.2d 140, 144 (1969).

In Iowa, the supreme court broadly interpreted the Iowa wrongful death statute to include prejudgment interest. See Wetz v. Thorpe, 215 N.W.2d 350, 358 (Iowa 1974). For an article on awarding prejudgment interest in the area of wrongful death actions, see Annot., 96 A.L.R.2d 1103 (1964).

129. See infra notes 190-223 and accompanying text.
130. See supra notes 18, 20.
132. See, CAL. CIV. CODE § 3288 (West 1970) (interest on noncontractual damages, discretion of the jury); N.Y. CIV. PRAC. LAW § 5000(a) (McKinney 1963).
133. See Hare & Meelheim, supra note 9, at 91-92 (supporting tort action).
135. 276 S.E.2d 539 (W. Va. 1981). Other cases might have been chosen as illustrative of recent developments in the area of awarding prejudgment interest. For example, an analysis of court rulings in Wisconsin or Iowa reaffirms the courts' more lenient interpretations and applications of the common-law prejudgment interest rules. See Wetz v. Thorpe, 215 N.W.2d 350 (Iowa 1974); Dahl v. Housing Auth., 54 Wis.2d 22, 194 N.W.2d 618 (1972) (citing Laycock v. Parker, 103 Wis. 161, 179, 79 N.W. 327, 332 (1899)).
136. See Act of Mar. 24, 1965, L. 30, § 2, 1965 Alaska Sess. Laws 16, 17. Before 1965, the "prevailing party in an action against the State of Alaska was entitled to interest only
The amendment allows interest to be awarded for periods prior to the date of the judgment. The legislature intended that prejudgment interest be awarded more liberally than prior judicial interpretations had allowed. The first major case to test the breadth of the Alaska legal rate of interest statute was State v. Phillips.

In Phillips, the Alaska Supreme Court did not follow the traditional liquidated-unliquidated distinction. Rather, the court found that the legal rate of interest statute expressly asserted that interest must be awarded from the date the cause of action accrued, which is when the damages are "due." The Alaska Supreme Court reasoned that granting prejudgment interest was a means of making the plaintiff whole and that "denying interest on unliquidated damages erroneously subordinates plaintiff's interest in full compensation to a feeling that defendant should not be penalized for failing promptly to pay an uncertain amount." The Phillips court also noted that "the award of prejudgment interest encourages early settlement and discourages defendants from using delay between injury and judgment to defeat a legitimate demand.

The strength of the Phillips decision lies in its interpretation of the legal rate of interest statute. The court held that prejudgment interest is not mandatory, and the trial court may use its discretion to deny prejudgment interest in a particular case. The court commented, "All damages then, whether liquidated or unliquidated, pecuniary or non-

from the date of judgment." State v. Phillips, 470 P.2d 266, 272 (Alaska 1970). The Phillips court analyzed the expansion of granting prejudgment interest in the area of contracts and torts when the amount became "due" under ALASKA STAT. § 09.50.280 (1973) which reads: "If judgment is rendered for the plaintiff, it shall be for the legal amount found due from the state with legal interest from the date it became due and without punitive damages." Id. This prejudgment interest statute does not delineate between a contract or tort action against the state, but only whether the damages awarded became "due" prior to the judgment being rendered. The Phillips court applied this statute in a wrongful death action against the state. See 470 P.2d at 272-73.

137. See ALASKA STAT. § 09.50.280 (1973).
139. 470 P.2d 266 (Alaska 1970).
140. See id. at 273.
141. 470 P.2d at 272. See also supra note 136. Under this statutory interpretation, the Phillips court awarded prejudgment interest in a wrongful death action from the date of the death because that is when the cause of action became "due." Id. at 272-73.
142. 470 P.2d at 274.
143. Id. at 273 n.27.
144. Id. at 274 n.27. The Phillips court quoted from the Harvard and Stanford law reviews. See id. at 273 n.27. The Phillips court also stated: "We are influenced by the policy consideration that failure to award prejudgment interest creates a substantial financial incentive for defendants to litigate even where liability is so clear and the jury award so predictable that they should settle." Id. at 274. See In re Air Crash Disaster Near Chicago, 480 F. Supp. 1280, 1286 (N.D. Ill. 1979), aff'd, 644 F.2d 633 (7th Cir. 1981).
145. 470 P.2d at 274.
pecuniary, should carry interest from the time the cause of action accrues, unless for some reason peculiar to an individual case such an award of interest would do an injustice.”

The Phillips decision is pivotal because the court allowed prejudgment interest on the rationale of just compensation and judicial expediency for swift resolution of lawsuits, rather than a rigid adherence to the traditional liquidated-unliquidated common-law distinction.

In 1973, the Alaska Supreme Court in *Davis v. Chism* examined the inclusion of prejudgment interest in an “offer of judgment” or a pre-trial settlement offer. The Chism court held that prejudgment interest is similar in nature to compensatory damages, and that when an offer of judgment contains only a single figure then “[that figure] would include all sums which the defendant believes will fairly compensate the plaintiff for all damages sustained, including the damage resulting from deprivation of the use of the money between the date of the cause of action accrued and the date of the offer.” After Chism, it is imperative in Alaska that a plaintiff calculate the amount of prejudgment interest he is entitled to prior to accepting the offer of judgment. If the plaintiff accepts a single lump sum as an offer of judgment, the court will assume that the plaintiff has included prejudgment interest in the total offer.

