POSITION PAPER OF THE LEGISLATION COMMITTEE OF DIVISION IV OF THE D.C. BAR CONCERNING PREJUDGMENT INTEREST FOR CIVIL SUITS IN THE DISTRICT OF COLUMBIA COURTS

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SUMMARY

In the attached position paper, the Division IV Legislation Committee recommends the adoption of amending legislation to the D.C. Code to allow prejudgment interest in all tort and contract suits in the District of Columbia courts. Currently, D.C. law has been construed narrowly to bar prejudgment interest on most non-liquidated contract claims and on all tort claims. This denies full compensation to most plaintiffs and likely encourages delay in resolving disputes. Prejudgment interest would encourage settlement and discourage dilatory tactics.

The statute proposed by the accompanying position paper (see Appendix A) would create a presumption of prejudgment interest to be awarded by the court, but would reserve discretion in the court to reduce or award no such interest in unusual circumstances as outlined herein. In that event, the court would have to justify its ruling by findings and a statement of reasons. Interest would accrue from the date of notice of the claim, defined in the proposed statute.

The Division IV Steering Committee took a different position from that of the Legislation Committee on the date from which prejudgment interest should begin to accrue, with the Steering Committee endorsing the "when the course of action arose" standard for the reasons expressed herein.

POSITION PAPER
OF
DIVISION IV - LEGISLATION COMMITTEE
DISTRICT OF COLUMBIA BAR

CONCERNING

PREJUDGMENT INTEREST FOR CIVIL SUITS IN THE DISTRICT OF COLUMBIA COURTS

I. INTRODUCTION

The Legislation Committee of Division IV of the District of Columbia Bar concludes in this position paper that the District of Columbia should amend D.C. Code § 15-109 to provide for prejudgment interest on damage awards in civil cases filed in the D.C. Superior Court, with discretion vested in the court to reduce or deny prejudgment interest in limited circumstances. The current D.C. law governing prejudgment interest has been construed to provide no prejudgment interest in most cases.

In 1982, the D.C. Council considered "The District of Columbia Prejudgment Interest Authorization Act of 1982" (Bill 4-364, as amended), which would have authorized the discretionary award of prejudgment interest on all or any part of any damages awarded in contract or tort actions. Faced with heavy opposition from the insurance industry, the Act was never reported out of the Judiciary Committee.

With delays in the resolution of civil cases in Superior Court in the neighborhood of two to three years on the average, the Legislation Committee believes the issue should now be re-examined by the Council, both in the interest of fairness to

plaintiffs and in order to discourage delays in case disposition in the interest of efficient court administration.

The Council for Court Excellence has recently drafted its own prejudgment interest bill which is substantially similar to the proposed bill drafted by the Legislation Committee and, indeed, borrowed some aspects from the Legislation Committee's proposal. The Legislation Committee supports the concept of prejudgment interest and, in most respects, the bill prepared by the Council on Court Excellence, and our rationale is set out in this position paper.

The proposed statute appearing in Appendix A establishes a presumption in favor of prejudgment interest in all cases, whether in tort or contract. The court would have discretion to award less than the total amount of interest authorized, or no prejudgment interest at all, where good cause is shown for that result, but in that event the court would have to justify its position by findings and a statement of reasons. The rate of prejudgment interest would be the same as that authorized for postjudgment interest, currently tied to the U.S. Treasury rate for tax underpayments.

VIEWS OF THE DIVISION IV STEERING COMMITTEE

The Division IV Steering Committee endorsed the Legislation Committee's proposal on prejudgment interest in all respects except as to the date from which interest should ac-

crue. The Steering Committee narrowly endorsed "when the course of action arose" (the standard reflected in the bill proposed by the Council for Court Excellence), as contrasted with the Legislation Committee's proposed notice-to-defendant standard. The rationales for each viewpoint are set out in Section VI.

II. THE CURRENT LAW REGARDING PREJUDGMENT INTEREST IN THE DISTRICT OF COLUMBIA

The current law in the District of Columbia, D.C. Code §§ 15-108, 109, provides that the D.C. Superior Court may award prejudgment interest to prevailing litigants only in limited circumstances.

D.C. Code § 15-108 (1981) provides for interest on judgments in contract actions for liquidated damages to be awarded from the time the debt was due:

> In an action . . . to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.

This statutory provision codifies the common law rule. See McIntosh v. Aetna Life Insurance Co., 268 A.2d 518, 521 (1970).

