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The Postjudgment Interest Rate in Pennsylvania: Ignoring Reality for Too Long

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I. INTRODUCTION

The postjudgment interest rate[1] in the Commonwealth of Pennsylvania is presently six percent per annum,[2] and has been so since the eighteenth century.[3] This rate represents the lowest non-varia-

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1. In this comment, the term "postjudgment interest" will be used to refer to interest imposed on money judgments after entry of such judgments. There is no common law basis for interest borne on judgments, but instead the matter is left to statutory control. *See* 45 AM JUR. 2D *Interest and Usury* §§ 59-60 (1969). The issue of whether *statutory* regulation of this area is or should be universal will be discussed *infra* notes 44-55 and accompanying text.

2. 42 PA. CONS. STAT. ANN. § 8101 (Purdon Supp. 1984-85) provides: "Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award." *Id.* The "lawful rate" designation necessitates reference to 41 PA. CONS. STAT. ANN. § 202 (Purdon Supp. 1984-85), titled "Legal Rate of Interest," which provides:

> Reference in any law or document enacted or executed heretofore or hereafter to "legal rate of interest"[,] and reference in any document to an obligation to pay a sum of money "with interest" without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum.

Id.

Postjudgment interest rates are generally applied in cases in which no other rate is specified in a document or contract provision, as exemplified by most tort cases. This concept is not as clear under the Pennsylvania provision, but as long as the rate does not exceed the applicable maximum rate of interest, the rate of interest in the contract will be enforced. *See, e.g.*, Wright v. Hanna, 210 Pa. 349, 354-55, 59 A. 1097, 1098 (1904) (four percent interest on promissory note applies until maturity date, after which legal rate applies). See 41 PA. CONS. STAT. ANN. § 3 (repealed in 1974), for the precursor to the present legal interest statute in Pennsylvania, in which the contractual issue is stated more explicitly.

For another example of the rules operating in conjunction, see Printed Terry Finishing Co. v. City of Lebanon, 264 Pa. Super. 192, 399 A.2d 732 (1974), which held, *inter alia*, that an unsuccessful appeal by the losing party will not suspend postjudgment interest accrual. *Id.* at 196, 399 A.2d at 734.

3. The first legal interest statute in Pennsylvania actually established a *higher* interest rate (eight percent), than the present six percent rate. *See* Act of March 10, 1688, ch. 1, 187 (repealed in 1723). The lawful rate was changed to six percent by Act of March 2, 1723, ch. 262 (repealed in 1858), at which level it has remained notwithstanding various alterations in the wording of the statute, at 41 PA. CONS. STAT. ANN. § 202 (Purdon Supp. 1984-85). See generally Comment, *Usury in Pennsylvania: Revision of Maximum Interest Rate and Finance Charge Laws*, 84 DICK. L. REV. 241 (1980), for a review of legal interest and usury in Pennsylvania.

As to past postjudgment interest rates in Pennsylvania, the present section 42 PA. CONS. STAT. ANN. § 8101 is a substantial reenactment of Act of November 27, 1700 (1 Sm. L. 7) § 2,

ble[4] postjudgment interest rate applied in the United States, both in the state and federal courts.[5] At best, this represents a legislative oversight by the Pennsylvania Legislature; at worst, it is indicative of a stubborn failure to grasp the realities of the modern economic world by Commonwealth lawmakers.[6] This comment will first examine the status of postjudgment interest rates in the other forty-nine states, the District of Columbia, and the federal system, to determine why, when and in some cases how the changes to higher or variable rates were made,[7] in the hope of bringing the Pennsylvania lapse to the surface through means of comparison. The Pennsylvania status quo and suggestions in regard to the substance and method of a postjudgment interest rate increase in Pennsylvania will then be discussed.[8] The primary purpose throughout is to demonstrate empirically that the six percent rate employed by Pennsylvania is an anachronism that must be removed from Pennsylvania law, and an appropriate substitute put in place.

II. A Comparative Survey of Postjudgment Interest in America

The method and rate of postjudgment interest in the various states are not uniform, but they are consistent in one way: they all employ rates above six percent per annum or use a variable rate.[9]

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and Act of April 6, 1859 (P.L. 381) § 1, which were formerly codified at 12 Pa. Cons. Stat. Ann. §§ 781 and 782 (repealed in 1976).

