A Matter of Interest:
Collection of Full Arrearages on Nevada Judgments[1]
by
Marshal S. Willick

1. INTRODUCTION

Many Nevada attorneys are failing to obtain for their clients the full awards to which those clients are entitled. In many cases involving personal injury and contract claims, the time delay between accrual of a right and payment of damages is not being accounted for by the attorneys, and not being compensated by those owing the money. In many Family Court cases, attorneys seeking arrearages in alimony, child support, or property settlement installments are neglecting to obtain interest on each accrued installment from the date that it becomes due.

The same rules apply to all periodic (or even lump sum) payments, and the failure to calculate and collect interest appears to pervade litigation throughout Nevada, injuring clients, and exposing the attorneys involved to potential liability.

It appears that many practitioners simply do not know that they can and should collect pre-judgment interest on accrued arrears, as well as post-judgment interest. Some attorneys who know that their clients are entitled to such interest believe that it is optional, or that it is too difficult to calculate, or that it is "not worth it" in smaller cases. All these beliefs are incorrect, and should be dispelled.

2. CALCULATION OF INTEREST IS MANDATORY

The Nevada Supreme Court has made inclusion of statutory interest mandatory on arrears judgments. See Gibellini v. Klindt, 110 Nev. 1201, 885 P.2d 540 (1994). There, the Court found that the legislature did not intend for the district courts to have discretion to set interest rates on judgments, and reversed that portion of the judgment with instructions to amend the award by applying the statutory interest rate.

The following year, the Court decided Schoepe v. Pacific Silver Corp., 111 Nev. 563, 893 P.2d 388 (1995), in which it held that NRS 99.040(1)[2] required calculation and recovery of interest as a matter of right, is not discretionary, and requires determination of only the rate of interest, the time it commences to run, and the amount to which interest applies. The Court added that these are factual, not discretionary, inquiries.

These holdings flowed pretty naturally from the Court's prior holdings that the purpose of pre-judgment interest (like post-judgment interest) is to provide compensation to the claimant for the use of money from the time the cause of action accrues until the time of judgment. See Ramada Inns v. Sharp, 101 Nev. 824, 711 P.2d 1 (1985) (speaking of NRS 17.130(2)). It is easy to see how judges could have concluded otherwise before the holdings in Gibellini and Schoepe, however, since the Court had from time to time discussed the application of interest as a form of sanctions. See, e.g., SIIS v. Wrenn, 104 Nev. 536, 762 P.2d 884 (1988).

In short, the Nevada Supreme Court has made it pretty clear that it is not up to judges as to whether or not they believe interest should be applied, and it is not up to lawyers to decide whether or not to request it. Interest is owed, and lawyers should request it.

3. CALCULATION OF INTEREST IS REALLY NOT THAT DIFFICULT

1. The Governing Statutory Provisions

There are two statutory provisions governing interest. The calculations applied under each provision are identical; the statutory scheme has not changed since 1987, and neither statute has been changed in any way since 1989. For contracts, the governing provision is NRS 99.040(1):

When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the commissioner of financial institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, in the following cases:

(a) Upon contracts, express or implied, other than book accounts.

(b) Upon the settlement of book or store accounts from the day on which the balance is ascertained.

(c) Upon money received to the use and benefit of another and detained without his consent.

(d) Upon wages or salary, if it is unpaid when due, after demand therefore has been made.

The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

NRS 17.130(2) provides for interest when no rate is provided is provided by contract, or by other statute, or otherwise specified in a judgment:

When no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the judgment draws interest from the time of service of summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the commissioner of financial institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

The statutes are straight-forward, leaving only questions as to the appropriate starting date, the applicable interest rate, and the mechanics of performing the calculations.

2. Figuring the Correct Starting Date for Interest

In most cases, interest is calculated from the date of the financial transaction in question. This is explicit as to contract cases, in the statute itself.

In tort cases, there was some confusion in the decisions until 1990, when the Nevada Supreme Court issued LTR Stage Lines v. Gray Line Tours, 106 Nev. 283, 792 P.2d 386 (1990). That case clarified that damages prior to the filing of a complaint accrued interest from the time of the complaint; damages after the complaint was filed but before judgment accrued interest from the time the damages were actually incurred; and all future damages accrued interest from the date of the judgment.