Although section 15-108 prescribes that interest be awarded in all cases if the debt is liquidated, the courts have ruled that even this limited right to prejudgment interest may be defeated based upon equitable considerations. For example,

in Powers v. Metropolitan Life Insurance Co., 439 F.2d 605 (D.C. Cir. 1971), the court held that prejudgment interest should not be awarded on a liquidated claim to insurance policy proceeds, because it would not further the aim of encouraging settlements. In that interpleader action, the "demand by one claimant [could] not be met without prejudicing the claim of another, and thereby possibly subjecting the company to double liability." 439 F.2d at 609. See also Giant Food, Inc. v. Bender, 399 A.2d 1293, 1299 and n.6 (D.C. 1979) (an unliquidated counterclaim may offset the interest authorized by § 15-108 on a liquidated claim).

Section 15-109 of the D.C. Code, concerned primarily with postjudgment interest, further provides that prejudgment interest may be awarded on a contract claim "if necessary to fully compensate a plaintiff":

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest. (Emphasis added.)

This provision has been construed to grant broad discretion to trial courts to award prejudgment interest in contract actions. Edmond J. Flynn Co. v. LaVay, 431 A.2d 543, 550 n.6 (D.C. App. 1981). The situation is quite different, however, with respect

to tort actions. While Section 5-109 is, on its face, ambiguous as to whether prejudgment interest may be awarded on tort claims, the courts have construed it narrowly to allow for prejudgment interest only on contract claims, and not on tort claims. In Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 856 (D.C. Cir. 1981), cert. denied, 455 U.S. 994 (1982), the U.S. Court of Appeals for the D.C. Circuit reasoned:

> "[S]ection [109] generally limits interest to the postjudgment period. The second sentence appears to provide an exception. It is unclear, however, whether the exception refers only to contract actions specified in the first sentence, or to both contract and tort actions. The location of the second sentence in the paragraph, followed by the provision in the third sentence that the judgment shall bear interest in tort actions, suggests that the exception applies only to contract actions. Our interpretation is confirmed by the statute's legislative history and by the case law." 658 F.2d at 856.1/

Thus, under current D.C. law, a prevailing plaintiff in a contract case for a liquidated sum will, under most circumstances, be entitled to prejudgment interest, and a prevailing plaintiff in a contract action for a non-liquidated sum may

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1/ There is some early common law authority, however, that suggests that a jury has discretion to award interest as part of the damages to a successful plaintiff in a tort action. See Washington & Georgetown Railroad v. Tobriner, 147 U.S. 571, 588 (1893); Washington & Georgetown Railroad v. Hickey, 12 App. D.C. 269, 276 (1898).

obtain prejudgment interest. However, a successful plaintiff in a tort case cannot be awarded prejudgment interest.

III. PURPOSES OF PREJUDGMENT INTEREST

The primary goal of prejudgment interest is full and adequate compensation for plaintiffs, by including in the damage award compensation for the delay in the receipt of damages. Prejudgment interest awards compensate the successful plaintiff for the retention and use by the defendant of money ultimately assessed as damages but which was retained by the defendant during the pendency of the lawsuit. Damage awards without prejudgment interest do not account for the diminution in value of the damage award as a result of inflation and the non-use by the plaintiff of the money over the period prior to judgment.[1/]

Indeed, the District of Columbia Court of Appeals has recognized that the primary purpose for prejudgment interest is to provide full compensation to the successful litigant, including compensation for the use of the damages by the defendant prior to payment. See Giant Food, Inc. v. Bender, supra, 399 A.2d at 1299.

1/ See, e.g., Comment, Prejudgment Interest: Survey and Suggestion, 77 Nw. U.L. Rev. 192 (1982) (hereafter, "Summary and Suggestion"); T. Coleman, Pre-And Postjudgment Interest: The Fight For a Higher Rate, Los Angeles Lawyer (1982); Note, Prejudgment Interest: An Element of Full Compensation In Wrongful Death Cases, U. Ill. L. Rev. 453 (1981).

This full-compensation rationale is not diminished by the fact that delay in obtaining judgment may be caused in large part by court backlogs or some other cause outside of the parties' control. On the contrary, the plaintiff should be compensated for the delay occasioned by the use of the court system, with the resultant though legitimate delays, if the principle of full compensation is to be vindicated. According to 1983 D.C. Superior Court statistics, litigants experience average delays in resolving civil cases of up two to three years. The defendant is not unfairly treated in this circumstance, because he has the use of the money owing to the plaintiff during the pendency of the suit. As one commentary has noted:

> "Defendant's apparent dilemma -- whether to pay the claim and avoid prejudgment interest, or to litigate the claim with the possibility of an interest award -- is illusory. If defendant is found liable, he has not suffered the uncertain loss of interest damages. Theoretically, the money controlled by him, and found owing as damages, has produced during the period of litigation the exact amount due as prejudgment interest."