In *Guin v. Ha*, the Alaska Supreme Court followed the compensation rationale established in *Phillips* and *Chism*. The Guin court held that defendants in tort actions have the obligation to pay prejudgment inter-

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146. *Id.* (emphasis added).
147. *Id.* at 273.
149. *Id.* at 480-82. The Chism opinion is a rare instance of a court discussing the issue of whether prejudgment interest should be included in a pre-trial settlement.
150. *Id.* at 481. The Chism court commented on prejudgment interest being a form of compensatory damages:

The reason for awarding pre-judgment interest is that money is worth less the later it is received. Plaintiff is entitled to the amount to which he has been damaged by the defendant from the date his cause of action accrued. Thus it may be argued that plaintiff was entitled to the use of that amount from the same date, and the use of that money has real economic value, of which the plaintiff has been deprived. In this sense, pre-judgment interest is necessary to compensate the plaintiff, not only for the amount by which he has suffered damages in the usual sense but also for the loss of the use of the money to which he has been entitled.

*Id.*
151. *Id.*
152. *Id.* at 480-82. Plaintiffs should require defendants to divide the offer of judgment into separate parts, with the amount for prejudgment interest specifically delineated. For similar reasons, plaintiffs should require the use of the special verdict in jury trials. See *Sebring v. Colver*, 649 P.2d 932, 936 (Alaska 1982) (no prejudgment interest awarded where jury verdict incorporated damages for the financial impact of the passage of time).
154. *Id.* at 1286-87.
est from the date of injury.\textsuperscript{155}

In a recent prejudgment interest case, \textit{City of Juneau v. Commercial Union Insurance Co.},\textsuperscript{156} the Alaska Supreme Court reaffirmed the \textit{Phillips} rationale by holding that the purpose of the prejudgment interest is to place the plaintiff in the same position as if he had been immediately compensated for his loss.\textsuperscript{157} The \textit{City of Juneau} court held that prejudgment interest was not a remedial or procedural device.\textsuperscript{158} Rather, prejudgment interest is a substantive right of an injured party to recover for economic loss occasioned by his inability to use the award of damages between the injury and the judgment.\textsuperscript{159} This rationale is applicable to both contract and tort actions without regard to whether the damages are liquidated or unliquidated.\textsuperscript{160}

The national trend toward a more lenient application of the common-law prejudgment interest rules also can be seen in the recent West Virginia case of \textit{Bond v. City of Huntington}.\textsuperscript{161} As in \textit{Phillips}, the issue before the \textit{Bond} court was whether prejudgment interest could be awarded in a wrongful death action.\textsuperscript{162} To decide this issue, the \textit{Bond} court distinguished between allowing interest from the date of the verdict under the statutory law\textsuperscript{163} and the award of interest as a form of damages under the court's discretion in equity.\textsuperscript{164} The West Virginia Supreme Court also divided damages in a personal injury case into three separate categories: compensation for non-pecuniary loss (such as disfigurement, pain and suffering, and mental anguish), compensation for pecuniary loss (such as medical and hospital expenses), and compensation for loss of future pecuniary damages.\textsuperscript{165} The \textit{Bond} court held that "a rule permitting additional damages by way of compensatory interest on pecuniary losses incurred prior to trial in personal injury actions, as well as in wrongful death claims is consistent" with the West Virginia interest on the verdict statute.\textsuperscript{166} Interest awarded from date of the verdict is set by statute in West Virginia, whereas interest as compensatory damages is set

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\bibitem{155} Id. at 1284.
\bibitem{156} 598 P.2d 957 (Alaska 1979).
\bibitem{157} Id. at 959.
\bibitem{158} 598 P.2d at 959.
\bibitem{159} Id.
\bibitem{160} See \textit{Phillips}, 470 P.2d at 273-74.
\bibitem{161} 276 S.E.2d 539 (W. Va. 1981).
\bibitem{162} Id. at 546; accord Wetz v. Thorpe, 215 N.W.2d 350 (Iowa 1974) (wrongful death action).
\bibitem{163} 276 S.E.2d at 549.
\bibitem{164} See id. at 548-49.
\bibitem{165} See id. at 547-48. This division of personal injury damages is a common approach used to decide when to award or deny prejudgment interest. See D. DOBBS, supra note 1, § 3.5, at 165-67; C. MCCORMICK, supra note 1, at § 56; 22 AM. JUR. 2D Damages §§ 189-91 (1965). See also Lovell v. Marianna Fed. Sav. & Loan Ass'n, 267 Ark. 164, 167, 589 S.W.2d 577, 578 (1979) (adopting a similar division of personal injury damages).
\bibitem{166} 276 S.E.2d at 549.
\end{thebibliography}
by the court. With this distinction in mind, the Bond court ruled that prejudgment interest is a form of damages. The court did not allow prejudgment interest for future pecuniary losses, current non-pecuniary losses, or punitive damages. The Bond court concluded that where there is ascertainable pecuniary loss, the allowance of interest is to fully compensate the injured party for the loss of funds expended.