4. The term "variable rate" will be used here to indicate a rate which is subject to change based upon an economic indicator or indicators, or which is based upon another rate which is subject to such economic variation.

5. See infra note 9, 30 and accompanying text for these current postjudgment rates.

6. See generally Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 Bus. Law. 129, 131-35 (1983), for a discussion of the modern economic non-reality of the six percent rate in Pennsylvania as applied to prejudgment interest. *Cf.* Kaplan, *Interest Rates in Eminent Domain: Is 6 Percent Just Compensation in a 12 Percent World?*, 1984 Institute On Planning, Zoning, And Eminent Domain 389 (general critique of the six percent rate in eminent domain actions).

7. *See infra* notes 9-35 and accompanying text.

8. *See infra* notes 36-59 and accompanying text.

9. The following is an alphabetical listing of the postjudgment interest rates in the various states and the District of Columbia, with the exception of Pennsylvania, *see supra* note 2, along with the statutory, rule, or case authority, and with most recent pertinent amendments listed parenthetically. All rates are at simple interest per annum unless otherwise noted.

Alabama: Ala. Code § 8-8-10 (Supp. 1984), 12% (increased from 6% by amendment, 1982 Ala. Acts 696); Alaska: Alaska Stat. § 09.30.070 (Supp. 1984), 10.5% (increased from 8% by amendment, 1980 Alaska Session Laws § 5); Arizona: Ariz. Rev. Stat. § 44-1201 (Supp. 1984-85), 10% (increased from 6% by amendment, 1980 Ariz. Sess. Laws 2d S.S., Ch.2, § 4);