Note, Recovery of Prejudgment Interest on an Unliquidated State Claim Arising Within the Sixth Circuit, 46 U. Cin. L. Rev. 151, 164 (1977).

In addition to the paramount goal of fully compensating successful claimants, prejudgment interest is intended to discourage defendants from avoiding early settlement and

prolonging litigation, by decreasing or eliminating the financial incentive to do so. See, e.g., Survey and Summary at 210; State v. Phillips, 470 P.2d 266, 274 (Alaska 1970); Busik v. Levine, 307 A.2d 571, 576 (N.J. 1973). The Legislation Committee has been unable to locate empirical evidence of whether, in fact, prejudgment interest reduces delay in resolving litigation or encourages early settlement. However, it is reasonable to assume that the potential for prejudgment interest would reduce delay in at least some cases, particularly where the defendant's case is weak. A defendant is more likely to settle and do so at an earlier stage in the proceedings if he knows he must pay for the use of the sum which may ultimately be assessed as damages. This is so even where litigation delays are the result of a backlogged court system.

It should be stressed that prejudgment interest is not a penalty assessed against defendants for exercising their rights to use the court system and proceed to trial, although some courts have so viewed it and thus defeated the full-compensation principle. Compare Bush Aircraft Corp. v. Harvey, 558 P.2d 879, 888 (Alaska 1976) and Busik v. Levine, 307 A.2d 471, 475 (N.J. 1973) (prejudgment interest is not a penalty) with Glus v. G.C. Murphy Co., 629 F.2d 248, 58 (3d Cir.), cert. denied, 449 U.S. 949 (1980) (prejudgment interest punishes a defendant who has exercised his right to proceed to trial). Instead, prejudgment interest is intended to prevent defendants

from obtaining a windfall by having the use of plaintiffs' damages for what is often a significant period of time.

IV. CRITICAL ANALYSIS OF TYPES OF APPROACHES TO PREJUDGMENT INTEREST

There are three basic approaches to prejudgment interest embodied in state statutes or court rules adopted in some 24 states: the traditional, discretionary, and mandatory approaches.

A. The Traditional Approach

The traditional approach to prejudgment interest allows such interest only on liquidated contract claims, or, in some cases, where damages are reasonably ascertainable. Section 15-108 of the D.C. Code, described above, is an example of this traditional restrictive approach. Maryland also follows this approach. _See_ _Wartzman_ v. _Hightower Productions, Ltd._, 456 A.2d 82, 89 (Md. App. 1983). _See_, _e.g._, _Moutsopoulos_ v. _American Mutual Insurance Co._, 607 F.2d 1185, 1190 (7th Cir. 1979) (Wisconsin law); _Potter_ v. _Hartzell Propeller, Inc._, 291 Minn. 513, 189 N.W.2d 499 (1971). In jurisdictions following the traditional approach, a genuine dispute as to the amount due will defeat the claim for prejudgment interest, because the defendant cannot reasonably determine the amount due and tender it. _Pappas_ v. _Jack O.A. Nelson Agency, Inc._, 81 Wisc.2d 363, 374, 260 N.W.2d 721, 726-27 (1978).

The rationale for the traditional approach is stated in Potter v. Hartzell Propeller, Inc., supra:

> "The underlying principle is that one who cannot ascertain the amount of damages for which he might be held liable cannot be expected to tender payment and thereby stop the running of interest." 189 N.W.2d at 504.

See also Summary and Suggestion at 197; Note, Prejudgment Interest in Oklahoma, 34 Okla. L. Rev. 643 (1981). The Legislation Committee does not find this rationale persuasive. As one commentator has noted,

> "[I]f the goal of civil litigation is, indeed, to provide full compensation to the plaintiff, then the defendant's uncertainty as to the amount of his liability should be irrelevant." Summary and Suggestion at 197-98.

Moreover, the argument for the traditional approach based upon unfairness to defendants is undercut by the fact that the defendant has the use of the money owing to the plaintiff and may earn interest on it during the pendency of the lawsuit.

Recognizing the inequity of allowing defendants to hold and use damage monies during the pendency of a lawsuit, some courts in jurisdictions with restrictive prejudgment interest statutes have nonetheless awarded such interest by characterizing it not as interest, but as a part of the damage award itself. See Survey and Suggestion at 205-06; Maryland Port

Administration v. C.J. Langenfelder & Sons, Inc., 438 A.2d 1374, 1385 (Md. App. 1982). Although the merit of this rationale has been questioned, its use demonstrates the unsatisfactory nature of the traditional approach to prejudgment interest.

Thus, under statutes reflecting the traditional approach to prejudgment interest, claimants receive arbitrary treatment depending on whether their claim is liquidated or unliquidated. This results in the denial of full compensation to some plaintiffs, and provides defendants with an economic incentive to prolong litigation and to avoid settlement.