The Bond decision has special import for Minnesota because Minnesota has an interest on the verdict statute similar to West Virginia. The West Virginia Supreme Court was willing to expand the common-law prejudgment interest rules to encompass certain pecuniary losses incurred prior to trial as a form of additional damages.

C. Prejudgment Interest Awarded under a Calculation of Damages Approach

In re Air Crash Disaster Near Chicago is a pivotal case in the trend toward allowing prejudgment interest in tort actions. The Federal District Court for the Northern District of Illinois held that plaintiffs were entitled to prejudgment interest in a wrongful death action under California, Wisconsin, and Illinois law. The Air Crash court reasoned that the plaintiffs should be awarded prejudgment interest despite the presence of multiple defendants. Because large amounts of money were at issue, equitable considerations warranted the availability of prejudgment interest as an incentive for the defendants to pay plaintiffs promptly. The court was concerned also with the swift resolution of plaintiffs' lawsuit. The court based its decision on the Illinois wrongful death stat-
ute stating that prejudgment interest is "an essential element of 'fair and just compensation.'"178 The Air Crash decision is significant because the trial court overlooked precedent which disallowed prejudgment interest in tort actions. Instead, the court wanted to expedite settlements and speed the fair and just disposition of cases.179 The decision is also important for its persuasive argument that prejudgment interest should be awarded in personal injury tort actions under the compensatory theory of recovery.180

On appeal, the Seventh Circuit Court of Appeals found that the district court's reliance on other jurisdictions' interpretation of their wrongful death statutes based on a "fair and just compensation" approach was unfounded.181 The court of appeals ruled that the district court was limited to construing plaintiff's case in light of the Illinois wrongful death statute and Illinois case law, rather than examining California or Wisconsin law.182 The appellate court also held that the Illinois prejudgment interest statute allowing interest on money withheld by "unreasonably and vexatious delay" of payment was inapplicable as a basis for decision in this case.183 The only basis, therefore, for the district court to allow prejudgment interest was under the Illinois wrongful death statute.184 Plaintiff was unable to cite authority for the proposition that prejudgment interest should be awarded under the Illinois wrongful death statute.185 The appellate court, however, distinguished the only case applicable and allowed prejudgment interest as a measurement of compensatory damages in wrongful death actions under Illinois law.186

The result obtained by the appellate court is substantially the same as that of the district court. Even though the district court used the "fair

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178. *Id.* at 1286.
179. *Id.* at 1286-88.
180. *Id.* at 1285-86. The court noted that the defendants knew one of them was liable and that plaintiffs' losses were calculable. Given the large amounts due in damages, there was "a real incentive for the defendants to delay payment." *Id.* at 1285. The court concluded:

The losses suffered by the decedent's survivors arise at the moment of the decedent's death; the award of judgment in a subsequent wrongful death suit is merely an *ex post facto* determination of a preexisting obligation. Unless prejudgment interest is available, the survivors suffer the additional loss of the income from the damages they incurred on the date of death.

*Id.* at 1286 (citations omitted).
181. *In re* Air Crash Disaster Near Chicago, 644 F.2d 633, 637-38 (7th Cir. 1981).
182. See *id*.
183. *Id.* at 638.
184. *Id.* at 638-39.
185. *Id.* at 640.
186. See *id.* at 639-41.
and just compensation theory” and the appellate court adopted a calculation of pecuniary damages approach, the result reached under both analyses is identical.187 The appellate court conceded this point when it stated, “Prejudgment interest per se is not allowable [in Illinois] as a separate element of the wrongful death damages award, but use of interest is implicit in the calculation of the present value of the plaintiff’s pecuniary loss as of the date of trial.”188

In summarizing the impact of either Air Crash decision, it is significant that the courts were willing to adapt the wrongful death statute to meet the need for current application of the prejudgment interest rules which further just compensation and judicial efficiency at a time when federal courts are severely congested.189

D. Prejudgment Interest Awarded under a Court-Promulgated Rule Approach

Another approach to the revision of common-law rules on prejudgment interest is the enactment by state supreme courts of court-promulgated rules.190 New Jersey and Pennsylvania followed this approach and enacted prejudgment interest rules governing personal injury actions.191

In 1971, the New Jersey Supreme Court adopted a rule, pursuant to its rule-making powers, that the trial court must award prejudgment inter-

187. See infra note 180 and accompanying text. The district court’s rationale was criticized on appeal; however, the substance of the plaintiff’s argument for “fair and just compensation” was left intact by the appellate court.

188. 644 F.2d at 641. The appellate court noted:

We realize that the district court characterized the adjustment award as interest rather than an adjustment of the “present value at death” calculation. But it seems clear from the instructions themselves that full compensation was what was intended . . . . The so-called “prejudgment interest” is just an element of the formula for calculation of the compensatory damages.