In family law matters, when a judgment requires payments at a series of future dates, no cause of action accrues until and unless a court-ordered payment is missed. At that moment, the missed payment "draws interest . . . until satisfied." See e.g., Jones v. Jones, 86 Nev. 879, 478 P.2d 148 (1970). A similar standard is followed in other jurisdictions. See, e.g., LaBow v. LaBow, 537 A.2d 157 (Conn. App. 1988); Finley v. Finley, 410 N.E. 2d 12 (Ill. 1980).

Payments due for either child support or alimony are statutory judgments from the date they are due but unpaid, while other periodic payments are not, and could therefore be argued to constitute mere unliquidated damages until such time as they are reduced to judgment. See NRS 125.150(7); NRS 125B.140(1)(a).

It appears that for purposes of calculation, however, this is a distinction without a difference. The holding in Ramada Inns v. Sharp, supra, eliminated the distinction that might otherwise be implied in law, since pre-judgment interest runs as to all installment payments from the date they are due. If a "due" date is ascertainable from a property settlement agreement, or Decree of Divorce, interest is probably due on each payment from the due date of each payment irrespective of whether it is appropriate to invoke NRS 17.130 or NRS 99.040.[3]

Nor can any difference in methodology apparently lie in the form of order that gave rise to the obligation. A property settlement agreement merged into a Decree of Divorce constitutes a "contract" making the operative provision NRS 99.040 (governing interest on contract damages) rather than NRS 17.130 (interest on judgments). See Morelli v. Morelli, 102 Nev. 326, 720 P.2d 704 (1986); BHY Trucking v. Hicks, 102 Nev. 331, 720 P.2d 1229 (explaining and contrasting pre-judgment interest provisions), cert. denied, 479 U.S. 994, 107 S. Ct. 597 (1986). But the factors applicable to figuring out the date from which interest runs remain the same in each case.

3. Figuring the Applicable Interest Rate

Before 1987, the statutes set a specific rate of interest, and the sparse case law had to do with when causes of action accrued, since that determined which rate of interest applied. See Arnold v. Mt. Wheeler Power, 101 Nev. 612, 707 P.2d 1137 (1985).

The rapidly-changing inflation and interest rates in the 1970s and 1980s led to legislative changes to the interest rate applied, and eventual dissatisfaction with a fixed rate.[4] The 1987 amendment to both statutory provisions put into place the semi-annual change of interest rate,

and established the “prime plus two percent” formula. The amendment provided that it applied to “causes of action which arise on or after July 1, 1987.”

This history has apparently caused a legislative over-ruling of one holding in Arnold: that an arrearage arising on a specific date continues to accrue interest at the rate in effect at that time until the debt was satisfied, even if the interest rate was changed during the time between the accrual of the debt and the date it was finally paid. 101 Nev. at 615. This holding, and some inconsistent legislative phrasing, caused a good deal of complexity for those that tried to calculate interest by hand, or with a spreadsheet.[5]

The 1987 amendment effectively overruled the Arnold holding recited above, at least as to arrears arising on or after July 1, 1987, so that interest on later-accruing arrears was adjusted “on each January 1 and July 1 thereafter until the judgment is satisfied.” There are an ever-decreasing number of cases as to which the prior statutory scheme is still relevant; they are discussed below in a discussion of the statute of limitations.

For all sums due or payments missed on or after July 1, 1987, the interest rate applicable to the arrearage had to be adjusted semi-annually until payment was made, as follows. Of course, sometimes the rate did not happen to change:

July, 1987-December, 1987 - 10.25%

January, 1988-June, 1988 - 10.75%

July,1988-December, 1988 - 11.00%

January,1989-June, 1989 - 12.50%

July, 1989-December, 1989 - 13.00%

January, 1990-June, 1990 - 12.50%

July,1990-December, 1991 - 12.00%

January, 1991-June, 1991 - 12.00%

July,1991-December, 1991 - 10.50%

January,1992-June, 1992 - 8.50%

July, 1992-December, 1992 - 8.50%

January, 1993-June, 1993 - 8.00%

July,1993-December, 1993 - 8.00%

January, 1994-June, 1994 - 8.00%

July,1994-December, 1994 - 9.25%

January, 1995-June, 1995 - 10.50%

July,1995-December, 1995 - 11.00%

January,1996-June, 1996 - 10.50%

July, 1996-December, 1996 - 10.25%

January, 1997-June, 1997 - 10.25%

July,1997-December, 1997 - 10.50%

January, 1998-June, 1998 - 10.50%

July,1998-December, 1998 - 10.50%

January, 1999-June, 1999 - 9.75%

July,1999-December, 1999 - 9.75%

January,2000-June, 2000 - 10.25%

July, 2000-December, 2000 - 11.50%

January, 2001-June, 2001 - 11.50%

July, 2001-December, 2001 - 8.75%

4. The Mechanics of Performing the Calculations

There are several aspects to the mechanics of performing the calculations made necessary by the legislative changes and case laws, but taken one at a time, they are not really very complicated.

1. Effect of the statute of limitations and historical interest rates

There is one species of judgment for which the historical interest rates, and the cases as to their application, are most relevant: child support cases. On July 1, 1987, the Nevada Legislature amended NRS 125B.050 to eliminate the statute of limitations for collection of child support arrears. In the first appellate case concerning the amended statute, the Nevada Supreme Court ruled that the amendment did not apply retroactively. See McKellar v. McKellar, 110 Nev. 200, 871 P.2d 296 (1994). Four years later, however, through an oddly fractured plurality opinion, the

Court partially overruled McKellar and held that the statute of limitations on child support payments that accrued between July 1, 1981, and July 1, 1987, never ran, since the Nevada Legislature abolished the statute of limitations before the period would have run. Washington v. Bagley, 114 Nev. 788, 963 P.2d 498 (1998).

Under the current interpretation, any child support payment coming due on or after July 1, 1981, is never time-barred by the statute of limitations. Presuming the holdings as to interest rates are not overruled at some point, that means that child support payments accruing from July 1, 1981, have continued to accrue interest at 12%, while all payments accruing since then have "adjusted" every six months.

What about those cases in which partial payments were made? The question is whether payments should apply to support due in the month of payment (as probably intended by the payor), or to the arrearages. Earlier cases, concerned with the statute of limitations, held that payments are applied first to the oldest portion of the debt. See Foster v. Marshman, 96 Nev. 475,611 P.2d 197 (1980).

There is nothing in the Foster opinion to indicate that its holding failed when the statute of limitations was abolished, even though that was the reason for the holding. Presuming it is still good law, the opinion makes the interest calculations more complex, since a "loop" must be created whereby every payment made is first checked against all former amounts due before being applied to the month in which paid. The result is to pay off the old child support arrearages (which accrue interest at a fixed rate), before applying payments to the current support due.[6]

While Foster and similar cases do not discuss the point directly, they give an indication of how the mechanics of calculation should be performed. For example, the statutes do not expressly state whether payments should be applied against the interest on the oldest principal sums due before being applied against later-accrued principal. The question is important to the "bottom line" reached. The cases do tell us that only simple interest is allowed, however.[7] This indicates that all payments should be applied against only principal, while unpaid interest simply accrues, to be paid last. The effect of this application is to make the ultimate sum owed smaller than it would otherwise be, since no payments will be applied to sums (the accrued interest) that are not themselves accruing any interest.[8]

The old interest rates could be applicable to cases other than those involving child support. It is possible to renew any civil judgment every six years. NRS 17.214. The statute does not make it clear whether a renewed judgment continues to accrue interest at the rate in effect when the original judgment was entered, or at the rate existing when the judgment is renewed. The older interest cases would seem to indicate that whatever interest rate was in effect when the original sums accrued remain the rates applicable.

2. How to effectively compound interest within the rules

Interest is calculated on each payment from its due date under a prior judgment or order until

reduced to a new judgment, at which time it begins accruing interest as a new "lump sum" under the interest rate then in effect. Obviously, this practice effectively constitutes a kind of "compounding," since interest is subsequently charged on amounts that had previously accrued as interest, but have now been converted into the principal sum of a judgment.

3. Common errors (how not to do interest calculations)

There are at least three apparently wrong ways of calculating interest frequently seen in our courts: flat rate, end-of-year multiplication, and compounding. The first two result in under-collection, and the third results in over-collection.