B. The Discretionary Approach

A number of jurisdictions, including our neighboring State of Virginia,[1/] have statutes that permit a discretionary award of prejudgment interest, in some cases by juries.[2/]

Courts most frequently exercise their discretion to deny prejudgment interest where a case involves unliquidated

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1/ Va. Code § 8.01-382 (Supp. 1982).

2/ See, e.g., Cal. Civ. Code § 3288 (Deering 1972); N.D. Cent. Code § 32-03-05 (Supp. 1981); S.D. Codified Laws Ann. § 21-1-13 (1979). Eastern Federal Corp. v. Avco-Embassy Pictures Corp., 331 F. Supp. 1253, 1256-57 (N.D. Ga. 1971); Western & Atlantic Railroad v. Brown, 102 Ga. 13, 15, 29 S.E. 130, 131 (1897); Floyd v. Jay County Rural Electric Membership Corp., 405 N.E.2d 630, 635-36 (Ind. Ct. App. 1980); Schaefer & Associates, P.A. v. Schirmer, 3 Kan. App. 2d 114, 118-19, 590 P.2d 1087, 1092 (1979); Congoleum-Nairn, Inc. v. M. Livingston & Co., 257 Ky. 573, 78 S.W.2d 781, 785 (1935); Commercial Union Insurance Co. v. Byrne, 248 So.2d 777 (Miss. 1971); Marrazzo v. Scranton Nehi Bottling Co., 438 Pa. 72, 74-75, 263 A.2d 336, 337 (1970); Draper v. Great American Insurance Co., 224 Tenn. 552, 562, 458 S.W.2d 428, 432-33 (1970); City of El Paso v. Nicholson, 361 S.W.2d 415, 418 (Tex. Civ. App. 1962).

damages, see, e.g., Lodges 743 and 1746 Internat'l Assoc. of Machinists v. United Aircraft Corp., 534 F.2d 422, 447 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976), or where a defendant has not unduly delayed the litigation, see, e.g., Glus v. G.C. Murphy Co., 629 F.2d 248, 258 (3d Cir.), cert. denied, 449 U.S. 949 (1980); Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1198 (6th Cir. 1974), cert. denied, 422 U.S. 1048 (1975).

The foregoing cases demonstrate that under the discretionary approach interest may be denied under circumstances that do not differ from the traditional approach. Indeed, the absence of guidelines for the exercise of discretion has caused some courts to deny awards of prejudgment interest. See Summary and Suggestion at 208. Further, it is unfair to require dilatory behavior on the part of defendants as a prerequisite to the award of prejudgment interest; except in the most extreme cases, a legitimate rationale can generally be posited for the use of motions practice and other litigation devices, even where the trial is significantly delayed thereby, and the courts are reluctant to find that defendants have acted unreasonably for fear of penalizing them for making full use of the court system. See Glus v. G.C. Murphy, supra, 629 F.2d at 258 ("An award of interest here would punish the [defendant] unfairly because it exercised its right to proceed to trial").

The result is that, where only the defendant's conduct is scrutinized, successful plaintiffs may be denied full

compensation through recovery of prejudgment interest. And the uncertainty as to whether prejudgment interest will be awarded under discretionary statutes diminishes the incentive for defendants to refrain from prolonging the pre-trial process. The Legislation Committee believes that it is more appropriate to focus on the plaintiff's conduct, and to deny or reduce prejudgment interest only where the plaintiff has caused delay through bad faith dilatory tactics. That approach provides both sides with an incentive not to delay in proceeding to trial.

Another disadvantage of discretionary statutes is that they inevitably result in a lack of uniformity in the award of prejudgment interest from case to case. Some judges are more reluctant than others to award a full measure of prejudgment interest, and each judge will accord a different degree of weight to each relevant factor, such as the number of motions filed by a defendant. At the very least, statutory guidelines should be provided to ensure some measure of consistency in awards of prejudgment interest.

Some courts awarding prejudgment interest under discretionary statutes have acknowledged that the purpose of prejudgment interest is to compensate plaintiffs for the lost value of the money damages caused by the delay in recovery. See Phillips Petroleum Co. v. Adams, 513 F.2d 355, 370 (5th Cir.),

cert. denied, 423 U.S. 930 (1975).[1] Yet this full-compensation goal is not completely realized by giving the courts unfettered discretion to deny such interest. The Legislation Committee is of the view that, while some discretion is desirable to deal with specialized cases where a full award of prejudgment interest would be unfair or counterproductive (such as in circumstances more fully discussed infra), prejudgment interest should generally be awarded as a matter of course consistently with the goal of full compensation.