Id. at 645-46. Apparently in a case like Air Crash, where the largest amount of damages sought are for compensation the appellate court’s fine distinction, between not allowing prejudgment interest outright but awarding compensatory damages and including interest from the date of the loss, will have little effect on the final result. As conceded by the appellate court, “In other words, the outcome here, after discounting to the date of death and adding prejudgment interest, is substantially the same outcome as if damages had been correctly computed by calculating present value at the date of trial.” Id. at 646. The appellate court’s decision changed the formula used and not the result; both the district and appellate courts awarded prejudgment interest to the plaintiffs.


This rule was challenged in *Busik v. Levine* as being a matter of substantive law and beyond the constitutional grant to the New Jersey Supreme Court of its power "to make rules governing . . . the practice and procedure" for New Jersey courts. Busik argued that the New Jersey Supreme Court "trespassed upon the legislative domain in adopting the rule, in breach of the principal of separation of powers . . . ." Although interest is generally of statutory origin in the United States, the contrary has been true in New Jersey. New Jersey has no statute dealing with interest on contracts, claims, or judgments. The *Busik* court emphasized that the controlling law on the award of prejudgment interest has always been court promulgated. For the New Jersey Supreme Court to enact a specific rule on the award of prejudgment interest in tort actions, therefore, was not unique.

The significance of the *Busik* decision is the court's reliance on equity and justice to dictate the award of prejudgment interest. Rather than following established common-law rules as in *Philips* and *Bond*, the *Busik* court stated:

> Interest is not punitive . . . ; here it is compensatory, to indemnify the claimant for the loss of what the moneys due him would presumably

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**Interest: Rate on Judgments; in Tort Actions**

(a) **Rate.** Judgments, awards and orders for the payment of money and taxed costs shall bear simple interest on the amount of the award at 12% per annum from the date of entry, except as otherwise ordered by the court and except as may be otherwise provided by law.

(b) **Tort Actions.** Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest at 12% per annum on the amount of the award from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

*Id.*


194. *Id.* at 355, 307 A.2d at 573.

195. *Id.*

196. *Id.* at 356, 307 A.2d at 573-74.

197. *Id.*

198. *Id.*

199. *Id.*

200. See *id.* at 357, 307 A.2d at 573-74.

201. The New Jersey Supreme Court held in *Busik* that the rule which authorized prejudgment interest in tort actions was appropriate in the consideration of injustice for litigants and to minimize problems of judicial management arising from delay if prejudgment interest is denied. See *id.* at 359-360, 307 A.2d at 575-76. The *Busik* court also held that the prejudgment interest rule sufficiently relates to "practice and procedure" and it was properly adopted pursuant to the New Jersey Supreme Court's rule-making powers. See *id.* at 361-68, 307 A.2d at 577-80.
have earned if payment had not been delayed. . . . [The limitation disallowing prejudgment interest] apparently rested upon the view that a defendant should not be deemed in default when the amount of his liability has not been adjudged. But interest is payable on a liquidated claim when liability itself is denied, even in good faith. [citation omitted]. The fact remains that in both situations the defendant has had the use, and the plaintiff has not, of moneys which the judgment finds was the damage plaintiff suffered. This is true whether the contested liability is for a liquidated or for an unliquidated sum. 

The Busik opinion emphasizes the weakness of the traditional liquidated-unliquidated rules and favors a more equitable resolution based on court-promulgated rules. The court was not willing to expand the concept of a "liquidated" sum to find a basis for an award of interest. Enactment of the prejudgment interest rule by the Busik court was an attempt to combat the special inducement for delay inherent without a prejudgment interest rule of some form.

Pennsylvania is the only other state to adopt a court-promulgated rule that allows the award of prejudgment interest in tort actions. In 1978 the Pennsylvania Supreme Court enacted a rule awarding prejudgment interest where the plaintiff receives a jury verdict in excess of 125% of the settlement offer made by the defendant prior to trial. The Pennsylvania Supreme Court upheld the constitutionality of the court-

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202. Id. at 358-59, 307 A.2d at 575.
203. See id. at 359, 397 A.2d at 575.
204. See id.
205. See id. at 359-60, 307 A.2d at 576. See also Laudenberger v. Port Auth., 496 Pa. 52, 64, 436 A.2d 147, 153 (1981) (court notes that prejudgment interest rule was enacted to combat the problem of delay), appeal dismissed sub nom. Bucheit v. Laudenberger, 102 S.Ct. 2002 (1982).
207. Id. at 56, 436 A.2d at 149. Rule 238 of the Pennsylvania Rules of Civil Procedure states:

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1836, P.L. 715, as amended, 5 P.S. § 30 et seq., or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. § 1301.101 et seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.

(c) Except as provided in subdivision (e), damages for delay shall be ad-
promulgated rule in *Laudenberger v. Port Authority.* The court based its rationale on the court's constitutional powers and public policy. The appellees in *Laudenberger* argued that the rule involved a substantive right which was beyond the procedural rule-making authority of the supreme court. The *Laudenberger* court analyzed the promulgated rule approach adopted by the New Jersey court for prejudgment interest and found "there is no substantive distinction between New Jersey and Pennsylvania with respect to the judicial procedural rule-making authority." Therefore, when the New Jersey rule was found constitutional as a procedural and not substantive rule, the *Laudenberger* court also found the Pennsylvania prejudgment interest rule constitutional. The appellees argued that the New Jersey case of *Busik* ded to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

(a) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.

