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A Primer on Judgment and Pre-Judgment Interest in Arkansas

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Who shall dwell on thy holy hill?
. . . he who does not put out his money as interest.

—Psalm 15: 1, 5

I don't believe in principle,
But oh I du in interest.

—Epodes (c. 29 B.C.) st. 9

Interest is the compensation fixed by the parties or allowed by the law for the use or detention of money.[1]

Interest may be prohibited, or regulated, by the Constitution or statutes. Within such boundaries, the parties are free to contract. The rationale behind a judicial award of interest is obvious: an individual who has had the use of another's money should be obligated to pay interest from the time it lawfully should have been paid.[2] The initial difficulty, obviously, is in deciding when interest should lawfully have been paid. Interest is divided into two categories: interest awarded for the period prior to the date of judgment and interest awarded from the date of judgment to the date of satisfaction. The latter is little-disputed and rarely litigated; the former has presented numerous and conflicting rules.

A decade ago the Arkansas Supreme Court admitted the inconsistencies that had developed in the area of pre-judgment interest and purported to adopt a new standard. In *Lovell v. Marianna Federal Savings and Loan Association*,[3] the court adopted the rule that pre-judgment interest should be awarded when the damages were ascertainable at the time of the injury. If the damages were immediately ascertainable, with reasonable certainty, at the time of the injury, the trial court must as a matter of law award pre-judgment interest. Depending upon the size of the judgment and the time prior to judgment, such interest may obviously amount to a sizable sum. But despite a decade of case law, not all the questions concerning interest in Arkansas have been answered.[4] This note is intended to review the status of interest in Arkansas and point practitioners and the courts to the next decade of litigation.

A. The Prior Law on Pre-judgment Interest

The approach of the common law was to distinguish between liquidated and unliquidated demands. Pre-judgment interest was not recoverable on unliquidated demands. A party was under no obligation to pay interest on a sum that was disputed as to both liability and amount.

A century ago the Arkansas Supreme Court rejected this rule.[5] The plaintiff, having lost the use of his property or money from the time of the injury, should be entitled to recover interest as sub-

stitutionary compensation for that loss. The elimination of the common law rule became firmly established in Arkansas case law. For example, interest was allowed on the market value of animals from the date of the killing[6] and on damage to a growing cotton crop caused by negligent application of chemicals.[7] In the latter case the interest was calculated from the date of the spraying, even though the jury's verdict was less than one-third of the sum sought. The rationale was that the compensation for the damage to property could be measured by market value or some other definite standard, even though a jury was required to determine the precise amount.

Further the courts did not require that the party seeking interest be able in every instance to establish before the trial the exact amount of liability.[8] In contract actions pre-judgment interest was frequently, indeed almost automatically, awarded. One guideline was whether the complaint sought sums certain.[9] If so, pre-judgment interest was available, even though the jury did not award the specific sums requested. For example, the Supreme Court affirmed an award of pre-judgment interest on modifications on a construction contract, finding that the claims were "capable of ascertainment with a reasonable degree of certainty." Interest from the date of contract completion was awarded to compensate the plaintiff for the monies wrongfully detained.[10]

In quantum meruit actions, despite some authority that pre-judgment interest was not available,[11] the courts generally awarded interest. For example, when the contract did not provide for a specific sum, but instead called for services to be provided, the plaintiff was held entitled to recover on a quantum meruit basis the reasonable value of those services, with interest from the date the services were completed and payment was due.[12] On the other hand, in an action for the reasonable value of an attorney's services, the plaintiff was entitled to interest, even though the recovery was less than the demand, but only from the time he made his demand for payment.[13]

Early authority held that pre-judgment interest did not depend on whether the action is in contract or tort.[14] Following that authority Arkansas courts awarded pre-judgment interest in a variety of tort cases: the killing of a horse,[15] destruction of crops by flood or chemicals,[16] conversion,[17] and wrongful detention of money.[18] But then the tort-contract distinction was adopted in a series of cases by an insured party against an insurer for negligently failing to settle. Although involving statutory authority, the court characterized them as tort actions and curtly refused to allow pre-judgment interest.[19] Likewise, despite earlier precedent and despite the liquidated nature of the plaintiff's loss, the court denied pre-judgment interest in a legal malpractice case, finding the action was based in tort.[20]

B. The Current Law

The facts of *Lovell v. Marianna Federal Savings and Loan Association* were simple, perhaps even too simple for the court to adopt a new rule. Mr. Lovell deposited $36,000 with Marianna Federal Savings and Loan in a joint account with his wife. Subsequently, during a marital dispute with his wife (from whom he had been twice divorced and to whom he had been thrice married), he instructed Marianna Federal to change the account and substitute his son for his wife on the joint account. Upon his death, Marianna Federal commenced an interpleader action, naming the wife and the son as the defendant-claimants. The court found that the wife was entitled to the funds, because the attempt to alter the account was ineffective. However, the son asserted a claim in the alternative, alleging negligence by the savings and loan association in failing to carry out the express intentions of Mr. Lovell. The Supreme Court agreed and held Marianna Federal Savings and Loan liable.[21]

The next question was whether Marianna Federal was liable for interest from the time of the attempted transfer.[22] The trial court denied interest on the funds to be paid to the son.[23] In discussing the briefs filed before it, the Arkansas Supreme Court commented on the earlier Arkansas cases cited: "We cannot say either the court or counsel misunderstand or misquote the law or cases. We must admit the error of the cases on this subject. They are simply irreconcilable and we must decide which rule to follow in this case and in the future."[24] Rejecting the line of cases that predicated the availability of pre-judgment interest on the nature of the cause of action, whether tort or contract, the court emphasized the test of "whether there is a method of determination of the value of the property at the time of the injury."[25] And again, "if the damages are not by their nature capable of exact determination, both in time and amount, pre-judgment interest is not an item of recovery."[26] Given that standard, the decision was easy: on the

day Marianna Federal refused to turn the funds over to the son, the funds had an "exact determination, both as to time and amount." Pre-judgment interest was awarded from that day.

In a subsequent case, the Court clarified *Lovell* by indicating that what had to be ascertainable was "the initial measure of damages."[27] This initial measure is to be distinguished from the precise amount that the plaintiff would claim in his complaint, and further to be distinguished from the amount that the fact finder would ultimately award. But that clarifying opinion did not deviate at all from the requirement of the damages being "determinable immediately after the loss." But the Court has, in another instance, used perhaps somewhat stricter language by stating that the test for pre-judgment interest is "whether a method exists for fixing an exact value on the cause of action at the time of the occurrence of the event which gives rise to the cause of action."[28]

C. In What Situations Is Pre-Judgment Interest Available?

The justification for pre-judgment interest is obvious. An injured party was entitled to have the use of his money (or property) from a particular day. Deprived of that use, he has suffered a loss. Since specific relief in the form of restitution is not available, only substitutionary relief in the form of interest can be granted. Since the *Lovell* decision, the Arkansas courts have awarded pre-judgment interest in a variety of situations: the refund of payments made on a land contract;[29] breach of contract for a real estate commission;[30] lost profits resulting from the breach of a fiduciary duty;[31] unwritten contracts for landscape work,[32] surveying services,[33] and land clearing;[34] an open account for bowling equipment;[35] a bank's letter of credit;[36] an implied contract for contribution;[37] and property damage to an automobile.[38] In each case the court concluded that the amount of the loss could be determined at the time of the loss.