C. The Mandatory Approach

An increasing number of jurisdictions have adopted either statutes or court rules that make the award of prejudgment interest mandatory, or mandatory in all but exceptional circumstances.[2]

1/ "Texas courts . . . realize that the right to interest is a marketplace concept and that the use of the money is a mercantile privilege which should not go uncompensated . . . . [Defendant] cannot be heard to say that it is fair and equitable that it should enjoy such a financial advantage for so long, and pay not a cent for it." See also South Central Livestock Dealers, Inc. v. Security State Bank, 614 F.2d 1056, 1062 (5th Cir. 1980).

2/ E.g., Alaska Stat. § 45.45.010 (Supp. 1982) (10% from date action accrued); Colo. Rev. Stat. § 13-21-101 (Supp. 1981) (9% interest from date action accrued); La. Rev. Stat. § 13:4203 (West 1968) (interest from filing date); Maine Rev. Stat. tit. 14, § 1602 (Supp. 1982-83) (interest from date filed); Mass. Gen. Laws ch. 231, §§ 6B, 6C (Supp. 1983) (10% from date filed for tort actions and from date of demand or breach in contract actions); Mich. Stat. 600.6013 (Supp. 1983-84) (5% from date action filed); N.H. Rev. Stat. § 524:1-b (1974) (6% from date action filed); N.Y. Est. Powers & Trusts Law § 5-4.3 (Consol. Supp. 1982-83) (in wrongful death cases, from date of death); Okla. Stat. tit. 12, § 727(2) (West Supp. 1982-83) (15% from date action filed).

The mandatory prejudgment interest statutes differ most significantly with respect to the point in time when interest begins to accrue, whether on the date of filing[1/] or the date the cause of action arose.[2/] In New Jersey, where prejudgment interest is required by court rule except in "exceptional circumstances," interest begins to accrue on the date the complaint is filed or six months after the accrual of the cause of action, whichever is later. Civil Practice Rules Governing the Court of the State of New Jersey, R. 4:42-11(b) (West 1981). In Virginia, the accrual date is a discretionary matter for the jury in jury cases or for the court.[3/]

The mandatory approach to prejudgment interest presents substantial advantages: the certainty of the award fulfills the twin goals of prejudgment interest to compensate fully successful claimants and to eliminate defendants' financial incentive to prolong litigation in a consistent manner. Nevertheless, the Legislation Committee believes that some limited discretion should be reserved to the court to ensure equitable results in exceptional circumstances, as discussed *infra*. The

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1/ *E.g.*, New Hampshire, N.H. Rev. Stat. § 524:1-b (1974); Louisiana, La. Rev. Stat. Ann. § 13:4203 (West 1968); Michigan, Mich. Stat. § 600:6013 (Supp. 1983-84); Oklahoma, Okla. Stat. tit. 12, § 727 (West Supp. 1982-83).

2/ *E.g.*, Alaska, Alaska Stat. § 45.45.010; Colorado, Colo. Rev. Stat. § 13-21-101 (Supp. 1981); Rhode Island, R.I. Gen. Laws § 9-21-10 (Supp. 1982).

3/ Va. Code § 8.01-382 (Supp. 1982).

experience of New Jersey is instructive in this respect. The New Jersey court rule originally promulgated made prejudgment interest mandatory in tort cases. In Espin v. Allegan Pharmaceutical, Inc., 127 N.J. Super. 496, 317 A.2d 779 (1973), however, a lower state court retreated from this absolute requirement and ruled that delay by plaintiff in proceeding to trial would defeat the right to prejudgment interest. 317 A.2d at 780. The New Jersey rule was subsequently modified to provide discretion to disallow prejudgment interest in "exceptional cases." However, this rule recently has been viewed as entirely discretionary. Hild v. Bruner, 496 F. Supp. 93, 100 (D.N.J. 1980). See Summary and Suggestion at 213, discussing the New Jersey rule.

V. OTHER JURISDICTIONS

Some 22 states permit awards of prejudgment interest in tort actions on either a discretionary or mandatory basis.[1/] Fixed statutory rates of interest vary from a high of 15% (Oklahoma) to a low of 7% (Wisconsin); most fixed-rate statutes use a figure in the 9% to 12% range. Maryland law prescribes 10% for liquidated damage awards, and Virginia law mandates a

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1/ Alaska, California, Colorado, Iowa, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. New York law mandates prejudgment interest in wrongful death actions.

12% rate only for actions on negotiable instruments and has no specified rate for other actions.