It is interesting to note the fact that the clear majority of the

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Arkansas: ARK. STAT. ANN. § 29-124 (1974), 10%, but court has discretion to lower rate to not less than 6% (increased from 6% by amendment, 1975 Ark. Acts No. 474, § 1); California: CAL. CIV. PROC. CODE § 685.010 (West 1985), 10% (increased from 7% by repeal of former § 685.010, 1982 Cal. Stats., c. 1364, § 1); Colorado: COLORADO REV. STAT. § 5-12-102(4)(b) (Supp. 1984), 8%, compounded annually (increased from 6% by amendment, 1983 Colo. Sess. Laws p. 394, § 1), and as to personal injury damages, COLO. REV. STAT. § 13-21-101 (Supp. 1984), two percentage points above the discount rate, defined as "the rate of interest a commercial bank pays to the federal reserve bank of Kansas City using government bond or other eligible paper as security," established on a yearly basis; Connecticut: CONN. GEN. STAT. §§ 37-3a, 37-3b (Supp. 1985), 10% (§ 37-3a rate increased from 8% by amendment, 1983 Conn. Acts 83-267, S.1. Section 37-3b established the 10% rate for negligence actions by 1981 Conn. Acts 81-315, S.2.); Delaware: DEL. CODE ANN. tit. 6, § 2301 (Supp. 1984), legal rate established by this statute is applied as postjudgment interest by case law. *See* Devex Corp. v. General Motors Corp., 569 F. Supp. 1354, 1365-67 (D. Del. 1983) (federal district court applying Delaware law as to postjudgment interest applied legal rate which was 5% over the Federal Reserve discount rate); District of Columbia: D.C. CODE § 28-3302(c) (Supp. 1984), 70% of the rate of interest established by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code (variable rate established in place of 6% rate by 1982 D.C. Law 4-70, § 2, 28 D.C. Reg. 5236 (1982)); Florida: FLA. STAT. ANN. § 55.03 (West Supp. 1985), 12% (increased from 10% by amendment, 1981 Fla. Laws c. 81-113, § 1); Georgia: GA. CODE ANN. § 7-4-12 (1982), 12% (increased from 7% by amendment, 1980 Ga. Laws p. 1118, § 1); Hawaii: HAWAII REV. STAT. § 478-2 (Supp. 1984), 10% (increased from 8% by amendment, 1981 Hawaii Sess. Laws, c. 9, § 2); Idaho: IDAHO CODE § 28-22-104(2), 18% (increased from 8% legal rate by amendment, 1981 Idaho Sess. Laws, ch. 157, §1); Illinois: ILL. CODE OF CIV. PROC. AND COURT RULES ch. 110, para 2-1303 (1984), 9%; Indiana: IND. CODE ANN. § 24-4.6-1-101 (Burns 1982), 12% (increased from 8% by amendment, 1981 Ind. Acts, P.L. 220, § 1); Iowa: IOWA CODE ANN. § 535.3 (Supp. 1984-85), 10% (increased from 7% by amendment, 1980 Iowa Acts (68 G.A.) ch. 1170, § 1); Kansas: KAN. STAT. ANN. § 16-204 (Supp. 1983), 15% (increased from 12% by 1982 Kan. Sess. Laws, ch. 88, § 1); Kentucky: KY. REV. STAT. ANN. § 360.040 (Baldwin 1983), 12%, compounded annually (increased by amendment, 1982 Ky. Acts v.7 § 2); Louisiana: LA. CIV. CODE ANN. art. 2924 (West 1985), 12% (increased from 10% by amendment, 1981 La. Acts No. 574, §1); Maine: ME. REV. STAT. ANN. tit. 14, § 1602-A (Supp. 1984-85), 15% (increased from 10% by amendment, 1983 Maine Laws, c. 427, § 2); Maryland: MD. CTS. & JUD. PROC. CODE ANN. § 11-107 (1984), 10% (increased from 6% by amendment, 1980 Md. Laws, ch. 798); Massachusetts: MASS. GEN. LAWS ANN. ch. 235, § 8 (West Supp. 1985), the same rate per annum as provided for prejudgment interest, which rate is provided for at ch. 231, § 6B, 12%; Michigan: MICH. COMP. LAWS ANN. § 600.6013(4) (West Supp. 1984-85), 12%, compounded annually (rewritten by 1980 Mich. Pub. Acts No. 134, § 1); Minnesota: MINN. STAT. ANN. § 549.09 (West Supp. 1985), rate based on the secondary market yield of one year United States treasury bills, calculated on a bank discount basis provided in this section, and in no event less than 12% per year (rewritten by 1980 Minn. Laws, c. 509, § 179); Mississippi: MISS. CODE ANN. § 75-17-7 (Supp. 1984), 8% (increased from 6% by amendment, 1975 Miss. Laws ch. 336, § 1); Missouri: MO. ANN. STAT. § 408.040 (Vernon Supp. 1985), 9% (increased from 6% by amendment, 1979 Mo. Laws, p. 580, § 1); Montana: MONT. CODE ANN. § 29-9-205 (1983), 10%; Nebraska: NEB. REV. STAT. § 45-103 (Supp. 1984), same rate as 45-104.1, 14%; Nevada: NEV. REV. STAT. § 17.130 (1983), 12%; New Hampshire: N.H. REV. STAT. ANN. § 336:1 (Supp. 1984), 10% (increased from 6% by amendment, 1981 N.H. Laws 348:1); New Jersey: N.J. RULES 4:42-11 (Pamph. 1985), 12%; New Mexico: N.M. STAT. ANN. § 56-8-4 (Supp. 1984), 15% (revised by 1983 N.M. Laws ch. 254, § 2); New York: N.Y. CIV. PRAC. LAW § 5004 (McKinney Supp. 1984-85), 9% (increased from 6% by amendment, 1981 N.Y. Laws c. 258, § 1); North Carolina: N.C. GEN. STAT. § 24-5 (Supp. 1983), legal rate

postjudgment interest rates have changed within the past five years, with most of the rest changing within the last ten,[10] a groundswell which Pennsylvania has managed to avoid. Also noteworthy upon perusal of these rates is that only four states, Delaware, North Carolina, Vermont,[11] and Pennsylvania[12] correlate the postjudgment rate of interest with the prevailing statutory legal rate of interest,[13] and of these four, only Pennsylvania does so by