The requirement that the damage be ascertainable at the time of injury is illustrated by a comparison of two cases involving crop damages. In *Dickerson Construction Co. v. Dozier*,[39] a pre-*Lovell* case, "knee-high" soybeans were destroyed by a heavy rain within a forty-eight hour period. Because a value could be placed on the soybeans and because the time of the loss was determinable, pre-judgment interest was appropriate. In contrast, in *Berkeley Pump Co. v. Reed-Joseph Land Co.*,[40] irrigation pumps were defective and their inadequacies caused damage to rice crops. With evidence comparing crops on adjacent tracts, the owners were able to demonstrate with reasonable certainty the amount of the loss. However, because the loss occurred over an entire growing season, the time of the loss was not capable of exact determination and pre-judgment interest was not awarded. That case demonstrates the shortcoming of the *Lovell* requirement. Certainly at the end of the growing season, the damages were also determinable. Pre-judgment interest should logically commence at that point, rather than be denied entirely.

Another recent case further illustrates the approach taken and its limitation. In an action by a homeowner against his insurance company for failure to pay on the policy covering the destruction of the house by fire, the jury awarded $90,000 for the value of the house, $45,000 for the value of the contents and $1,000 in additional living expenses under the homeowners' insurance policy. The court awarded pre-judgment interest on the award for the house and its contents, for these sums were readily calculable.[41] On the other hand, the additional living expenses were not capable of determination at the time of the fire, and pre-judgment interest was not appropriate.

To the outsider, while the value of a house may have an ascertainable market value, the contents of the house (used clothes, furniture, appliances) do not. Actually, given the available markets, (commodity markets or Saturday morning garage sales), the damages to a soybean crop may be much more ascertainable than used household contents, especially when tested against the *Lovell* requirement of "exact determination."

Despite the language of *Lovell*, recent cases have sometimes referred back to the underlying cause of action as the basis to decide whether pre-judgment interest should be awarded. In *Prudential Ins. Co. v. Stratton*,[42] the Court of Appeals remanded for a new trial a complaint by a logging contractor who had not finished clearing the land. The court stated that if the jury's finding when manifested in a special verdict gave the contractor the contract price minus the saving from not completing the contract, pre-judgment interest should be awarded. But if the contractor was not found to have substantially performed, the contractor could recover only on a quantum meruit basis for his time and labor, based on the benefit conferred on the landowner. In that

instance, pre-judgment interest would not be appropriate. In support of that proposition the court cited a pre-*Lovell* case disallowing interest in a quantum meruit action.[43] *Lovell* and its progeny do not make the legal theory controlling. The issue is whether the amount was determinable at the time of the loss. Regardless of whether the theory is substantial performance of the contract or quantum meruit, the exact amount due to the plaintiff was not known on the day the plaintiff stopped work. One theory requires that the savings be determined and deducted; the other requires that the time and labor of the plaintiff be determined, and the benefit to the defendant be calculated. Pre-judgment interest should be awarded or denied in both instances. The question should be whether, at the time the plaintiff stopped work, the "initial measure of damages" could have been determined, even if the precise amount could not be determined until after trial.

Another approach to this case would have been to avoid any discussion of pre-judgment interest. The law of contracts provides that in the case of a contract for service, payment is due within a reasonable time after completion of the services. Upon the debtor's failure to make that payment, the supplier of services may then begin to charge interest, even if not previously agreed to or discussed.[44] Although interest would commence at a later date, its availability would not be suspect.

A further aspect on the issue of when pre-judgment interest is available is presented by personal injury cases. Pre-judgment interest in personal injury cases has been rejected, virtually uniformly. Such actions involve damages that are unliquidated at the commencement of the action, unascertainable at the time of the injury, and tortious in nature. Earlier Arkansas case law contains language rejecting such pre-judgment interest.[45] On the other hand, the court had expressly affirmed pre-judgment interest in wrongful death cases.[46]

The court in *Lovell*, in dicta, adopted the restrictive approach to pre-judgment interest in personal injury cases. Without reference to the prior cases, the court emphasized that the amount of money damages cannot be measured at the time of the injury. Since the damages are not capable of exact determination, pre-judgment interest is not an element of recovery. Subsequently the court, while awarding pre-judgment interest on property damages to a vehicle, commented that "in most personal injury cases the amount of money damages is not measurable until some future time."[47] The court in that case further added the requirement that, for an award of pre-judgment interest, the "initial measure of damages" must be determinable immediately after the injury.

But suppose an injured plaintiff incurs the loss of wages, medical expenses, and out-of-pocket expenses. While perhaps not ascertainable at the time of the injury, these damages are known at the time actually lost or incurred. By establishing the amount and time of the ascertainable damages, counsel can argue that pre-judgment interest should be allowed to provide full compensation for the injured party. A court that previously approved interest on damage awards from the instant of death should at least allow interest on ascertainable amounts when incurred. A more appropriate and fairer rule would be to authorize interest from the time of actual loss, even if unascertainable at the time of injury.

Another distinction that logically could be drawn is whether the injured party has suffered an actual loss. A victim who has medical bills but does not pay them has not suffered any loss beyond the bill itself. A victim who receives and pays the bills out of his pocket has lost the use of his funds while awaiting reimbursement from the tort-feasor.

The Arkansas statutes provide that if an insured is compelled to sue his insurance company on a policy that the company refuses to honor, the successful plaintiff is entitled as well to a 12% statutory penalty and reasonable attorney's fee.[48] In addition, the insured is entitled to pre-judgment interest on the award under the policy.[49] At first glance such a decision appears to be double recovery in that the insured receives 12% statutory interest and 6% pre-judgment interest. However, the awards accomplish different objectives: namely a statutory penalty to punish this insurer and encourage others to pay in a timely fashion, and compensation for the delay in payment.[50] This difference is further pointed out because the statutory penalty commences when the judge adds the penalty to the verdict amount; whereas the pre-judgment interest commences from the filing of the proof of loss claim. Even if the insured is not entitled to the 12% because the jury did not award the full amount in the complaint, the insured may still qualify for pre-judgment interest because the insurance company has deprived him of the use of his funds.[51]

Unlike the requirement for statutory penalty interest in the insurance statute, the controlling fac-

tor for pre-judgment interest is not whether the plaintiff receives the exact sum sought in the complaint. If a sum certain is sought and a lesser amount awarded, pre-judgment interest is still appropriate.[52] In *Brown v. Summerlin Associates, Inc.*,[53] a surveyor claimed over $16,000 for the value of his services, but the court awarded only $11,000 on a quantum meruit basis. Pre-judgment interest was appropriate, although the opinion does not clarify whether the interest was from the time the bill was submitted. It is unclear how the damages were "ascertainable as to amount and time." If this case satisfies the test by having "the initial measure of damages" known, most cases certainly will. The court determined that at some prior point, the defendant knew how much was to be paid and when it was to be paid. Thus pre-judgment interest was appropriate.