Federal courts have in some instances awarded prejudgment interest on judgments under federal statutes not containing any express language authorizing such awards, in the interest of fully compensating plaintiffs.[1/] In addition, Congress has recently authorized prejudgment interest by statute in antitrust actions on a discretionary basis "if the court finds that the award of such interest is just in the circumstances." Courts are directed to consider dilatory motions and other practices by both parties. Antitrust Procedural Improvements Act of 1980, 15 U.S.C. § 15(a) (Supp. 1984).

VI. RECOMMENDED LEGISLATION

The Legislation Committee proposes legislation to amend Section 15-109 of the D.C. Code to authorize prejudgment interest in non-liquidated contract and in tort actions, as set forth in Appendix A hereto.

1/ *See, e.g.*, Clinchfield Coal Co. v. Cox, 611 F.2d 47 (4th Cir. 1979) (Federal Coal Mine Health and Safety Act of 1969); Usery v. Associated Drugs, Inc., 537 F.2d 1991 (5th Cir. 1976) (Fair Labor Standards Act of 1938); Chris-Craft Inds. v. Piper Aircraft Corp., 516 F.2d 172, 190 (2d Cir. 1976), *rev'd on other grounds*, 430 U.S. 1 (1977) (Securities Act); Louisiana & Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (5th Cir. 1966) (Interstate Commerce Act); Sharp v. Coopers & Lybrand, 491 F. Supp. 55 (E.D. Pa. 1980), *vacated on other grounds*, 649 F.2d 175 (3rd Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (Securities Act); Marshall v. Board of Education of Baltimore County, 470 F. Supp. 517 (D. Md. 1979), *aff'd*, 618 F.2d 101 (4th Cir. 1980) (Fair Labor Standards Act of 1934.

The Legislation Committee has examined the proposed statute with twin aims in mind: to provide full compensation to successful plaintiffs and to make the award of prejudgment interest as mechanical as possible, so as not to add another layer of litigation. As to some issues, these goals have pointed to different results, in which case the Legislation Committee resolved the conflict in the manner discussed below.

1. Basis for prejudgment interest. The statute proposed reflects an amalgam of the mandatory and discretionary approach to prejudgment interest. Prejudgment interest would be awarded as a matter of course in all damage actions, whether in contract or tort and without regard to whether damages are liquidated. To this end, the statute establishes a presumption in favor of prejudgment interest. Nevertheless, the court would retain limited discretion upon a showing "of clear and convincing evidence that there is good cause to adjust the interest rate, eliminate an award of prejudgment interest or to allow interest to accrue from a date other than the date the cause of action arose." Specific considerations are not listed in the proposed statute for the sake of simplicity and in order to avoid precluding the exercise of discretion in situations that cannot be anticipated. Nevertheless, it is anticipated that the legislative history would set out in some detail the types of circumstances that would make exercise of this discretion appropriate.

For example, where the plaintiff has unduly delayed the litigation after its filing through actions amounting to or approaching bad faith, discretion should be exercised. On the other hand, the defendant's conduct should not be a basis for reducing the presumptive award of prejudgment interest. Discretion might be exercised to reduce the statutory interest rate (discussed below) where there has been an unusual fluctuation in market interest rates so that rates are unusually high at the time of judgment relative to those prevailing over the period of the lawsuit.

The quantitative reduction in the award should reflect the particular reason for that reduction; the statute is specifically intended not to make prejudgment interest an all-or-nothing proposition.

If the court reduces or denies an award of prejudgment interest, then findings are required to justify that decision. This provision emphasizes the presumption in favor of prejudgment interest and the unusual nature of circumstances justifying its denial or reduction. The requirement of findings has the additional advantage of allowing the appeals court to determine whether the intent of the prejudgment interest statute has been reflected in a particular award. <u>See</u> <u>Rolf</u> v. <u>Blyth, Eastman, Dillon & Co</u>, 570 F.2d 38, 50 (2d Cir.), <u>cert. denied</u>, 439 U.S. 1039 (1978).

2. <u>Court to make prejudgment interest awards</u>. The court would determine the award, rather than the jury, even in

jury cases. This will promote consistency, avoid adding to the decision-making burdens for juries, and ensure that the appropriate criteria are considered. The court is in the best position to evaluate the pre-trial behavior of the parties, the prevailing interest rates and the other considerations to be addressed in making prejudgment interest awards.

3. Point in time from which interest starts to run. This is a controversial issue as to which ease of application may conflict with full compensation. Three possible dates were identified as the starting point for prejudgment interest accrual: (1) the date the cause of action arose, (2) the date the defendant receives notice of the claim, and (3) the date of the filing of a complaint. (In actions involving liquidated claims, interest would accrue from the date a debt was due and unpaid, under D.C. Code § 15-108.)

