

4 PREJUDGMENT AND POST-JUDGMENT INTEREST

The right to compensation accrues at the time of the injury. An award of prejudgment interest is necessary in order to fully compensate an injured party.¹ Prejudgment interest, therefore, is in the nature of compensatory damages.²

In general, for causes of action accruing on or after August 7, 1997, the rate of interest on judgments and decrees for the payment of money is three (3) percentage points above the 12th Federal Reserve Discount Rate in effect on January 2nd of the year in which the judgment or decree is entered.³ The 12th Federal Reserve discount rate fluctuates and has been as low as 3% and as high as 13% in recent years. The 12th Federal Reserve Discount Rate on January 2, 1998 was 5%, 1999 was 4.5%, 2000 was 5%, 2001 was 6%, and 2002 was 1.25%. Thus, for judgments and decrees entered during 1998, prejudgment and post-judgment interest was 8%, 1999 was 7.5%, 2000 was 8%, 2001 was 9%, 2002 was 4.25%, and 2003 was 3.75%.

An exception is made for judgments and decrees which are founded upon a contract that provides for a specified rate of interest not in excess of the legal rate for that type of contract. A judgment or decree founded on such a contract will bear interest at the rate specified if the interest rate is set out in the judgment or decree.⁴

The statute, AS 09.03.070, also provides that prejudgment interest begins to accrue from the day process is served on the defendant, or the day the defendant received written notification that an injury occurred and that a claim may be brought against the defendant for that injury, whichever is earlier. The statutory requirement of written notice may be satisfied by proof of actual notice.⁵ Thus, proof that a defendant had actual notice of a likely claim or suit is sufficient to trigger the running of prejudgment interest.⁶

AS 09.17.040(a) requires the finder of fact to itemize damages into past and present categories, using the time of trial as a reference point. This itemization can be

¹ See *State v. Phillips*, 470 P.2d 266, 273-74 (Alaska 1970).

² See *Davis v. Chism*, 513 P.2d 475, 480 (Alaska 1973); *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322 (9th Cir. 1995).

³ See AS 09.30.070(a).

⁴ See AS 09.30.070(a).

⁵ See *Lloyd & Inst. of London Underwriting Cos. v. Fulton*, 2 P.3d 1199, 1210-11 (Alaska 2000); *In Re Estate of Evans*, 901 P.2d 1138, 1142 (Alaska 1995).

⁶ See *McConkey v. Hart*, 930 P.2d 402, 405 (Alaska 1996).

done with a special verdict form, which will be held to the same standard of review as jury instructions, and thus errors in the form will not be cause for reversal unless it can be demonstrated that they caused prejudice.⁷ The 1997 amendments to AS 09.30.070 added section (c), which expressly states that prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or punitive damages.⁸ Before section (c) was enacted, the Alaska Supreme Court had considered the issue of whether a plaintiff was entitled to prejudgment interest on future damages, and held that future damages should receive prejudgment interest only where they have been discounted to a time before trial.⁹ It therefore appears that AS 09.30.070(c) precludes any award of prejudgment interest.

AS 09.30.070 applies only to actions for personal injury, death and property damage, and expressly does not apply to claims for purely economic loss.¹⁰ Interest is not recoverable on punitive damages awards.¹¹

Insurance Policies, Prejudgment Interest, and Civil Rule 82 Attorney's Fees

Automobile policies providing the statutory minimum limits of coverage mandated by Alaska law¹² **must** include coverage for prejudgment interest on the policy limits, in addition to the face amount of the policy.¹³ Therefore, when an insurer offers "policy limits" with respect to a policy providing minimum limits of coverage, the insurer must offer prejudgment interest on those limits as well. Where a liability insurance policy includes a "supplementary payments" clause, or an "amendatory endorsement," providing that the insurer will pay prejudgment interest awarded against its insured in addition to the limit of liability, a "policy limits" settlement includes prejudgment interest on the amount of the policy since the insurer's maximum potential liability under the policy included payment of prejudgment interest.¹⁴ Prejudgment interest is similarly to be added to UM/UIM limits, in connection with minimum statutory limit policies, to

⁷ See *Glamann v. Kirk*, 29 P.3d 255, 264 (Alaska 2001).