A different situation is presented by the occurrence of an undisputed wrong, but with the amount of damages uncertain. At some subsequent point, prior to judgment and perhaps prior to litigation, the exact amount does become known with a reasonable degree of certainty. The rationale behind pre-judgment interest suggests that it begin at that point. However, the language in *Wooten* indicated that the "initial measure of damages" must be determinable immediately after the loss. For example, in *City of Moro v. Cline-Frazier*,[54] the defendant defectively designed a sewer system. Although the defects were capable of exact determination by engineering principles at the time of completion, the court denied pre-judgment interest because at the time any defects were not only immediately ascertainable, but were indeed entirely speculative.

Occasionally defendants have argued that pre-judgment interest should not be awarded because, even though the amount of the loss and the time of the loss were certain, a trial was essential to determine whether they were liable, and that they therefore never knew whether they had an obligation to pay. It is not essential that ultimate liability be established at the time of the injury. The test is whether the damages were essentially liquidated at the time of the injury.[55] The homeowner who objected to the bill from the landscape developer was willing to pay a portion of it, but the court's award of pre-judgment interest covered both the disputed and undisputed portions.[56]

Pre-judgment interest does not need to be specifically sought in the pleadings. A prayer for general relief is sufficient.[57] In the instance of a verdict that covers both property damage and personal injuries, an award of pre-judgment interest is inappropriate.[58] A special verdict must clarify what portion of the award is for property damages, and pre-judgment interest can then be added to that portion.

An award of compensatory damages measured by interest is to be distinguished from pre-judgment interest. For example, in *Taylor v. Green Memorial Baptist Church*,[59] the contractor was several months late in finishing remodeling and expanding a church. The jury awarded damages for breach of contract, along with a specific award of $2,500 for the interest damages the church incurred by reason of the delay. The evidence demonstrated that the construction delays had postponed the shift from construction financing to permanent financing and thus had resulted in financial losses. Unlike pre-judgment interest, the award was made by the jury; the damages were not limited to 6%; and the plaintiff had no right to an award.

It is certainly conceivable that on top of interest damages could come pre-judgment interest. For example, the jury could have found that the church was to be finished August 1, but was not completed until January 4. The $2,500 represents the losses caused by that four months' delay. Pre-judgment interest would reflect the further losses suffered by the contractor's failure to make that award of interest payment on January 4, when the amount was established.

D. What Is the Rate for Pre-Judgment Interest?

The *Lovell* opinion created similar difficulties in setting forth the standards for the rate of pre-judgment interest. The opinion stated that the rate of pre-judgment interest should be "the rate of interest . . . currently in use by those lending money." Presumably, this rate would be limited by the Arkansas constitutional limit,[60] though arguably, if characterized as damages in the nature of interest, the constitutional limit could be avoided. The opinion was unclear as to whether "currently" means at the time of the injury, at the time of commencement of the action, or at the time of judgment. It was unclear whether "those lending money" means banks, savings and loan associations, or other financial institutions. It was unclear as to the nature of proof required to establish the current rate of interest. If the purpose of pre-judgment interest is to

compensate the victim for the loss of the use of his money, it is essential to ask what could the victim have reasonably earned at the time of the loss. On the other hand, though it may lack a neat theoretical basis, the selection of the lending rate has a significant practical aspect, in that the lending rate will be higher than the savings rate, and thus the award to the victim higher.

However, despite the language about the rate at which money is borrowed and lent, and despite the policy reasons for interest, the *Lovell* court awarded 6% interest, "as required by Article 19, Section 13 of the Arkansas Constitution." But the problem is that provision does not apply. That usury provision sets forth the maximum interest rate to which parties can contract. It provides that in the absence of an agreement by the parties, the court shall grant six percent. The Constitutional provisions do not apply to judgment interest or pre-judgment interest.

This initial confusing reference to the Arkansas Constitution has been followed. The court has uniformly awarded 6% pre-judgment interest in contract disputes. For example, in *Wilson v. Lester Hurst Nursery, Inc.*,[61] a landscape contractor was awarded judgment for the work done, plus interest of 6% because the obligation was contractual and there was no agreed rate of interest. That court's strict adherence to 6% pre-judgment interest had continued in other cases.[62] When a trial court did award more than 6% pre-judgment interest, the appellate court relying on precedent quickly reversed.[63]

While the Constitution does give some guidance in cases involving contracts, it gives no guidance in tort cases. But the court, without constitutional or statutory compulsion, has there set pre-judgment interest at 6%.[64] Such an arbitrary rule ignores the language of *Lovell* as to the "rate for lending money" and further ignores the reasons for pre-judgment interest in the first place. Indeed even to focus upon whether there is a contract or tort claim undermines *Lovell*, which asks whether the loss was ascertainable at the time.

On the other hand, the court has referred to the failure of the legislature to set a rate for pre-judgment interest, thus by default leaving it at 6%.[65] Perhaps the rate for pre-judgment interest is not locked into the granite of the Arkansas Constitution after all. Recent attempts to enact legislation have not been successful.[66]

The court in *Lovell* and *Wooten* emphasized that the interest is the compensation for the loss of use of money and the rate should be that rate which is currently in use by those lending money. However, with the one exception of highway condemnation,[67] the courts have not taken testimony and entered a judgment based upon what the plaintiffs have lost. Instead they have simply awarded 6% as the price set by the Constitution for the use of money. It makes little sense to apply that artificial figure to pre-judgment interest for *tort* claims, as in *Wooten*. It makes some sense to apply that constitutional limit of 6% to contract claims, as in *Lester Hurst Nursery*. But doing so still does not assure the plaintiff recovery for what he has lost.

This shortcoming is further emphasized if the court examines what the defendant may have gained. For example, in *Toney v. Haskins*,[68] the plaintiff was entitled to pre-judgment interest on the secret profits that his agent had withheld for himself in violation of his fiduciary duty to the principal. The profits had an exact value, based on the selling price per acre, on the date of the real estate closing, and the plaintiff was wrongfully deprived of the use of those funds from that date.

Suppose the agent had taken those funds and invested them at 11% interest. It would be foolish in that instance to limit the plaintiff to the 6% pre-judgment interest or even the 8% that the plaintiff might have earned. Instead, relying on principles of unjust enrichment and tracing, the agent should be compelled to disgorge his earnings. If necessary, such an order could be enforced through the constructive trust mechanism of equity.

The plaintiff is further short-changed because the case law limits him to 6% simple interest, not compounded in any way.[69] If the plaintiff had not been deprived of the use of the money and had invested it himself, some compounding, even if only on an annual basis, seems certain.