As noted at the outset of this paper, the Division IV Steering Committee narrowly preferred the date the cause of action arose while the Legislation Committee advocated the date when the defendant is placed on notice of an injury which would give rise to a claim against him. Both options are discussed herein.

a. The date the cause of action arose. The Steering Committee believes that this option best vindicates the full-compensation principle, which this report recognizes to be the paramount goal of prejudgment interest. This date

would remove any incentive on the part of plaintiffs to rush to court and file suit in order to start the running of prejudgment interest, rather than engage in pre-suit settlement negotiations. Since most disputes are settled prior to the commencement of litigation, the date would allow plaintiffs who settle to be in a strong position to obtain interest as a part of the settlement package, thus encouraging settlements.

The law as to when a cause of action arises in the statute of limitations context is fairly well-settled, and that same law could be applied to control prejudgment interest. In a contract action, the cause of action arises on the date the contract is breached, for example, when defective work is done. _See_ _Ehrenhaft_ v. _Malcolm Price, Inc._, ____ A.2d ____, No. 83-1261, slip op. at 12 (D.C., filed Nov. 14, 1984). In tort actions, the cause of action arises when the injury resulting from the alleged tort occurs. _Id._, slip op. at 13. The Steering Committee believes that the date the cause of action arose would be more easily determinable under this generally applicable standard than under the notice rule proposed by the Legislation Committee which would require more particularized, factual analysis.

While in most tort cases the date the cause of action arose will be the date of the accident or tort, there will be situations in which the date will be more questionable, and the court would be required to determine the issue. Although this

would add a layer of litigation, the issue often will have to be determined in any case for statute of limitations purposes.

The Steering Committee believes that judicial discretion to reduce awards of prejudgment interest in unusual circumstances would address the unfairness which is the chief rationale for the notice standard. For example, where the statute of limitations is tolled by the discovery rule, *see*, *e.g.*, *Ehrenhaft* v. *Malcolm Price, Inc.*, *supra*, the defendant could not be expected to take action to compensate the victim in the pre-litigation period, and the court would have discretion to reduce prejudgment interest to address any inequity. Of course, such a reduction would have to be supported in the court's findings and statement of reasons.

b. *Date of notice*. The Legislation Committee is of the view that the date the defendant is placed on notice of injury caused by his actions would best strike an equitable balance between the full compensation principle for plaintiffs and fairness to defendants. The notice standard is set forth in the proposed statute at Appendix A.

Notice would be defined as the date the defendant is put on inquiry -- *i.e.*, is aware of sufficient facts to lead a reasonable person to exercise due diligence in conducting a reasonable inquiry -- that there exists a claim for damages as a result of his acts or failure to act or from the date the defendant denies liability, whichever is first. No formal

written notice would be required except in cases against the District of Columbia, as discussed _infra_. This definition incorporates the general definition of inquiry notice (_see_, _e.g._, _Hobson_ v. _Wilson_, 737 F.2d 1, 35 n. 107 (D.C. Cir. 1984); _State ex rel. Gleason v. Rickhoff_, 541 S.W.2d 47, 50 (Mo. 1977)), and is the notice date used in other jurisdictions for prejudgment interest on unliquidated damages. _See_ _Liberty Mutual Ins. Co. v. General Insurance Co._, 517 S.W.2d 791, 798 (Tex. 1975). _But see_ _Levy-Zentner Co. v. Southern Pac. Transp. Co._, 74 Cal. App. 3d 762, 798-799, 142 Cal. Rptr. 1, 25 (1975). The date should be determined by the court and not the jury, consistently with other aspects of prejudgment interest. _See_ _Busik v. Levine_, _supra_. In many if not most cases the notice rule would yield the same date as the "when the cause of action arose" rule: _i.e._, the date of the tort or contract breach.

Unlike the "date the cause of action arose" standard, the notice rule gives the injured party an incentive to let the defendant know of the injury at the earliest possible date, thus encouraging pre-litigation settlement efforts. At the same time, the full-compensation principle would be vindicated, because the notice rule puts it within a plaintiff's power to begin the running of interest. The rule would also be fair to defendants, who cannot be expected to take steps to compensate the injured party until they are aware of the injury giving rise to a claim for damages. There may be a significant lapse

of time between the point in time when the breach or tort occurs and when a defendant learns of the injury, notably where the discovery and concealment rules for the tolling of statutes of limitation are applied. See, e.g, Hobson v. Wilson, supra, 737 F.2d at 35-40; Wilson v. Johns-Mansville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982). While application of court discretion to reduce prejudgment interest awards could address this inequity problem, the resulting awards would be more consistent from case to case under a notice standard.

4. Rates of interest. The rate of prejudgment and postjudgment interest should be the same, and the rate should be specified in the statute to promote consistency and certainty. The rate should be tied to the market interest rate prevailing when judgment is entered. Because of fluctuating interest rates, we have rejected a flat statutory rate so prevalent in other jurisdictions.