Many attorneys simply apply the interest rate in effect at the time of judgment to all arrears, irrespective of when they accrued. This practice disregards the statutory mandate. If, for example, a divorce decree had been issued in 1979 and had called for child support over the following eighteen years, applying the 1979 rate would result in a tremendous loss to the client for those arrears accruing in later years. The reverse application (applying the interest rate that happens to be in effect at the time a case goes to court, irrespective of when a particular arrearage accrued) is just as bad, and could greatly increase, or decrease, the judgment sum, depending on the vagaries of the calendar.

Probably the most common error is end-of-year multiplication, where the total arrears for a calendar year are multiplied by some interest rate, and then multiplied by the number of years to the present. This is simple; but it ignores the holding in Foster, results in the loss of all incremental interest that accrued on payments from the beginning to the end of the year, and does not account for changing rates. Usually, this oversimplification results in judgments smaller than they should be.

Some attorneys would like to compound the interest due on arrearages (i.e., have the accrued interest added to the total before calculating the next month's interest). The case law does not allow it, as set out above. Usually, this is seen when attorneys use mortgage amortization computer programs (or hire CPAs who claim to be using "generally accepted accounting principles" instead of Nevada statutory and case law) as the basis of their calculations. At best, such claims are erroneous over-reaching. At worst, making such a request is unethical.

4. A shameless commercial message

Generally, a CPA will charge a significant sum to perform the calculations necessary to comply with the statutory and case law. The results obtained will still be dependent on how well the CPA understands and applies the legal framework set out above. Usually, a calculation of any complexity (involving multiple changed interest rates, application of partial payments, accrual of interest, etc.) tends to lead to incorrect results in any simple spreadsheet.

Generic computer packages (spreadsheets or databases) are capable of performing the necessary calculations, but freezing some interest rates while adjusting others, and other aspects of the "looping" calculations required by Foster v. Marshman, supra, make the task quite complicated

and prone to error.

Practitioners should be cautious about dedicated software packages available from other states that purport to perform arrearage interest calculations; they do not seem to properly handle Nevada's semi-annually adjusted interest rate very well, or to take the case mandates discussed above into account (one frequent error is to apply payments to interest before principal).

At the time the original version of this article was written at the beginning of 1990, I used to produce spreadsheet calculations of arrearages by hand. It did not take long to discover that interest on accrued payments often was of such a magnitude that the interest properly attributable to an award was sufficient to pay all costs and attorney's fees, while still enlarging the net award to the client. Basically, over the past ten years or so, interest has run at about 10% per year; if it takes five years to collect a judgment after it accrues, the sum owed increases by about 50%.[9]

In 1990, the total number of interest rate changes was not large, and the performing the task manually was manageable. Producing the required spreadsheets and checking for errors was still terribly time-consuming, however, and I had hoped to automate the process by hiring a programmer and building a system.

Like most computerization efforts, the programming took four times longer, and several times more money, as had been predicted. The original version of the Marshal Law Judgment and Interest Calculator Program (for DOS) was not issued until May, 1991. It worked, however, and was adopted by a number of practitioners, courts and agencies.[10]

Eventually, the universality of Windows required the program to be ported to that environment. Another programmer was hired, and in an effort that again went several times in length and an order of magnitude greater in cost than had been estimated, version two of the program, for Windows, was completed and shipped, in November, 1999.[11]

In a (presumably futile) effort to someday recover the costs of creating the program, we sell copies; it is available from my office.[12] Frankly, it is only because of the availability of the program that this article can claim that calculation of interest on damages and judgments is not difficult. I have personally tried every other means of calculating interest that has come to my attention, manual, automated, or by third party, and I know of no other means of doing so that is economical, efficient, and accurate.

4. A COUPLE OF HYPOTHETICALS

The most appropriate illustration of the power of interest calculations is to pull a couple of more-or-less real world examples.

1. Personal Injury Action

Suppose there had been an auto accident on June 15, 1996. The Plaintiff suffered $8,000.00 in medicals, mainly in 1996 and 1997, at ascertainable dates. Suit was filed on November 19, 1997.

Settlement discussions failed, and after trial, judgment was entered on April 23, 1999, the Plaintiff was awarded $25,000.00 for future pain and suffering, $4,000.00 in lost wages, and $1,800.00 in costs.