E. When Does Pre-Judgment Interest Begin?

The pre-*Lovell* cases conflicted on the beginning point for pre-judgment interest. For example, the court allowed pre-judgment interest on modification of a construction contract from the date of contract completion.[70] But in another construction contract, the court permitted an award of pre-

judgment interest, but commenced the running of the interest from the date of filing the complaint, rather than the completion of the contract, without clearly indicating a reason for the different commencement date.[71] In both instances the appellate court affirmed the trial court on this point.

In another pre-*Lovell* case, the court required interest on the damage caused to a cotton crop from the date of the application of the chemicals.[72] But in contrast, the court permitted pre-judgment interest on delinquent child support payments only from the date of the commencement of the action for support payments.[73] Allowing interest on the delinquent child support payments only from the date of the commencement of the action seems unduly restrictive in comparison to other awards. The amount of child support payments was known by the defendant from the outset; the value of growing cotton was not and could not have been.

Similarly, in an action upon an open account the court in dicta would have authorized interest from the date of the filing of the complaint to the date of judgment.[74] But in a quantum meruit action for the reasonable value of an attorney's services, the plaintiff was entitled to interest from the time he made his demand for payment.[75]

The *Lovell* case does not assist in determining whether the interest is to commence at the time of injury, the time of loss, or the time of litigation. The court there allowed interest from the date of demand for the certificates of deposit.[76] The specific test announced was an ascertainable value at the time of the injury, suggesting that if the value could be so determined, pre-judgment interest would commence from the time of the injury. But if the ascertainable value can be determined only after the injury, but prior to litigation, can pre-judgment interest commence from the date of an ascertainable value, regardless of when it is? Logic and fairness compel an affirmative answer.

The issue of when pre-judgment interest commences is confusing. For example, in an action by a broker for a real estate commission, the court awarded pre-judgment interest from the date the complaint was filed. Certainly the amount of the commission would be determined at the time of the closing. Further it was the real estate closing that was the event that gave rise to the cause of action. From the time of the closing the broker lost her commission and the use of that commission.[77] In a similar decision, a materialman on enforcing his lien was entitled to pre-judgment interest from the time the complaint was filed.[78] From a policy perspective, a rule based on the filing of a complaint may be undesirable. It may serve primarily to hasten the race to the courthouse.

Although *Lovell* speaks of the time of the loss as the appropriate time to determine the value of the property, other decisions have refined that by focusing on the time the amount should have been paid. For example, the landscape developer was awarded pre-judgment interest from the date his bill was submitted, not from the date the work was completed (for even he had not set a price then), and not from the date his complaint was filed.[79] Such an approach is more logical and more consistent with the objectives of *Lovell*.

Subsequently, the court awarded interest in a quantum meruit case from the time it determined the amount due should have been paid.[80] The language suggests some flexibility in the determination of the date and the commencement of pre-judgment interest. The court also awarded pre-judgment interest on property damage to a vehicle from the date of the accident[81] and on the secret profits arising from an agent's breach of his fiduciary duty from the date of the closing of the transaction.[82]

As a general rule, interest on an improperly disallowed insurance claim accrues as a matter of law from the date the amount due should have been paid under the policy.[83] When the policy prohibits the bringing of a lawsuit until 60 days after proof of loss has been furnished, interest commences after the passage of this reasonable time for payment,[84] not at the time of the fire itself, not the time the insurer is aware of and notified of the claim.[85] The rationale is that the insurance company should have time to evaluate the claim and decide whether it is appropriate and necessary for the insurer to pay. In effect the court has recognized the insurance policy, the statute and the mandatory proof of claim form as a modification of *Lovell*. Any defendant would like to pay pre-judgment interest, not from the date of the loss, but from a date 60 days after the plaintiff files a proof of loss.[86] But only the defendant insurance company can claim that advantage. That advantage may be unjustified. Even in insurance cases, if the common law permits pre-judgment interest, it should commence at the time of the loss. The rationale for the beginning point for pre-judgment interest comes from a case involving

the 12% statutory penalty, which has the policy objective of punishment, not compensation.

F. Who Decides Whether to Award Pre-Judgment Interest?

Unless authorized by statute or express judicial decision, pre-judgment interest was traditionally not allowed as a matter of right or law.[87] Earlier case law suggested that pre-judgment interest rested within the discretion of the jury.[88] The court approved a jury instruction authorizing the jury to include pre-judgment interest in its calculation of damages.[89] When pre-judgment interest was not allowed, the court had in some instances permitted the jury to consider the delay in compensating the plaintiff as an element of the damages.[90] On the other hand, the court affirmed the action of a trial judge in adding interest to a verdict when the jury had not done so.[91]

The language of *Lovell* and its progeny indicates that discretion has been reduced, if not removed: "Where pre-judgment interest is collectible at all, the injured party is always entitled to it as a matter of law. Nothing is left for the jury's consideration."[92]

An award of pre-judgment interest is a question of law, to be decided without a jury.[93] Pre-judgment interest may be added in a post-judgment motion.[94] The appellate courts have reversed trial courts for failing to award pre-judgment interest.[95] The basis for, and calculation of, pre-judgment interest must be demonstrable. A trial court judgment that included a large amount for pre-judgment interest without any showing as to the rate of interest applied, the period of time, or the principal amount was remanded for clarification and modification.[96]

On the other hand, the trial court must determine whether the damages were sufficiently ascertainable as to amount and time so as to permit pre-judgment interest.[97] Likewise, in an action involving judgments on both a complaint and counterclaim, the trial judge may have some discretion in determining whether to award pre-judgment interest on the net difference between the judgment or on the entire claim.[98] Pre-judgment interest may be available on one claim and not the other, or if available on both, the interest may commence at different times.

Other factors may militate against the award of pre-judgment interest. If the equivalent of pre-judgment interest has been awarded to or made available to the successful party, an additional sum for interest is unlikely. For example the Court of Appeals, in permitting rescission of a real estate contract, refused to award pre-judgment interest on the amount that the buyer had paid, finding that the buyer could have been in possession of the land during the dispute.[99] Likewise, courts have been reluctant to award pre-judgment interests when punitive damages are, and justly so, also awarded. A windfall is acceptable, but a double windfall is not.

Further, when the action is equitable in nature, the chancellor may have some additional discretion. Isolated pre-*Lovell* authority suggests the court of equity has discretion to allow or refuse interest.[100] The cases following *Lovell* do not speak of any discretion, but do not distinguish equity actions. In deciding whether to award pre-judgment interest, courts in other jurisdictions have evaluated such factors as the use of delaying tactics by the defendant, the presence of multiple defendants whose proportionate liability may be unclear initially, the available records on the computation of damages and the parties' relative responsibility for incomplete records, and the concurrence of an economy with spiraling inflation.[101]

On the other hand, if interest is one element of damages, rather than damages in the nature of interest as compensation for the delay in reimbursing the plaintiff, then the jury may consider evidence as to that element of damages in the same manner as any other element. For example, when a construction contract was breached, requiring the owner to pay interest on its interim loan at a higher rate because it was unable to convert to permanent financing, the jury could properly determine the date of project completion, the periodic withdrawals on the interim principal, and the extra interest due from the evidence presented.[102]