Currently, D.C. law for postjudgment interest specifies 70 percent of the rate used by the Internal Revenue Service for underpayments and overpayments of taxes, a rate tied to the market interest rate. D.C. Code § 28-3302. The Council for Court Excellence has recommended both changing the statutory postjudgment interest rate to eliminate the 70 percent provision and allowing the same market-based rate for prejudgment interest. (The proposed amendment of section 28-3302 is included in Appendix A.) The Legislation Committee agrees that this approach is more consistent with the full compensation principle than

current section 28-3302, but we emphasize that the rate should be the same for both prejudgment and postjudgment interest. We urge that if a different rate than that reflected in the current section 28-3302 is adopted for prejudgment interest, then section 28-3302 should be amended as well to authorize the same rate for postjudgment interest.

5. District of Columbia. Under current law, the District of Columbia is subject to interest on judgments at a much lower rate than other litigants: 4 percent. D.C. Code § 28.3302(b). The Legislation Committee believes this to be unfair to successful plaintiffs suing the District of Columbia. Further, the District of Columbia government is not insensitive to the economic cost or windfall of delay in civil litigation. Accordingly, the proposed amendment would make the District of Columbia subject to prejudgment and postjudgment interest to the same extent as private litigants.

Under current law, those seeking unliquidated damages against the District of Columbia are required to give written notice to the City within six months of the injury or damage. D.C. Code § 12-309. For convenience and to avoid confusion, notice for purposes of when prejudgment interest accrues in actions against the District of Columbia under the proposed statute would incorporate the notice provision of Section 12-309.

The Legislation Committee
Division IV
D.C. Bar

APPENDIX A

(I.) D.C. Code, Sec. 15-109, is amended to read as follows:

Section 15-109. Prejudgment interest; interest on judgments for damages.

(a) Prejudgment interest. In an action to recover unliquidated damages, for breach of contract or for a wrong, prejudgment interest, in the discretion of the court, shall be assessed on the compensatory damages awarded in a verdict to the prevailing party at a rate which shall, in the absence of express contract, be that established by the Internal Revenue Service pursuant to section 6621 of the Internal Revenue Service Code of 1954, approved January 1, 1975 (88 Stat. 2114; 26 U.S.C. sec. 6621) for underpayments and overpayments of tax. Such interest shall accrue from the date notice of a claim is received, and shall extend to the date of the entry of the judgment. Such interest shall be calculated at the rate which is effective on the date of judgment.

(b) Notice of Claim. For purposes of subsection (a) "notice of claim" is defined as the date upon which a party, or his or her agent, either is put on inquiry that there exists a claim for damages against the party as a result of the party's actions or failure to act, or denies liability, whichever date is earlier.

(c) Presumption. There shall be a presumption in favor of an award of prejudgment interest as set forth in subsection (a) which may be overcome by showing of clear and con-

vincing evidence that there is good cause to adjust the interest rate, reduce or eliminate an award of prejudgment interest, or to allow interest to accrue from a date other than the date the cause of action arose. If the court awards an amount less than that required in subsection (a), the court shall specify the basis for its decision in findings constituting a statement of reasons.

(d) District of Columbia. Prejudgment interest shall be assessed on any compensatory damages awarded against the District of Columbia to the extent authorized by subsections (a) and (c), except that notice of the claim is defined as notice under D.C. Code § 12-309.

(e) Postjudgment interest. In an action to recover damages, postjudgment interest shall be allowed from the date of judgment as provided in Section 28-3302.

(II.) D.C. Code, Sec. 28-3302, is amended to read as follows:

§ 28-3302. Rate of interest not expressed and on judgments.

(a) The rate of interest in the District upon the loan or forbearance of money, goods or things in action in the absence of express contract, is 6 percent per annum.

(b) The rate of interest on judgments and decrees, where the rate of interest is not fixed by contract, shall be the rate established pursuant to section 6621 of the Internal

Revenue Code of 1954, approved January 1, 1975 (88 Stat. 2114; 26 U.S.C. sec 6621) for underpayments and overpayments of tax to the Internal Revenue Service: Provided, that in the case of the judgments entered prior to the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, that are not satisfied until after the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, the rate of interest thereon shall be the rate of interest prescribed in this subsection from the effective date of the Consumer Credit Interest Rate Amendment Act of 1981, until the date of satisfaction.

(III.) Application of Act.

(a) This act applies to all judgments entered on or after the effective date of this act.

(b) This act shall take effect after a 30-day period of Congressional review following approval by the Mayor (or in the event of a veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(1)).