(b) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

(c) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effective date, damages for delay shall be computed from the date plaintiff files the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

(d) This rule shall not apply to

(1) eminent domain proceedings
(2) pending actions in which damages for delay are allowable in the absence of this rule.

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210. See *id.* at 64, 436 A.2d at 153-54.

211. *Id.* at 64, 436 A.2d at 154.

212. See supra notes 192-205 and accompanying text.

213. See *Laudenburger*, at 63-67, 436 A.2d at 153-55. The *Laudenberger* court reasoned:

Nonetheless, one can always argue, and not unconvincingly, that Rule 238 creates a new substantive right to interest in the plaintiff based upon a secondary, derivative wrong perpetrated by the defendant in delaying settlement.

Undeniably, Rule 238 embodies both procedural and substantive elements. Its purpose and effect are procedural, yet its performance will touch upon substantive rights of both parties. However, the fact that a rule does involve the substantive rights of litigants should not mean that the rule is an inappropriate topic for Supreme Court rule-making. Most rules of procedure will eventually reverberate to the substantive rights and duties of those involved. . . . As we have stated previously, the legislature is forbidden to act in the field of procedure; we are bound to do so by the terms of authority. . . . Clearly, Rule 238,
v. Levine\textsuperscript{214} was inapplicable in Pennsylvania, because "historically, New Jersey's rules concerning interest upon obligations, claims and judgments have been judge-made. In Pennsylvania, on the other hand, interest on verdicts and judgments has always been governed by statute."\textsuperscript{215} The Laudenberger court dismissed this historical difference by pointing out that the Pennsylvania Supreme Court had also enacted court-promulgated rules in the area of attorney fees which has been traditionally statutory.\textsuperscript{216} The court reasoned that allowing prejudgment interest is "simply another step in a continuum aimed at furthering litigation in a meaningful way while protecting the rights of litigants."\textsuperscript{217}

The Laudenberger court distinguished the scope of the court-promulgated New Jersey prejudgment interest rule from that of the Pennsylvania rule.\textsuperscript{218} The Pennsylvania prejudgment interest rule encourages early disposition of tort litigation,\textsuperscript{219} whereas, under the New Jersey rule, "successful plaintiffs are compensated for delay whether they receive and reject any reasonable settlement offers or not. There is no impetus to the plaintiff to accept an early, yet reasonable settlement offer, since interest continues to run after the time the offer is made."\textsuperscript{220} The court continued:

\begin{quote}
[The Pennsylvania rule] clearly reflects a primary desire to encourage pre-trial settlement... Undeniably, this rule serves to compensate the plaintiff for the inability to utilize funds rightfully due him, but the basic aim of the rule is to alleviate delay in the disposition of cases, thereby lessening congestion in the courts... Rule 238 fulfills this Court's obligation to the legislature and to the public to effectuate prompt, expeditious trial and settlement of cases.\textsuperscript{221}
\end{quote}

The Laudenberger opinion illustrates the willingness of some courts to adopt prejudgment interest rules to promote pre-trial settlements and to

\begin{quote}
when viewed from the perspective of its purpose and goal, contributes to the orderly and efficient administration of justice in Pennsylvania, and must stand.
\end{quote}

\textit{Id.} at 66-67, 436 A.2d at 155.


\textsuperscript{215} Laudenberger, 496 Pa. at 64, 436 A.2d at 154.

\textsuperscript{216} See \textit{id.} at 65, 436 A.2d at 154.

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} See \textit{id.} at 59-60, 63-67, 436 A.2d at 151, 153-55.

\textsuperscript{219} \textit{Id.} at 59-60, 436 A.2d at 151. The Laudenberger court commented that:

The restrictions placed on the Pennsylvania rule encourage early disposition of tort litigation in a way that New Jersey's rule does not. In Pennsylvania, defendants may protect themselves from exposure to prejudgment interest by making a reasonable written settlement offer in a timely fashion. Should the plaintiff reject it and not recover an award 25% greater than the offer, the defendant is assessed interest only from the date on which the complaint is filed or one year from the accrual of the action, whichever is later, up to the date of the settlement offer. Thus, the format of Rule 238 is responsive to its fundamental goal of prompting meaningful negotiations in major cases so as to unclutter the courts.

\textit{Id.}

\textsuperscript{220} \textit{Id.}

\textsuperscript{221} \textit{Id.} at 59-61, 436 A.2d at 151-52.
fairly and fully compensate plaintiffs. Recently enacted statutes and court interpretations of the common-law rules on prejudgment interest show that the trend toward allowing prejudgment interest is based on theories of compensation and equity, rather than the common-law liquidated-unliquidated distinction. The Minnesota courts should adopt a multi-factor analysis to be utilized on a case-by-case basis. A suggested multi-factor approach follows.