G. Is Interest Available against a Governmental Defendant?

The State of Arkansas is not liable for interest in any instance unless by express agreement she consents.[103] Interest may be authorized by the legislature or by a lawful contract of the State's executive officers acting within the scope of their authority.[104] The authority to bind the State to the payment of interest must be plainly expressed and not implied.[105] For reasons explicable only by a legislator, a judgment against a city bears interest,[106] while a judgment against a county does not.[107]

The constitutional requirement of just compen-

sation for the governmental condemnation of private lands requires the payment of interest on the value of the land from the date of the taking.[108] Upon the State's exercise of its constitutional right of taking under the eminent domain power, it must deposit the estimated compensation in the court registry. If the landowners withdraw a sum that exceeds the actual compensation as subsequently determined by a jury, they must return to the State not only the excess, but also interest on the excess.[109] Despite the lack of a constitutional requirement and the unliquidated nature of just compensation for the taking of land, the landowners may not profit by having had the use of an excessive deposit, at least when they took the initiative and sought the higher deposit.[110]

The taking of land by the State Highway Commission is governed by a specific statute, which provides for interest at 6% from the date of surrender of possession to the date of payment.[111] However, the landowner is entitled to just compensation for his property. Constitutional principle provides that if he does not receive the full compensation at the time of the surrender, he has lost the use of that portion of the compensation. That loss is to be compensated by interest. If the statutory interest is not sufficient, the constitutional requirement must override and interest must be granted at a proper rate.[112]

The first case that accepted the principle that just compensation means interest "at a proper rate" awarded 10%, the same as the statute on judgment interests.[113] But a subsequent case went even further. The landowner offered evidence that from the time of the taking to the time of judgment the interest payable on a 12-month certificate of deposit at a local savings and loan was 11.77%. The Highway Commission's evidence was that a risk-free United States Treasury bill paid approximately 7% to 9% during the period in question. The appellate court affirmed the trial court's finding that the proper rate of interest on the unpaid portion of the condemnation award was 11.77%.[114]

H. Is There Interest on the Judgment?

In contrast to the preceding sections, the law governing interest on judgment is much simpler. By statute, a judgment on a contract is to bear interest at the contractual rate or ten percent per annum, whichever is greater,[115] subject of course to constitutional limits.[116] On any other type of judgment, the law was changed in 1985. Prior to 1985 the interest rate was ten percent, but the trial court could affirmatively exercise discretion and reduce the rate to not less than 6%.[117] The 1985 amendment removed the discretion and set the interest rate at 10% per annum.[118]

The post-judgment interest statute was intended by the legislature to apply to all judgments, except those expressly excluded.[119] Accordingly, it applies to accumulated child support obligations,[120] other domestic relations judgments,[121] and judgments against municipalities for tax refunds.[122] Post-judgment interest should be awarded as well on the amount of pre-judgment interest to provide total compensation for the loss of the use of money prior to, as well as subsequent to, the date of the judgment.[123]

I. What about Interest in the Federal Courts?

In cases arising under diversity jurisdiction, federal courts are compelled by the *Erie* doctrine to follow state law.[124] Accordingly, federal courts in Arkansas have awarded pre-judgment interest for services performed under a construction contract,[125] on workers' compensation premiums that had not been paid,[126] for the amount due on an insurance policy,[127] and for the debit amount balances in a commodity trading account.[128] But the courts have denied interest to a teacher wrongfully discharged,[129] and to a property owner recovering lost profits from a title insurer,[130] because the amount of damages could not be ascertained in a timely fashion.

In cases involving federal question jurisdiction, where they are not bound by state law, federal courts in Arkansas have denied pre-judgment interest in cases alleging racial discrimination in the Arkansas National Guard, because the amount and nature of defendant's liability was not established until trial.[131] They have granted pre-judgment interest at the rate of 10% on back pay awarded on an employment discrimination claim.[132] Such a result is easily justified by concluding that the amount of back pay was easily ascertainable at the time of the discriminatory act and what interest was necessary to make the plaintiffs whole.[133]

Under some federal statutes, the availability of pre-judgment interest depends upon the objectives to be satisfied. For example under the Age Discrimination Employment Act, pre-judgment interest is to provide compensation for losses that cannot be calculated with certainty. If the jury in such

a case awards both actual damages and statutory liquidated damages to compensate for such uncertain losses, the court should not then award pre-judgment interest on either sum because the objective of pre-judgment interest was satisfied with the liquidated damages.[134]

Federal courts follow a different rule than state courts in judgment interest.[135] Under a 1982 federal statute, interest on most judgments in federal courts is based on the rate of 52-week treasury bills at the time the judgment is rendered.[136] Unlike Arkansas law, interest will be compounded annually. Under the *Erie* doctrine, the determination of when post-judgment interest commences is a matter of federal procedural law.[137]

J. Conclusion

Unless the Arkansas legislature passes a pre-judgment interest statute that parallels the statute on judgment interest, the case law developed over the past decade will continue to apply. A successful plaintiff is entitled, as a matter of law, to interest on the loss if the loss had an "exact determination, both as to time and place." But the cases leave it unclear whether the loss has to be determinable immediately after the loss and whether only "the initial measure of damages" needs to be certain.

Similarly, although the leading cases stress the ascertainability of the time and amount of the loss, other cases have continued to consider the underlying legal theory. Although the court's rationale is to inquire of the plaintiff's loss by being deprived of this property, the interest awarded is a standard 6%. Sometimes pre-judgment interest has been awarded from the filing of the complaint, sometimes from the time of the underlying wrong. Perhaps the next decade of cases will bring the decisions into line with the underlying policy of fully compensating a party deprived of property or money from the time of deprivation.

NOTES

1. *See* BLACK'S LAW DICTIONARY 950 (5th ed., 1979).

2. Wright v. Rochner, 233 Ark. 50, 342 S.W.2d 483 (1961).

3. 267 Ark. 164, 589 S.W.2d 597 (1979).

4. The controversy is not limited to Arkansas. *See, e.g., Note, Prejudgment Interest for Personal Injury Litigants: A Summons for Indiana Lawmakers*, 17 INDIANA L. REV. 1095 (1984). *Note, Prejudgment Interest: Implementing Its Compensatory Purpose*, 15 LOYOLA U. OF CHICAGO L.J. 541 (1984). *Note, Prejudgment Interest in Minnesota*, 9 WILLIAM MITCHELL L. REV. 158 (1983). *Comment, Prejudgment Interest: Survey and Suggestions*, 77 NORTHWESTERN U. L. REV. 192 (1982). *Note, Prejudgment Interest in Oklahoma*, 34 Okla. L. Rev. 643 (1981).