⁸ See AS 09.30.070(c); see also, *John's Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002).

⁹ *McConkey v. Hart*, 930 P.2d 402, 405 (Alaska 1996).

¹⁰ *Beaux v. Jacob*, 30 P.3d 90, 100 (Alaska 2001); *Cole v. Bartles*, 4 P.3d 956, 958 (Alaska 2000).

¹¹ *Lockhart v. Draper*, 209 P.3d 1025, 1029 (Alaska 2009).

¹² Minimum coverage is \$50,000 per person, \$100,000 per accident. AS 28.20.440(b).

¹³ See *Hughes v. Harrelson*, 844 P.2d 1106, 1107 (Alaska 1993).

¹⁴ See *Tucker v. United Servs. Auto. Ass'n.*, 827 P.2d 440 (Alaska 1992).

achieve a "policy limits" UM/UIM offer.¹⁵ Attorney's fees under Civil Rule 82 are an additional item of coverage under the policy, and must be offered as part of any "policy limits" offer.¹⁶ Attorney's fees have been held to be part of "policy limits" if such an offer is made under a UM/UIM policy.¹⁷

However, in *Farquhar v. Alaska National Insurance Co.*,¹⁸ the Alaska Supreme Court held that, in the absence of policy language to the contrary, an automobile liability insurer is not obligated to pay prejudgment interest as an additional item of coverage on policies providing more than the minimum limits required by law (\$50,000 per person, \$100,000 per accident). Similarly, in *Gibson v. GEICO*, the Supreme Court held that, after a trial where the jury determined the insured's total damages, the trial court was correct in reducing the amount of the award by the amount previously received by plaintiff from the tortfeasor's liability policy, and only awarding interest and attorney's fees on the reduced amount.¹⁹

Where a liability insurance policy includes a "supplementary payments" clause or an "amendatory endorsement" providing that the insurer will pay prejudgment interest awarded against its insured in addition to the limit of liability, a "policy limits" settlement includes prejudgment interest on the amount of the policy since the insurer's maximum potential liability under the policy included payment of prejudgment interest.²⁰ Prejudgment interest is similarly to be added to UM/UIM limits to achieve a policy limits UM/UIM offer.²¹

In a case where Guess & Rudd P.C. represented the insurer, the Alaska Supreme Court held that an unrepresented claimant who presents a valid claim for bodily injuries with a value clearly exceeding the face limits of the applicable liability policy is not entitled to Civil Rule 82 attorney's fees as part of a tender of a demand for full "policy limits."²² The court held that, when calculating their maximum liability under

¹⁵ See *State Farm Mut. Auto. Ins. Co. v. Harrington*, 918 P.2d 1022, 1025 (Alaska 1996); see also Tab 14 Attorney's Fees; Tab 17 Uninsured and Underinsured Motorist Coverage.

¹⁶ See Tab 14 Attorney's Fees; see also *Schultz v. Travelers Indem. Co.*, 754 P.2d 265 (Alaska 1988).

¹⁷ See *Harrington*, 918 P.2d at 1025 (Alaska 1996).

¹⁸ 20 P.3d 577 (Alaska 2001).

¹⁹ 153 P.3d 312 (Alaska 2007).

²⁰ See *Tucker v. United Servs. Auto. Ass'n.*, 827 P.2d 440, 440-441 (Alaska 1992).

²¹ See *Harrington*, 918 P.2d 1022 (Alaska 1996); see also Tab 14 Attorney's Fees; and Tab 17 Uninsured and Underinsured Motorist Coverage.

²² *Maloney v. Progressive Specialty Ins. Co.*, 99 P.3d 565, 569 (Alaska 2004).

a policy, insurers are not required to speculate about the course of future litigation. Rather, insurers must base their offers "on a present-tense -- albeit hypothetical -- evaluation of the current situation." Because the plaintiff was not represented by counsel on the date of her policy limit offer, she had no right to expect a payment of Rule 82 fees.

Appendices:

Alaska R. Civ. P. 68
AS 09.17.040

AS 09.30.065
AS 09.30.070

Rule 68. [Applicable to cases filed before August 7, 1997.] Offer of Judgment.

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065 and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065.