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applied in case law, *see* Hardy-Latham v. Welcons, 415 F.2d 674, 679 (4th Cir. 1968) (legal rate of 6% applied). Present legal rate is at N.C. GEN. STAT. § 24-1 (Supp. 1983), 8% (increased from 6% by 1979 N.C. Sess. Laws, 21 Sess., c. 1157, S.1); North Dakota: N.D. CENT. CODE § 28-20-34 (Supp. 1983), 12% (increased from legal rate of 6% by 1981 N.D. Sess. Laws ch. 334, §1); Ohio: OHIO REV. CODE ANN. § 1343.03 (Page Supp. 1984), 10% (increased from 6% by amendment, 1982 Ohio Laws 138v H128); Oklahoma: OKLA. STAT. ANN. tit. 12, § 727 (West Supp. 1984-85), 15%; Oregon: OR. REV. STAT. § 82.010(3) (Supp. 1983), 9% (increased from 6% by amendment, 1979 Or. Laws, c. 794, § 1); Rhode Island: R.I. GEN. LAWS § 9-21-10 (Supp. 1984), 12% from date cause accrues (increased from 8% by amendment, 1981 R.I. Pub. Laws ch. 54, § 1); South Carolina: S.C. CODE ANN. § 34-31-20(B) (Law. Co-op. Supp. 1984), 14% (reformed by 1982 S.C. Acts No. 445); South Dakota: S.D. CODIFIED LAWS ANN. § 54-3-5.1 (Supp. 1984), refers to § 54-3-16, Category B interest rate, 15%; Tennessee: TENN. CODE ANN. § 47-14-121 (Supp. 1984), 10%; Texas: TEX. REV. CIV. STAT. art. 5069-1.05 (Supp. 1985), if a contract action, the rate is the lesser of contract rate or 18%; if otherwise the rate is based on the auction rate quoted on a discount basis for 52-week treasury bills issued by the United States government, as published by the Federal Reserve Board, computed on the 15th of each month. In no case will the rate be greater than 20% or less than 10%; Utah: UTAH CODE ANN. § 15-1-4 (Supp. 1983), 12% (increased from 8% by amendment, 1981 Utah Laws ch. 73, § 2); Vermont: RULES OF APP. PROC. 37 (1971), 12% legal rate by VT. STAT. ANN. tit. 9, § 41(a); Virginia: VA. CODE ANN. § 6.1-330.10 (1983), 12%; Washington: WASH. REV. CODE § 4.56.1109 (1983), refers to § 19.52.020, which states the rate of 12% or four percentage points above the equivalent coupon issue yield of the average bill rate for twenty-six week treasury bills, whichever rate is greater; West Virginia: W. VA. CODE § 56-6-31 (Supp. 1984), 10% (10% provision added by W. Va. Acts, c. 205); Wisconsin: WIS. STAT. ANN. § 814.04(4) (Supp. 1984-85), 12%; Wyoming: WYO. STAT. § 1-16-102 (1977), 10%.

10. *See supra* note 9.

11. *Id.*

12. *See supra* note 2.

13. Presently, only eighteen states states apply non-variable legal interest rates, or their functional equivalent, of 6% or lower. The eighteen states (plus the District of Columbia), and their statutory rates are as follow.

Alabama: ALA. CODE § 8-8-1 (1975), 6%; Arkansas: ARK. CONST. art. 19, § 13(d)(i), 6%; District of Columbia: D.C. CODE ANN. § 28-3302(a) (Supp. 1984), 6%; Illinois: ILL. ANN. STAT. ch. 17, §§ 6401-02 (1981), 5%; Iowa: IOWA CODE ANN. § 535.2, (West Supp. 1984-85), 5%; Maine: ME. REV. STAT. ANN. tit. 9-B, § 432 (1983), 6%; Maryland: MD. COM. LAW CODE ANN. § 12-102 (1975), 6%; Massachusetts: MASS. GEN. LAWS ANN. ch. 107, § 3 (West 1975), 6%; Michigan: MICH COMP. LAWS ANN. § 438.31 (West 1978), 5%; Minnesota: MINN. STAT. ANN. § 334.01 (West Supp. 1985), 6%; Montana: MONT. CODE ANN. § 31-1-106 (1983), 6%; New Jersey: N.J. STAT. ANN. § 31: 1-1 (West Supp. 1984-85), 6%; North Dakota: N.D. CENT. CODE. § 47-4-05 (Supp. 1983), 6%; Oklahoma: OKLA. STAT. ANN. tit. 15, § 266 (West Supp. 1984-85), 6%; Pennsylvania: 41 PA. CONS. STAT. ANN. § 202 (Purdon Supp. 1984-85), 6%; Texas: TEX. REV. CIV. STAT. art. 5069-1.03 (Supp. 1985), 6%; Virginia: VA. CODE ANN. § 6.1-33-.9 (1983); West Virginia: W. VA. CODE § 47-6-5 (1980), 6%; Wisconsin: WIS. STAT. ANN. § 138.04 (West Supp. 1984-85), 5%.