5. St. Louis, I.M. & S. Ry. v. Biggs, 50 Ark. 169, 6 S.W. 724 (1887).

6. *Id.*

7. Kennedy v. Clayton, 216 Ark. 851, 227 S.W.2d 934 (1950).

8. Swafford v. Sealtest Foods Div. of Nat. Dairy Prod. Corp., 252 Ark. 1182, 483 S.W.2d 202 (1972).

9. Advance Const. Co. v. Delta Asph. & Conc. Co., 263 Ark. 232, 563 S.W.2d 888 (1978).

10. Love v. H.F. Const. Co., 261 Ark. 831, 552 S.W.2d 15 (1977).

11. Loomis v. Loomis, 221 Ark. 743, 255 S.W.2d 671 (1953).

12. Norton v. Hickingbottom, 212 Ark. 581, 206 S.W.2d 777 (1947).

13. White & Black Rivers Bridge Company v. Vaughn, 183 Ark. 450, 36 S.W.2d 672 (1931).

14. St. Louis, I.M. & S. Ry. v. Biggs, 50 Ark. 169, 6 S.W. 724 (1887). *See Comment, Interest as Damages in Actions Sounding in Tort*, 17 ARK. L. REV. 188 (1963).

15. St. Louis, I.M. & S. Ry. v. Biggs, 50 Ark. 169, 6 S.W. 724 (1887).

16. Kennedy v. Clayton, 216 Ark. 851, 227 S.W.2d 934 (1950); Railway Co. v. Yarbrough, 56 Ark. 581, 20 S.W. 515 (1892).

17. Meyers v. Meyers, 210 Ark. 714, 197 S.W.2d 477 (1946) (interest from the date of the conversion); Humphreys v. Butler, 51 Ark. 351, 11 S.W. 479 (1888).

18. City of Fort Smith v. S.W. Bell Tel. Co., 220 Ark. 70, 247 S.W.2d 474 (1952).

19. Tri-State Ins. Co. v. Busby, 251 Ark. 568, 473 S.W.2d 893 (1971); Southern Farm Bureau Cas. Ins. Co. v. Hardin, 233 Ark. 1011, 351 S.W.2d 1158 (1961).

20. Rhine v. Haley, 238 Ark. 72, 378 S.W.2d 655 (1964).

21. Lovell v. Marianna Fed. S. & L. Assn., 264 Ark. 99, 568 S.W.2d 38 (1978). A case which is substantively analogous to *Lovell* is Corning Bank v. Rice, 278 Ark. 295, 645 S.W.2d 675 (1983), in which the bank negligently failed to carry out the decedent's intent to change the beneficiary on certificates of deposit. The bank was held to be liable on the original certificate to the estate and liable to the intended beneficiary on a negligence theory.

22. Lovell v. Marianna Fed. S. & L. Assn., 267 Ark. 164, 589 S.W.2d 577 (1979).

23. Admittedly there are some puzzling aspects to the case, or at least to the opinions. The first opinion sug-

gests to the reader that the wife received the interpleaded deposits, and that the son was entitled to recover on a negligence theory against Marianna Federal. *See, e.g.*, McIllwain v. Welco Rice Milling Co., 266 Ark. 991, 588 S.W.2d 459 (Ark. App. 1979). But the second opinion clearly speaks of the correct decision of the trial court in awarding the funds to the son. It is unclear whether Marianna Federal paid twice.

Second, it is unclear whether Marianna Federal upon commencing the interpleader action, deposited with the court registry the accumulated interest, as well as the principal on the accounts. Both logic and fairness suggest that it would, for just as Marianna Federal has no claim on the principal, it has no claims on the accumulated interest.

Third, it is unclear whether the funds once paid into the court registry were deposited into an interest earning account for the duration of the interpleader proceedings. Careful judicial management would so dictate. *See, e.g.*, McIllwain v. Welco Rice Milling Co., 266 Ark. 991, 588 S.W.2d 459 (Ark. App. 1979).

24. Lovell v. Marianna Fed. S. & L. Assn., 267 Ark. 164, 166, 589 S.W 2d 597, (1979).

25. *Id.*

26. *Id.* at 167.

27. Wooten v. McClendon, 272 Ark. 61, 612 S.W.2d 105 (1981).

28. Hopper v. Denham, 281 Ark. 84, 661 S.W.2d 379 (1983).

29. Broadhead v. McEntire, 19 Ark. App. 295, 720 S.W.2d 313 (1986).

30. Hopper v. Denham, 281 Ark. 84, 661 S.W.2d 379 (1983).

31. Toney v. Haskins, 7 Ark. App. 94, 644 S.W.2d 622 (1983).

32. Wilson v. Lester Hurst Nursery, Inc., 269 Ark. 19, 598 S.W.2d 407 (1980).

33. Brown v. Summerlin Associates, Inc., 272 Ark. 298, 614 S.W.2d 227 (1981).

34. Prudential Ins. Co. v. Stratton, 14 Ark. App. 145, 685 S.W.2d 818 (1985).

35. Eckles v. Perry-Austen Bowling Products, Inc., 275 Ark. 235, 628 S.W.2d 869 (1982) (28 months at 6% per annum).

36. City National Bank of Fort Smith v. First National Bank and Trust Company, 22 Ark. App. 5, 732 S.W.2d 489 (1987) (the trial court had awarded 13% interest on a claim arising out of a bank's letter of credit).

37. Halford v. Southern Capital Corp., 279 Ark. 261, 650 S.W.2d 580 (1983).

38. Wooten v. McClendon, 272 Ark. 61, 612 S.W.2d 105 (1981).

39. Dickerson Construction Co., Inc. v. Dozier, 266 Ark. 345, 584 S.W.2d 36 (1979). A similar pre-*Lovell* case is Kennedy v. Clayton, 216 Ark. 851, 227 S.W.2d 934 (1950), in which the court permitted pre-judgment interest on the value of a cotton crop because of the negligent application of insecticide and permitted it from the date of application.

40. Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 653 S.W.2d 128 (1983).

41. Metropolitan Prop. & Liab. Ins. Co. v. Stancel, 16 Ark. App. 91, 697 S.W.2d 923 (1985).

42. 14 Ark. App. 145, 685 S.W.2d 818 (1985).

43. Loomis v. Loomis, 221 Ark. 743, 255 S.W.2d 671 (1953).

44. Central Flying Service, Inc. v. Cain, 285 Ark. 310, 686 S.W.2d 432 (1985).

45. Dunn v. Brimer, 259 Ark. 855, 537 S.W.2d 164 (1976); Saliba v. Saliba, 178 Ark. 250, 11 S.W.2d 774 (1928).

46. Railways Ice Co. v. Howell, 117 Ark. 198, 174 S.W. 241 (1915); St. Louis I.M. & S. Ry. Co. v. Cleere, 76 Ark. 377, 88 S.W. 995 (1905).

47. Wooten v. McClendon, 272 Ark. 61, 612 S.W.2d 105 (1981).

48. ARK. CODE ANN. §§23–79–208; Brill, ARKANSAS LAW OF DAMAGES, ch. 8–3.

49. Metropolitan Property and Liab. v. Stancel, 16 Ark. App. 91, 697 S.W.2d 923 (1985). Occasionally the amount of pre-judgment interest is set by statute. For example, ARK. CODE ANN. §23–81–118 authorizes 8% pre-judgment interest upon the failure to pay life insurance proceeds within a reasonable time after death.