IV. A PROPOSED MULTI-FACTOR ANALYSIS

A multi-factor analysis balances the many competing interests of plaintiffs, defendants, and the judicial system. Minnesota courts should not hesitate to adopt a case-by-case approach rather than the current rigid application of arbitrary rules. Prejudgment interest is a form of damages. It should not be affected by the underlying claim be it contract, tort, or property. Interest as a part of damages, whether it is awarded because of excessive delay, wrongful detention of a plaintiff's use of his money, as just compensation to restore the injured party to status quo, or as a remedy to deprive the defendant of unjust enrichment, should depend on the exercise of the trial court's discretion arising out of its equitable jurisdiction. This limitation would establish the rule in Minnesota that interest is available as a matter of right only under the date of the verdict statute. Prejudgment interest would be afforded only as a matter of the court's discretion under the court's equity jurisdiction on a case-by-case analysis.

Traditionally, the liquidated-unliquidated factor was the controlling factor used by Minnesota courts. Yet the liquidated-unliquidated factor is the most complex and confusing of all factors used to determine whether prejudgment interest should be awarded. The essence of the

222. See id. at 71-72, 436 A.2d at 157 (Roberts, J., dissent).
223. The Minnesota legislature should enact a prejudgment interest statute that awards interest from the date of the injury or the date the suit was commenced. See supra note 17. This would be the preferred way to revise and update the prejudgment interest rules in Minnesota.
224. For a discussion of interest as a part of damages being allowed not by application of arbitrary rules, but as a result of the justice of the individual case and a compensation to the injured party, see 22 AM. JUR. 2D Damages § 179, at 256-57 (1965).
225. See D. Dobbs, supra note 1, § 3.5, at 165-66 (general overview of numerous reasons for awarding and denying prejudgment interest).
226. See supra note 17.
227. See supra notes 25-125 and accompanying text.
228. See, e.g., D. Dobbs, supra note 1, at 165-66. Dobbs suggests an abandonment of the analysis awarding prejudgment interest based on liquidated or ascertainable claims. What remains when all the talk of liquidated and ascertainable claims is excised is a fairly rational collection of guidelines. (1) Would an award of interest duplicate any other elements already awarded? (2) Was there actually any loss by the plaintiff, and if not (3) was there any unjust gain by the defendant reasonably measurable in terms of interest? (4) Was there a contract between the parties on which the claim is based, and if so, does the nature of the contract indicate an

http://open.mitchellhamline.edu/wmlr/vol9/iss1/6
liquidated-unliquidated analysis as adopted by the Minnesota courts is whether the amount is ascertainable prior to the verdict. Courts have readily allowed prejudgment interest on tort claims for injury to property where the value of the property loss can be ascertained from concrete facts. An analysis based upon ascertainability, however, does not aid the court in its treatment of damages in tort for personal injuries because the pecuniary value of personal injury claims often cannot be readily ascertained. For the Minnesota courts to fully compensate plaintiffs and prevent unjust enrichment of defendants, the courts should expand their analysis to include multiple factors rather than following the inflexible liquidated-unliquidated approach.

Whether a Minnesota court should allow prejudgment interest should depend on several factors. These factors will be to encourage Minnesota courts to utilize a case-by-case, multi-factor analysis to balance the competing interests of the parties involved. The decision to allow or deny prejudgment interest should rest on whether the court allows or denies interest as a matter of right or discretion, whether the underlying claim sounds in contract or tort, whether interest should be allowed for “unreasonable and vexatious delay,” as well as for other, miscellaneous factors, rather than under the current liquidated-unliquidated approach adopted in Minnesota. It is within the court’s equitable discretion to analyze a prejudgment interest demand through any or all of these factors and to award prejudgment interest in a requisite case.

A. The Matter of Right Versus Discretion Factor

The characterization of interest as a matter of right or as a matter of discretion is a pivotal factor in whether the trial court allows or denies interest. In several jurisdictions, how interest is characterized is found in statutes or case precedent. Minnesota law is not clear on this matter. Minnesota law does allow by statute, however, that interest be calculated from the date of the verdict as a matter of right. This limitation implies that prejudgment interest can be awarded as a matter of intent to either charge or forego interest in the situation before the court? The answer to these questions would furnish a reasonable guide to the award of interest. Since courts have moved steadily toward more liberal grants of interest, and have increasingly departed from standards based upon liquidated of claims, it seems reasonably likely that some such set of guidelines, of approximately, if not exactly this order, will affect decisions—subject, of course, to local statutes.

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229. See, e.g., Polaris Indus. v. Plastics, Inc., 299 N.W. 2d 414 (Minn. 1980) (where the court distinguishes between liquidated and unliquidated items).


231. See supra notes 131-35 and accompanying text.

232. See supra notes 37-38 and accompanying text; see also supra notes 78-125 and accompanying text. one suggestion is to allow judicial discretion in the instance of delay by either party. See Comment, supra note 28, at 740.

233. See supra note 17.
right in all liquidated claims and as a matter of discretion in all unliquidated actions.\textsuperscript{234} Despite this inference, it is unclear when a Minnesota plaintiff with an unliquidated claim that is fixed and established by a readily ascertainable standard\textsuperscript{235} is entitled to prejudgment interest whether as a matter of right or discretion. Thus, until the Minnesota Supreme Court clarifies this uncertainty, a trial court should use the matter of right or discretion factor as only a preliminary factor.