statute. Simple interest is the norm in this area, although three states, Colorado, Kentucky and Michigan, award compound postjudgment interest.[14] Six states employ a variable rate of interest of some sort, Arkansas, Delaware, Minnesota, Texas, and Washington, as well as the District of Columbia.[15]

Prior to the recent amendments of rate provisions mentioned above, there had been some critical commentary of the low postjudgment rates, which may have given impetus to the eventual rate increases. In typical commentary on this subject, the president of the Michigan Bar Association expressed his distaste for the Michigan six percent rate that was in effect in 1980,[16] noting that

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14. *See supra* note 9.

15. *Id.*

16. Barris, *Interest on Money Judgments: Time to Catch up With Reality*, MICH. BAR J. 12, Jan. 1980. The specific issue of low postjudgment interest rates has produced little commentary, most likely because the rate changes were made to pace the rise in interest rates. States slower to react to changing times were criticized, as exemplified by the Barris article. *See also* Coleman, *A Matter of Interest*, 4 L.A. LAW. 6, Oct. 1981. The author states: "A 7 percent interest rate at a time when the commercial rates are in excess of 20 percent can only operate as an economic incentive to clog the courts by dragging litigation out as long as possible with inequitable results." *Id.* at 7. A survey accompanied the above article concerning postjudgment and prejudgment interest. The article presumably had an effect, since the postjudgment rate was subsequently raised, *see* CAL. CIV. PROC. CODE § 685.010 (1982), from seven percent to ten percent; this measure, however, appears not to have appeased everyone. *See* Coleman, *Pre- and Postjudgment Interest: The Fight for a Higher Rate*, 5 L.A. LAW. 35, June, 1982. For a more sanguine reaction to such an increase, see Montgomery, *Rates of Interest on State and Federal Court Judgments: An Update*, 12 COLO. LAW. 446, March, 1983.

The above commentaries were written not by law professors or scholars, but by practitioners who were in an ideal position to realize the inequities perpetrated upon plaintiffs by insufficient postjudgment rates. Future scholarly commentary on this topic is, of course, unlikely, as most states have established more realistic rates, with the glaring exception of Pennsylvania.

The subject of prejudgment interest and "delay damages" is, however, the subject of relatively active scholarly commentary, as a growing area of law with various legal and economic permutations. *See, e.g.*, Kier & Kier, *supra* note 5; Comment, *Delay Damage Awards on Breach of Contract and Related Damages: A Comparative Analysis of New York, Ohio and Pennsylvania Law*, 23 DUQ. L. REV. 1097 (1985); Comment, *Prejudgment Interest, Survey and Suggestions*, 77 NW. L. REV. 192 (1982); Comment, *Prejudgment Interest: Too Little, Too Much, Or Both?*, 10 U.C.L.A. [UCLA]-ALASKA L. REV. 219 (1981); Comment, *Allowance of "Interest" on Unliquidated Tort Damages in Pennsylvania*, 75 DICK. L. REV. 79 (1970).

The ramifications of a six per cent interest rate have also been considered in the area of extracontractual insurance damages. *See, e.g.*, Comment, *Extracontractual Insurance Damages: Pennyslvania's Insureds Demand A "Piece of the Rock"*, 85 DICK. L. REV. 321, 327 (1981). *See also Pennsylvania Supreme Court Review, 1981*, 55 TEMP. L.Q. 617, 778 n.21 (1982). The former article discusses the six per cent rate in relation to the commercial rate that insurance companies can take advantage of by retaining insureds' benefits "as long as possible," thereby realizing profits on the rate differential between the "penalty" rate and the commercial rate. *See* Comment, *supra*, at 327. For the view that insurers should not be assessed damages above the contract rate in the policy because of the legal/commercial rate

the six percent rate, when compared with at least twice that prevailing in the money market, is "a bonanza for any judgment debtor smart enough to know the difference between 6 and 12, and most are that smart."[17] In 1980, the six percent rate was called "a polite form of highway robbery from the judgment creditor, and it [is] long past time to do something about it."[18] One consequence noted, and perhaps the most important, is that after a trial and return of a substantial judgment, the judgment debtor is given motivation by the low postjudgment rate "to prosecute appeals on the thinnest of grounds, simply to prolong the time that the defendant can continue to make 12 percent or more on plaintiff's money at a cost of 6 per cent."[19] The statute, therefore, fails of its essential purpose, that is, to fashion compensation that makes the judgment creditor whole.[20] The Michigan legislature doubled the postjudgment interest rate later that year.[21]