50. USAA Life Ins. Co. v. Boyce, 294 Ark. 575, 745 S.W.2d 136 (1988).

51. Hill v. Farmers Union Mut. Ins. Co., 15 Ark. App. 222, 691 S.W.2d 196 (1985).

52. Wilson v. Lester Hurst Nursery, Inc., 269 Ark. 19, 598 S.W.2d 407 (1980).

53. Brown v. Summerlin Associates, Inc., 272 Ark. 298, 614 S.W.2d 227 (1981).

54. 26 Ark. App. 138, _____S.W.2d _____(1988).

55. Bone v. Refco, Inc., 774 F.2d 235 (8th Cir. 1985).

56. Wilson v. Lester Hurst Nursery, Inc., 269 Ark. 19, 598 S.W.2d 407 (1980).

57. Eckles v. Perry-Austen Bowling Products, Inc., 275 Ark. 235, 628 S.W.2d 869 (1982). Compare ARCP 9, which requires specific damages to be specifically pleaded.

58. East Texas Motor Freight Lines, Inc. v. Freeman, 289 Ark. 539, 713 S.W.2d 456 (1986).

59. 5 Ark. App. 101, 633 S.W.2d 48 (1982). As an example of the award of interest to compensate for the loss of use of funds, *see* Fuller v. Norwood, 268 Ark. 89, 592 S.W.2d 452 (Ark. App. 1980), where in a specific performance action, the buyer was entitled to damages for delay in transfer of the property and the seller was entitled to interest on the amount that should have been paid at transfer.

60. ARK. CONST., Art. 19, §13.

61. 269 Ark. 19, 598 S.W.2d 407 (1980).

62. Hopper v. Denham, 281 Ark. 84, 661 S.W.2d 379 (1983); Malford v. Southern Capital Corp., 279 Ark. 261,

650 S.W.2d 580 (1983); Eckles v. Perry-Austen Bowling Products, Inc., 275 Ark. 235, 628 S.W.2d 869 (1982); Brown v. Summerlin Associates, Inc., 272 Ark. 298, 614 S.W.2d 227 (1981); Wilson v. Lester Hurst Nursery, 269 Ark. 19, 598 S.W.2d 407 (1980); Prudential Ins. Co. v. Stratton, 14 Ark. App. 145, 685 S.W.2d 818 (1985).

63. City National Bank of Fort Smith v. First National Bank and Trust Company, 22 Ark. App. 5, 732 S.W.2d 489 (1987) (the trial court had awarded 13% interest on a claim arising out of a bank's letter of credit).

64. Wooten v. McClendon, 272 Ark. 61, 612 S.W.2d 105 (1981).

65. *Id.*

66. A bill introduced by Representative Wilson in the House in 1985 would have provided that "In all judgments for monetary sums based on claims for unliquidated damages, there shall be added to the amount of the judgment, interest from the date of filing the action upon which the judgment is based, until date of judgment, at a rate to be determined by the court of not less than six percent (6%) per annum nor more than ten percent (10%) per annum. Provided that the interest provided herein shall only be applied to actual compensatory damages and shall not apply to punitive, exemplary, double or treble damages or any other damages penal in nature. Provided further, said interest shall not apply to any partial payments made prior to the filing of the action."

The policy objection to basing pre-judgment interest on the filing date of the complaint is that it encourages litigants to file lawsuits prematurely, without sufficient time for the collection of evidence, legal research, non-judicial resolution, or the change to a non-litigious attitude.

67. *See* text at footnotes 111–114 *infra*.

68. 7 Ark. App. 98, 644 S.W.2d 622 (1983).

69. Eckles v. Perry-Austen Bowling Products, Inc., 275 Ark. 235, 628 S.W.2d 869 (1982) (28 months at 6% per annum).

70. Love v. H. F. Const. Co., 261 Ark. 831, 552 S.W.2d 15 (1977).

71. Advance Const. Co. v. Delta Asph. & Conc. Co., 263 Ark. 232, 563 S.W.2d 888 (1978). *See also* Tech-Neeks, Inc. v. Francis, 241 Ark. 390, 407 S.W.2d 938 (1966).

72. Kennedy v. Clayton, 216 Ark. 851, 227 S.W.2d 934 (1950). *But see* McIllwain v. Welco Rice Milling Co., 266 Ark. 991, 588 S.W.2d 459 (Ark. App. 1979) where the court allowed interest on the amount due under a rice contract from the date the complaint was filed, not from the date of delivery of the rice or from the date of demand for payment.

73. Loomis v. Loomis, 221 Ark. 743, 255 S.W.2d 671 (1953).

74. Skelton v. Farm Service Co-op., Inc., 226 Ark. 827, 587 S.W.2d 76 (Ark. App. 1979).

75. White & Black Rivers Bridge Company v. Vaughn, 183 Ark. 450, 36 S.W.2d 672 (1931).

76. Lovell v. Marianna Fed. S. & L. Assn., 267 Ark. 164, 589 S.W.2d 577 (1979).

77. Hopper v. Denham, 281 Ark. 84, 661 S.W.2d 379 (1983).

78. Dempsey v. Merchants National Bank of Fort Smith, 292 Ark. 207, 729 S.W.2d 150 (1987). *See also*, Little Rock Crate & Basket Co. v. Young, 284 Ark. 295, 681 S.W.2d 388 (1984) (awarding pre-judgment interest from the date of the filing of the complaint even though the plaintiff reduced the prayer for relief after the defendant answered interrogatories).

79. Wilson v. Lester Hurst Nursery, Inc., 269 Ark. 19, 598 S.W.2d 407 (1980).

80. *Id.*

81. Wooten v. McClendon, 272 Ark. 61, 612 S.W.2d 105 (1981).

82. Toney v. Haskins, 7 Ark. App. 98, 644 S.W.2d 622 (1983).

83. Missouri State Life Ins. Co. v. Fodrea, 185 Ark. 155, 46 S.W.2d 638 (1932).

84. Financial Sec. Life Assur. Co. v. Wright, 254 Ark. 791, 496 S.W.2d 358 (1973); Old Republic Insurance Co. v. Alexander, 245 Ark. 1029, 436 S.W.2d 829 (1969).

85. Hill v. Farmers Union Mut. Ins. Co., 15 Ark. App. 222, 691 S.W.2d 196 (1985).

86. Such a rule was particularly beneficial to the defendant in *Hill* where the plaintiff insured homeowners waited four years after the fire before finally filing a proof of loss claim.

87. Kennedy v. Clayton, 216 Ark. 851, 227 S.W.2d 934 (1950).

88. St. Louis, I.M. & S. Ry. Co. v. Biggs, 50 Ark. 169, 6 S.W. 724 (1887).

89. Kennedy v. Clayton, 216 Ark. 851, 227 S.W.2d 934 (1950).

90. Western Union Tel. Co. v. T.C. Davis Cotton Co., 170 Ark. 506, 280 S.W.2d 977 (1926).

91. Wright v. Rochner, 233 Ark. 50, 342 S.W.2d 483 (1961); Rogers v. Atkinson, 152 Ark. 167, 237 S.W. 679 (1922).

92. Wooten v. McClendon, 272 Ark. 61, 612 S.W.2d 105 (1981). *See also* Brown v. Summerlin Associates, Inc., 272 Ark. 298, 614 S.W.2d 227 (1981).