\section*{B. The Tort-Contract Distinction Factor}

Prior to the liquidated-unliquidated approach, many courts decided whether prejudgment interest should be allowed by asking whether the action sounded in tort or contract.\textsuperscript{236} The answer to this question resulted in different outcomes. If the action sounded in tort, courts following the tort-contract distinction automatically denied prejudgment interest whether the claim was liquidated or unliquidated.\textsuperscript{237} If the action sounded in contract, the analysis turned on whether the amount was liquidated or unliquidated.\textsuperscript{238} If the amount was liquidated, prejudgment interest was awarded; if the amount was unliquidated, prejudgment interest was not awarded. The trend toward analyzing tort actions under the same rules as contract actions is summarized in \textit{Arizona Title Insurance & Trust Co. v. O'Malley Lumber Co.}.\textsuperscript{239}

We do not see in these cases [the older prejudgment interest cases], however, any essential distinction between \textit{contract} claims and \textit{tort} claims. Apart from the inherently unmeasurable damages to the per-

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\textsuperscript{235.} For a statement of the rule without comment as to whether interest is awarded as a matter of right or discretion, see Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169, 189 (8th Cir. 1971).

\textsuperscript{236.} See Lovell, v. Marianna Fed. Sav. & Loan Ass'n, 267 Ark. 164, 166-67, 589 S.W.2d 577, 578 (1979), where the court notes:

\begin{quote}
It does not appear that recovery of interest prior to judgment is dependent upon whether the claim is liquidated or whether it sounds in tort or contract. The test in prejudgment interest cases [in Arkansas] is whether there is a method of determination of the value of the property at the time of the injury. If such a method exists, prejudgment interest should be allowed. . . . Somewhere along the way a line of cases appeared holding that prejudgment interest was not allowed in tort actions. . . . we returned to the former rule which allowed prejudgment interest [where the compensation can be measured by market value or other definite standards].
\end{quote}

\textit{Id.} See also Banner Realty, Inc. v. Turek, 113 Ariz. 62, 645 P.2d 798 (1976) (court disregards the traditional distinction between tort and contract).

\textsuperscript{237.} See, e.g., 22 AM. JUR. 2D Damages § 189, at 267 n.16 (1965) (in North Dakota and West Virginia, the state legislatures have enacted statutes permitting interest to be awarded in certain tort actions.)

\textsuperscript{238.} See supra notes 236.

sonality mentioned in the earlier case [libel, slander and actions for damages for personal injuries], there is nothing to indicate that a tort claim cannot be a prejudgment interest bearing "liquidated" claim. . . . Turning to the general law, we find that there seems to be a cautious trend toward granting plaintiff in tort prejudgment interest on a liquidated claim . . . . In line with what appears to be the soundly conceived modern trend of authority, we hold that interest is awardable as a matter of right in the case of a liquidated tort claim.240

Minnesota has never followed the tort-contract distinction utilized in other jurisdictions.241 Even though the tort-contract distinction has generally been replaced with the liquidated-unliquidated approach, some courts still analyze whether to award or deny prejudgment interest under the tort-contract factor. If the tort-contract distinction arises in Minnesota, the court should find that this is only one factor in a multi-factor analysis.

C. The Unreasonable and Vexatious Delay Factor

Several courts allow prejudgment interest because without this judicial remedy defendants will take unfair advantage of the plaintiffs where the issue of liability is conceded. This factor was pivotal in the recent cases of In re Air Crash Disaster Near Chicago,242 Bond v. City of Huntington,243 Busik v. Levine,244 and Laudenberger v. Port Authority,245 as well as in a growing number of other courts.246 The courts reasoned that the defendants were merely attempting to prolong bona fide resolutions of the plaintiffs' lawsuits.247

Under the unreasonable and vexatious delay factor, a trial court awards prejudgment interest for defendant's delinquency. The theory

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240. Id. at 496, 484 P.2d at 649 (emphasis in original).
241. From the first case focusing on the conversion, detention and destruction of personal property, Minnesota has allowed prejudgment interest to be recovered on liquidated tort claims. See Murphy v. Sherman, 25 Minn. 196 (1878); see also supra notes 25-125 and accompanying text.
246. See, e.g., Mrowka v. Crouse Cartage Co., 296 N.W.2d 782, 784 (Iowa 1980) (there is merit to plaintiff's contention that a defendant may be unjustly enriched by deliberately withholding payment to which plaintiff is entitled); Marrazzo v. Scranton Nehi Bottling Co., 438 Pa. 72, 75, 263 A.2d 336, 338 (1970) (court notes that delay is a basis for allowing prejudgment interest).
247. See, e.g., The Home Ins. Co. v. Olmstead, 355 S. 2d 310, 314 (Miss. 1978) (court notes unreasonable delay); see generally C. McCORMICK, supra note 1, at § 57a (unreasonable delay noted as a reason for awarding prejudgment interest); Comment, Allowance of Interest, supra note 13, at 80 (notes that delay is a reason for awarding prejudgment interest).
for recovery is either a punitive or just compensation theory. The award of prejudgment interest under the delay factor is premised on the trial court’s equitable jurisdiction. A court under its equitable jurisdiction could deny prejudgment interest in a liquidated claim where the plaintiff was unfairly prolonging just resolution of the action. The delay issue in conjunction with prejudgment interest award has yet to arise before the Minnesota Supreme Court. Minnesota trial courts ought to take notice of this equitable remedy in light of the severe congestion of the courts.