(c) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 68. [Applicable to cases filed on or after August 7, 1997.] Offer of Judgment.

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is at least 5 percent less favorable to the offeree than the offer, or, if there are multiple defendants, at least 10 percent less favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Civil Rules and shall pay reasonable actual attorney fees incurred by the offeror from the date the offer was made as follows:

(1) if the offer was served no later than 60 days after both parties made the disclosures required by Civil Rule 26, the offeree shall pay 75 percent of the offeror's reasonable actual attorney fees;

(2) if the offer was served more than 60 days after both parties made the disclosures required by Civil Rule 26 but more than 90 days before the trial began, the offeree shall pay 50 percent of the offeror's reasonable actual attorney fees;

(3) if the offer was served 90 days or less but more than 10 days before the trial began, the offeree shall pay 30 percent of the offeror's reasonable actual attorney fees.

(c) If an offeror receives costs and reasonable actual attorney fees under paragraph (b), that offeror shall be considered the prevailing party for purposes of an award of attorney fees under Civil Rule 82. Notwithstanding paragraph (b), if the amount awarded an offeror for attorney fees under Civil Rule 82 is greater than a party would receive under paragraph (b), the offeree shall pay to the offeror attorney fees specified under Civil Rule 82 and is not required to pay reasonable actual attorney fees under paragraph (b). A party who receives attorney fees under this rule may not also receive attorney fees under Civil Rule 82.

Sec. 09.17.040. Award of damages; periodic payments. (a) In every case where damages for personal injury are awarded by the court or jury, the verdict shall be itemized between economic loss and noneconomic loss, if any, as follows:

- (1) past economic loss;
- (2) past noneconomic loss;
- (3) future economic loss;
- (4) future noneconomic loss; and
- (5) punitive damages.

(b) The fact finder shall reduce future economic damages to present value. In computing the portion of a lump-sum award that is attributable to future economic loss, the fact finder shall determine the present amount that, if invested at long-term future interest rates in the best and safest investments, will produce over the life expectancy of the injured party the amount necessary to compensate the injured party for

(1) the amount of wages the injured party could have been expected to earn during future years, taking into account future anticipated inflation and reasonably anticipated increases in the injured party's earnings; and

(2) the amount of money necessary during future years to provide for all additional economic losses related to the injury, taking into account future anticipated inflation.

(c) Subsection (b) of this section does not apply to future economic damages if the parties agree that the award of future damages may be computed under the rule adopted in the case of *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967).

(d) In an action to recover damages, the court shall, at the request of an injured party, enter judgment ordering that amounts awarded a judgment creditor for future damages be paid to the maximum extent feasible by periodic payments rather than by a lump-sum payment.

(e) The court may require security be posted, in order to ensure that funds are available as periodic payments become due. The court may not require security to be posted if an authorized insurer, as defined in AS 21.90.900, acknowledges to the court its obligation to discharge the judgment.

(f) A judgment ordering payment of future damages by periodic payment shall specify the recipient, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Payments may be modified only in the event of the death of the judgment creditor, in which case payments may not be reduced or terminated, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately before death. In the event the judgment creditor owed no duty of support to dependents at the time of the judgment creditor's death, the money remaining shall be distributed in accordance with a will of the deceased judgment creditor accepted into probate or under the intestate laws of the state if the deceased had no will.

(g) If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make payments required under (d) of this section, the court shall, in addition to the required periodic payments, order the judgment debtor to pay the judgment creditor any damages caused by the failure to make periodic payments, including costs and attorney fees. (§ 1 ch 139 SLA 1986)

Revisor's notes. — In 1986, the number "665" was substituted for "655" to correct a manifest error in subsection (c). In 1988, a reference to "(d) of this section" was substituted for "(c) of this section" to correct a manifest error in subsection (g).

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49 and 58, see §§ 5 and 7, respectively, ch. 139, SLA 1986, in the Temporary and Special Acts.