93. Hopper v. Denham, 281 Ark. 84, 661 S.W.2d 379 (1983).

94. USAA Life Ins. Co. v. Boyce, 294 Ark. 575, 745 S.W.2d 136 (1988).

95. Broadhead v. McEntire, 19 Ark. App. 295, 720 S.W.2d 313 (1986); Toney v. Haskins, 7 Ark. App. 98, 644 S.W.2d 622 (1983).

96. Skelton v. Farm Service Co-op., Inc., 266 Ark. 827, 587 S.W.2d 76 (1979) (Ark. App. 1979).

97. Brown v. Summerlin Associates, Inc., 272 Ark. 298, 614 S.W.2d 227 (1981).

98. Bone v. Refco, Inc., 774 F.2d 235 (8th Cir. 1985). Applying federal law, the federal courts have recognized several approaches to the situation where a liquidated

contract claim is opposed by an unliquidated counterclaim. *See* Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc., 416 F.2d 207 (8th Cir. 1969) (award of pre-judgment interests on the "balance" justified by extraordinary factors).

99. Sorrells v. Bailey Cattle Co., 268 Ark. 800, 595 S.W.2d 950 (Ark. App. 1980).

100. Keenan v. Crain, 220 Ark. 199, 246 S.W.2d 730 (1952).

101. *Note, Prejudgment Interest in Minnesota*, 9 WILLIAM MITCHELL L. REV. 158, 190–191 (1983).

102. Taylor v. Green Mem. Baptist Church, 5 Ark. App. 101, 633 S.W.2d 48 (1982).

103. State v. Thompson, 10 Ark. 61 (1849).

104. Jobe v. Urquhart, 102 Ark. 470, 143 S.W. 121 (1912).

105. *Id.*

106. City of Little Rock v. Cash, 277 Ark. 494, 514, 644 S.W.2d 229 (1982). Cities may seek pre-judgment interest. City of Moro v. Cline-Frazier, Inc., 26 Ark. App. 138, ____S.W.2d ____(1988).

107. ARK. CODE ANN. §16–65–114. *See* Sharp County v. N.E. Ark. Planning & Consulting Co., 275 Ark. 172, 628 S.W.2d 559 (1982).

108. Rest Hills Memorial Park, Inc. v. Clayton Chapel Sewer Improvement District No. 233, 6 Ark. App. 180, 639 S.W.2d 519 (1982).

109. Ark. State Hwy. Comm. v. Rich, 235 Ark. 858, 362 S.W.2d 429 (1962).

110. *Id.* The court may have been particularly unsympathetic to landowners who had the use of $219,000 for two and a half years.

111. ARK. CODE ANN. §27–67–316(e).

112. Arkansas State Highway Commission v. Vick, 284 Ark. 372, 682 S.W.2d 731 (1985).

113. *Id.*

114. Arkansas State Highway Commission v. Security Savings Association, 19 Ark. App. 133, 718 S.W.2d 456 (1986).

115. ARK. CODE ANN. §16–65–114.

116. Amendment 60 set the maximum rate of interest chargeable as 5% above the Federal Reserve Discount Rate at the time of the contract, with consumer loans subject to a second limitation of 17%, regardless of the discount rate.

117. ARK. STAT. §29–124 (superseded). That statute had permitted the judge to consider economic conditions and prevailing interest rates. Hopper v. Denham, 281 Ark. 84, 661 S.W.2d 379 (1983).

118. ARK. CODE ANN. §16–65–114.

119. Shofner v. Jones, 201 Ark. 540, 145 S.W.2d 350 (1940). Specific statutes cover some claims. For example, ARK. CODE ANN. §11–9–809 provides that interest at the legal rate shall be paid on workers' compensation claims, commencing on the day the administrative law judge makes an award.

120. Sharum v. Dodson, 264 Ark. 57, 568 S.W.2d 503 (1978).

121. Potter v. Easley, 288 Ark. 133, 703 S.W.2d 442 (1986).

122. City of Little Rock v. Cash, 277 Ark. 494, 514, 644 S.W.2d 299 (1982).

123. Hopper v. Denham, 281 Ark. 84, 661 S.W.2d 379 (1983).

124. Jennings v. Dumas Public School Dist., 763 F.2d 28 (8th Cir. 1985). Conversely, in Federal Employers' Liability Act actions, state courts are compelled to follow federal law, which does not authorize pre-judgment interest in FELA actions. Monessen Southwestern Railway Company v. Morgan, 108 S.Ct. 1837 (1988).

125. United States v. United States Fidelity and Guaranty Company, 644 F.2d 747 (8th Cir. 1981) (6% interest from the date when all payments were due).

126. Wal-Mart Stores, Inc. v. Crist, 664 F. Supp. 1242 (W.D. Ark. 1987) (interest from the date on which the premiums could have been calculated).

127. Bank of Mulberry v. Fireman's Fund Ins. Co., 720 F.2d 501 (8th Cir. 1983) (interest from a date sixty days after filing of a proof of loss claim).

128. Bone v. Refco, Inc., 774 F.2d 235 (8th Cir. 1985).

129. Jennings v. Dumas Public School Dist., 763 F.2d 28 (8th Cir. 1985) (amount of damages depended on the extent of mitigation, which was not known until trial).

130. Red Lobster Inns of America, Inc. v. Lawyers Title Insurance Corp., 656 F.2d 381 (8th Cir. 1981) (negligent title opinion delayed restaurant's opening for four months).

131. Taylor v. Jones, 495 F. Supp. 1285 (E.D. Ark. 1980), *aff'd*, 653 F.2d 1204 (8th Cir. 1981).

132. Parker v. Siemen-Allis, Inc., 601 F. Supp. 1377 (E.D. Ark. 1985).

133. Behlar v. Smith, 719 F.2d 950 (8th Cir. 1983).

134. Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982).

135. Jennings v. Dumas Public School Dist., 763 F.2d 28 (8th Cir. 1985) (12.08% judgment interest).

136. 28 USC §1961. Prior to this amendment, the statute had provided that judgment interest would be calculated "from the date of the entry of the judgment, at the rate allowed by state law. . . . " Although the statute covers money judgments, federal courts have power to grant judgment interest in equity cases by analogy. Donovan v. Sovereign Sec., Ltd., 726 F.2d 55 (2nd Cir. 1984) (injunction and order for back pay).

137. Bailey v. Chattem, Inc., 838 F.2d 149 (6th Cir. 1988). In this case a federal jury in 1980 awarded $400,000 as compensatory damages for fraud; the Sixth Circuit reversed and remanded. Upon re-trial the jury in 1983 awarded compensatory damages of $627,000. Recognizing a conflict within the circuits, the Sixth Circuit held that under the "equity of the statute" approach, judgment interest on the lesser included amount of $400,000 should commence from the 1980 verdict.