D. Other Factors Courts Utilize to Award or Deny Prejudgment Interest

Other factors courts have examined are whether there exist multiple defendants in the lawsuit, whether the plaintiff kept an accurate accounting of the alleged damages, whether the jury verdict conforms substantially with the plaintiff's claim for damages, and whether the defendant holds plaintiff's money during a period of spiraling inflation.

E. A Proposal for the Minnesota Courts to Adopt

If the Minnesota court approaches the prejudgment interest issue from a multiple-factor analysis, the number of issues in a particular case may bear on whether the plaintiff should be awarded prejudgment interest. Because prejudgment interest is a remedial damages remedy and not a substantive element that plaintiffs rely on in making a contract or entering into an agreement, the fact that the defendant cannot predict exactly how much he might owe if the court finds him liable for damages should not be a controlling factor. Rather, the more equitable approach of a multi-factor analysis for awarding prejudgment interest should be utilized by the Minnesota courts. A trial court should analyze a claim for prejudgment interest under a multi-factor analysis in the following order of priority: first, whether the award of interest is a matter of right or a...
discretionary matter with the court; second, whether the underlying claim sounds in contract or tort; third, whether the plaintiff or defendant has unreasonably and vexatiously delayed resolution of the dispute; and finally, any other factor which the trial court in its equitable discretion thinks will lead to just compensation.

V. CONCLUSION

In recent years, due to the high interest rates\(^ {255} \) and large judgment awards\(^ {256} \) the award of prejudgment interest is of growing concern for attorneys.\(^ {257} \) Prejudgment interest can be a substantial portion of the total judgment\(^ {258} \) and an effective mechanism for the court to use to pressure parties to shorten the discovery process or to settle cases. The number and length of lawsuits are reduced by a prejudgment interest "penalty" which increases as time passes.\(^ {259} \) Thus, prejudgment interest

\(^{255}\) See Goodwin v. Upper Crust of Wyoming, Inc., 624 P.2d 1192, 1198 (Wyo. 1981) where the court comments:

Appellees were entitled to the use of the money they were to receive under the agreement from the date it became due. The use of money has real economic value, particularly in the current economy of inflation and high interest rates of which we take judicial notice. Appellees were deprived of that benefit. Prejudgment interest should have been awarded as an attempt to compensate for that loss.

\(^{256}\) See, e.g., In re Air Crash Disaster Near Chicago, 480 F. Supp. 1280, 1285 (N.D. Ill. 1979), aff'd 644 F.2d 633 (7th Cir. 1981) (estimated between $115-500 million); Mayer v. Braniff Airways, Inc., 310 F. Supp. 149 (N.D. Ill. 1970) (2.5 million dollars deposited with the court); see generally Million Dollar Verdicts on the Upswing, 37 BENCH & B. OF MINN., May-June, 1981, at 44 (from 1970 to the present, over 380 verdicts have been rendered for over one million dollars).

\(^{257}\) See Hare & Meelheim, supra note 9; Comment, supra note 2.

\(^{258}\) For a case that shows the considerable extent that prejudgment interest may have on the final amount awarded the plaintiff, see Beech Aircraft Corp. v. Harvey, 558 P.2d 879, 878-88 (Alaska 1976) (court upheld prejudgment interest award of $604,000 where defendant had use of the plaintiff's money for 7-1/2 years, regardless of whose fault it was for the delay); see also Axler v. E.R. Squibb & Sons, Inc., No. 2888 (March, 1982, Phil. Ct. C.P.) (jury returned verdict of $1,750,000 to which $500,000 was added under Pennsylvania's procedural rule for prejudgment penalty for failure to make a reasonable settlement offer); Foley v. Clark Equip. Co., No. 5817 (Nov., 1981, Phil. Ct. C.P.) (jury award of $15 million in compensatory damages and $3,008,218.80 under the Pennsylvania Rule 238 as to delay damages).

deters parties from excessive delays. 260

If the Minnesota legislature and courts are reluctant to address the need for revision of interest from the date of the verdict statute and the strict construction of the prejudgment interest rules in Minnesota, then not only will injured parties continue to be under-compensated 261 but parties can excessively delay the just resolution of lawsuits with little fear of reprisal. 262

260. For articles on delay of judicial cases, O'Neill, How to Force Faster Litigation, 18 Judges J. 6 (1979); see Rosenberg & Sovern, Delay and Dynamics of Personal Injury Litigation, 59 Colum. L. Rev. 1115 (1959); Thompson, How to Get the Case Flow Moving, 18 Judges J. 12 (1979).

261. See Hare & Meelheim, supra note 9 (prejudgment interest is necessary to fully compensate plaintiffs).

262. See Minn. R. Civ. P. 68.02 bars costs and disbursements to the plaintiff if he rejects a sufficient offer of payment of the claim made by the defendant. There is no comparable rule to penalize the defendant who frivolously delays a legitimate settlement.