NOTES TO DECISIONS

Legislative intent. — Although the plain language of subsection (b) does not specifically designate the categories of damages that must be reduced to present value, the legislative intent appears to have

Sec. 09.30.065. Offers of judgment. (a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is at least five percent less favorable to the offeree than the offer, or if there are multiple defendants at least 10 percent less favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Alaska Rules of Civil Procedure and shall pay reasonable actual attorney fees incurred by the offeror from the date the offer was made, as follows:

(1) if the offer was served no later than 60 days after both parties made the disclosures required by the Alaska Rules of Civil Procedure, the offeree shall pay 75 percent of the offeror's reasonable actual attorney fees;

(2) if the offer was served more than 60 days after both parties made the disclosures required by the Alaska Rules of Civil Procedure but more than 90 days before the trial began, the offeree shall pay 50 percent of the offeror's reasonable actual attorney fees;

(3) if the offer was served 90 days or less but more than 10 days before the trial began, the offeree shall pay 30 percent of the offeror's reasonable actual attorney fees.

(b) If an offeror receives costs and reasonable actual attorney fees under (a) of this section, that offeror shall be considered the prevailing party for purposes of an award of attorney fees under the Alaska Rules of Civil Procedure. Notwithstanding (a) of this section, if the amount awarded an offeror for attorney fees under the Alaska Rules of Civil Procedure is greater than a party would receive under (a) of this section, the offeree shall pay to the offeror attorney fees specified under the Alaska Rules of Civil Procedure and is not required to pay reasonable actual attorney fees under (a) of this section. A party who receives attorney fees under this section may not also receive attorney fees under the Alaska Rules of Civil Procedure. (§ 3 ch 107 SLA 1980; am § 1 ch 48 SLA 1981; am § 2 ch 139 SLA 1986; am §§ 16, 17 ch 26 SLA 1997)

Revisor's notes. — Formerly AS 09.30.055. Renumbered in 1983. Originally enacted as AS 45.45.010(i) and renumbered in 1980.

Cross references. — For related court rule, see Civ. R. 68.

For provisions relating to the effect of the 1997 amendments to subsection (a) and addition of (b) on Rules 68 and 82, Alaska Rules of Civil Procedure, see § 52, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For

severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

Effect of amendments. — The 1997 amendment, effective August 7, 1997, rewrote subsection (a) and added subsection (b).

Editor's notes. — Section 9, ch. 139, SLA 1986 provides that the 1986 amendment to this section applies "to all causes of action accruing after June 11, 1986."

Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."

Sec. 09.30.070. Interest on judgments; prejudgment interest.

(a) Notwithstanding AS 45.45.010, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered, except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

(b) Except when the court finds that the parties have agreed otherwise and except as provided by AS 45.05.111(d), prejudgment interest accrues from the day process is served on the defendant or the day the defendant received written notification that an injury has occurred and that a claim may be brought against the defendant for that injury, whichever is earlier. The written notification must be of a nature that would lead a prudent person to believe that a claim will be made against the person receiving the notification, for personal injury, death, or damage to property.

(c) Prejudgment interest may not be awarded for future economic damages, future noneconomic damages, or punitive damages. (§ 4.07 ch 101 SLA 1962; am § 1 ch 69 SLA 1969; am § 1 ch 107 SLA 1980; am § 3 ch 139 SLA 1986; am §§ 18, 19 ch 26 SLA 1997; am § 1 ch 75 SLA 1999)

Cross references. — For provisions requiring judgment against the state to include legal interest, see AS 09.50.280; for legal rate of interest, see AS 45.45.010.

For provisions relating to the effect of 1997 addition of (c) to Rule 58, Alaska Rules of Civil Procedure, see § 53, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For transitional provisions relating to the applicability of the 1999 amendment of subsection (b), see § 26, ch. 75, SLA 1999 in the 1999 Temporary & Special Acts.

Effect of amendments. — The 1997 amendment, effective August 7, 1997, rewrote subsection (a) and added subsection (c).

The 1999 amendment, effective January 1, 2000, inserted "and except as provided by AS 45.05.111(d)" in the first sentence in subsection (b).

Editor's notes. — Under § 4, ch. 107, SLA 1980, the interest rate provided in this section applies only to judgments entered after July 1, 1980.

Section 5, ch. 107, SLA 1980 provides: "This Act does not amend Rule 68 of the Alaska Rules of Civil Procedure."

Section 9, ch. 139, SLA 1986 provides that the 1986 amendment to this section applies "to all causes of action accruing after June 11, 1986."

Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."