Sloppy counsel might just total all this up, and make a demand for $38,800.00, accepting a check in that amount from the insurance company (after several delays) on June 25, 1999.

Savvy counsel would note the holdings above, and demand, as part of the judgment, interest on the accumulated medical bills from the time of the complaint.[13]

In a calculation done on the date of trial, the sum due that day would have been $40,567.45, a sum that included $1,767.45 in prejudgment interest. If payment was made the next day, the sum due would have been $40,577.82, including $1,777.82 in prejudgment interest. An additional $10.37 per day in post-judgment interest accrued from that date forward. Using the MLAW program, all required calculations could be done in about 30 seconds. See Exhibit A.

In this hypothetical, plaintiff's counsel could, and should, inquire of defense counsel when payment was to be made, and calculate the sum due on that date accordingly. If the payment date was to be May 15, counsel should require payment of $40,795.47, and if payment was not made until June 25, counsel should hold out for the full $41,230.78 due by that time. See Exhibits B & C. In this scenario, the likelihood of prompt payment should be expected to correspond directly with counsel's ability and willingness to precisely calculate how much is due on any particular date.

2. Family Court Action

Suppose a couple was divorced on July 12, 1995, with a first child support payment of $500.00 due on the first of the next month. Intermittent payments – mostly less but sometimes more than the sum due in a month – were made on various dates through October, 1999, after which no payments were made until the couple returned to court on February 10, 2000. On August 30, 1996, the custodial parent had sustained a medical expense of $428.00 for the child, for which one-half contribution ($214.00) was immediately requested but never provided.

During the February 10, 2000, hearing, the court increased child support from $500.00 to $737.00 per month, and awarded $1,200.00 in attorney's fees. Only the previously-due amount of support was paid after that date, until the payor was brought back on a contempt motion on June 28, 2000.

The above (not untypical) scenario presents a colossal calculation headache if done by hand. Unfortunately, too many practitioners respond to the problem by ignoring it and asking for only the principal sums due. This is a mistake. At the time of the first hearing, counsel doing so would have given up $1,148.43 due to the underpaid custodian. See Exhibit D.

Counsel should, of course, request that the entire sum of unpaid principal and interest to date be reduced to judgment as of the date of the hearing. In this case, doing so would have allowed

counsel to make a demand at the second hearing of $9,759.22 – of which $348.79 was interest accrued in the four months between the first hearing and second one. See Exhibit E. Again, the necessary calculations only required a couple of minutes, and the difference between the client receiving and not receiving the money would be only the attorney's being willing and able to calculate it.

5. THE MALPRACTICE RISK

From Aloy v. Mash, 696 P.2d 656 (Cal. 1985), to Bross v. Denny, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000.00 malpractice award against trial attorney for not knowing that he could seek division of military retirement after change in the law), it has been made clear that attorneys are bound to know of and apply the applicable substantive and procedural law to the benefit of their clients. The potential liability is the value of the benefit lost to the client.

More to the point, in the absence of extenuating circumstances, it might very well constitute malpractice to fail to seek the full measure of damages allowed by law. See, e.g., Warmbrodt v. Blanchard, 100 Nev. 703, 692 P.2d 1282 (1984) (setting out elements of malpractice action). It is necessary to calculate interest whenever a client is owed money and payments are not made. The mandatory nature of calculating interest would appear to make worse than ever the risks to counsel for failing to do so.

6. CONCLUSION

Practitioners should routinely calculate interest on behalf of any client who is owed arrears; the failure to do so gives an incentive to the other side to delay payment as long as possible, and could raise the specter of malpractice liability. Ideally, if collection of interest became wide-spread, there might even be a beneficial impact on the behavior of debtors, leading to fewer impoverished former spouses, children, and other judgment creditors. By making it easier and cheaper for debtors to simply pay the sums they owe rather than delay or refuse to do so, counsel may succeed in keeping them out of court altogether.

Calculation and collection of interest fulfills the mandate of the Nevada Supreme Court, makes the creditors whole, encourages prompt payment, and helps apportion the burden of fees where it most properly belongs. It should be a routine part of the practice of any attorney who litigates collection of sums owed by one person or entity to another.