Other critics have discussed the changes after they have been made or proposed, either to praise them as a step in the right direction,[22] or to criticize them as not going far enough.[23] The prevailing theme is that raised in the previously discussed commentary: there was (and is) a need to have the postjudgment interest rate reflect financially realistic conditions in order to adequately

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differential, see Tasi, *Appellate Arguments Against Extra-Contractual Damages in First Party Insurance Cases*, 47 INS. COUNS. J. 188, 198 (1980). The writer asserts in detail that the bad publicity and resultant public opinion is an imposed penalty, as is also the control of the insurers by state insurance commissions, and that these penalties overcome any profits realized by delayed payment. *Id.* at 198-99. The latter argument is criticized in the Dickinson Comment, *supra*, at 327 n.39.

17. Barris, *supra* note 16, at 12.

18. *Id.*

19. *Id.*

20. *Id.*

21. MICH. COMP. LAWS ANN. § 600.6013 (1980), changing the rate from six percent to twelve percent compounded annually.

22. *See* Montgomery, *supra* note 16.

23. *See* Siegel, *The 1981 Amendment Raising the Interest Rate to 9%*, Supplementary Practice Commentaries to N.Y. CIV. PRAC. LAW. § 5004 (McKinney Supp. 1984-85), p. 410. Siegel characterized the legislature's raising of the rate from six percent to nine percent as "just a compromise to take at least a few steps toward the market. The steps are few." The author states the argument of the economic unreality of the rate and notes that the courts have not been unaware of the problem, but have, on the contrary urged change. *Id.* (citing Bankers Trust Co. v. Publicker Industries, 641 F.2d 1361 (2d Cir. 1981)). In the *Bankers Trust* case, the standard argument was made by the appeals court: "It is an imposition ultimately upon the American taxpayer that the low legal interest rates may encourage appeals solely for the purpose of delaying payment of money judgments." *Id.* at 1368.

For a counterproposal of a variable rate after the imposition of an increase in postjudgment rates from seven percent to ten percent, see Coleman, *supra* note 16 and accompanying text.

compensate judgment creditors.

What little legislative history[24] and case law discussion of this area that exists is in accord with the preceding discussion. Aside from the clear implication of the nationwide rise in rates within a matter of a few years, the Hawaii legislature has explicitly noted that the purpose of the increase of the postjudgment interest rate from eight to ten percent was "to allow interest on judgments to realistically reflect the reasonable loss of use of money from time of verdict."[25] Similarly, the court in a Maryland decision, *Mayor and City Council of Baltimore v. Kelso Corp.*,[26] noted that

> the purpose of postjudgment interest is to compensate the judgment creditor for the loss of the monies that are due and owing to him from the time the judgment is entered until it is paid. The change in the interest rate, from six to 10 percent per annum, recognized that the old rate no longer fairly compensated judgment creditors.[27]

The purpose behind the rise in the postjudgment rates is clear: to remedy a relic of former times and to end inequitable treatment of judgment creditors who can be made to suffer through possibly frivolous appeals, while the judgment debtor obtains the use of the creditor's money at over double the rate a debtor will be entitled to eventually.

B. *The Federal System*

Until recently, the interest rate on money judgments recovered in federal courts was the rate that was allowed by the state law to be applied.[28] This was changed by section 2 of the Federal Courts Improvement Act of 1982,[29] which fixes the rate of postjudgment interest

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any

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24. For the legislative history of a federal amendment changing the postjudgment interest rate to a variable rate in federal actions, see *infra* notes 32-35 and accompanying text.

25. 1981 Hawaii Sess. Laws, c. 9, § 1.

26. 294 Md. 267, 449 A.2d 406 (1982).

27. *Id.* at 273, 449 A.2d at 409.

28. 28 U.S.C. § 1961 (1977), *amended by* 28 U.S.C. § 1961 (1983).

29. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS. The section is presently codified at 28 U.S.C. § 1961 (1983).

changes in it to all Federal Judges.[30]

The section also provides for the interest to be compounded annually.[31]

The legislative history of this provision of the amendment is instructive.[32] It is noted therein that the practice of basing the postjudgment interest rate in federal courts on varying state rates leads to a rate that "frequently falls below the contemporary cost of money,"[33] and that consequentially, "a losing defendant may have an economic incentive to appeal a judgment solely in order to retain his money and accumulate interest on it at the commercial rate during the pendency of appeal."[34] The amended provision also incorporates all prior provisions for interest on judgments into the section, thereby further attaining uniformity in the federal courts.[35] This federal model and the legislative history clearly point out once again what should be obvious: it is necessary to have a realistic interest rate applied to judgments, and the states have not adequately responded, Pennsylvania being the slowest to act.

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30. 28 U.S.C. § 1961(a). The rate applies to all money judgments in civil cases in the federal district courts, and is calculated from the date of entry of judgment. *Id.* It is also applicable to final judgments against the United States in the federal circuit courts. *Id.* § 1961(c)(2).

The section excludes internal revenue tax cases from the treasury bill rate, but allows interest in those cases based upon the rate set in the Internal Revenue Code at I.R.C. § 6621. Judgments from the United States Court of Claims also run at this rate, barring a contrary law. 28 U.S.C. § 1961(c)(3) (1983).

31. 28 U.S.C. § 1961(b).

32. S. REP. No. 275, 97th Cong., 2d Sess. 11-20, 30, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 21-22, 40 [hereinafter SENATE REPORT]. The legislative history contains only the Senate Report, although the House Bill (H.R. 4482) was eventually passed after amendments to include text from the Senate Bill (S. 1700). *Id.* The Senate history comments on the proposed change to a uniform postjudgment interest rate based on the Internal Revenue Code, I.R.C. § 6621, which was limited to internal revenue cases in the final version of the law, 28 U.S.C. § 1961 (1983). SENATE REPORT, *supra*. While the final version of the law adopted the Treasury Bill rate, the change does not alter the validity of the reasons set forth in the Senate Report in support of having a postjudgment interest rate variable in substance with the economy, but uniform in application in the federal district courts. The specific variable economic indicators used are not germane to the underlying purpose of the amendment, as expressed in the Senate Report.

33. SENATE REPORT, *supra* note 32, at 11, 30, U.S. CODE CONG. & AD. NEWS at 21, 40.

34. *Id.* at 30, U.S. CODE CONG. & AD. NEWS at 40.

35. *Id.* at 12, 30, U.S. CODE CONG. & AD. NEWS at 22, 40. For further discussion of the amended federal law, see Montgomery, *supra* note 20, at 446, 452.

III. The Pennsylvania Status Quo and Suggestions for Change

A. *A Look at the Pennsylvania View of Interest*

Pennsylvania has not changed its view of interest in over two hundred years. The legal rate of interest, which has always been used as the postjudgment rate, has remained mired at six percent since well before the birth of the nation.[36] While the rate has been changed in regard to other matters,[37] it has remained constant as applied to interest on money judgments. This static quality in an area so marked by recent change is especially remarkable when viewed in light of the recent change in regard to interest for delay in certain tort cases, as evidenced by the Pennsylvania Rule of Civil Procedure 238.[38] Prior to this rule, prejudgment interest in tort cases was not allowed as a matter of law in Pennsylvania, but the courts would allow delay damages at the prejudgment stage, at the six percent legal rate, or, in certain situations, at a higher rate.[39] The rule changed the rate in certain cases resulting in

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36. *See supra* note 3 and accompanying text.

37. *See, e.g.*, Pa. Stat. Ann. tit. 77, § 717.1 (Purdon Supp. 1984-85), where under the Pennsylvania Workmen's Compensation statute it is provided, *inter alia*, that "[i]nterest shall accrue on all due and unpaid compensation at the rate of ten per centum per annum." *Id.* Section 717.1 was added to the Workmen's Compensation title by 1972 Pa. Laws 25, No. 12. In the preamble to the above session law it is stated that "[w]hen workmen's compensation was enacted more than half a century ago, it was described as legislation in advance of its time. Today we find that time has overtaken this legislation and that substantial reform is necessary in the public interest." *Id.* Specifically, a problem was observed in that "the act fails to equip the department with essential powers and mechanisms to require observance of reasonable time standards in processing and payment operations . . . ." *Id.* The purpose of the amendments "[was] to correct these procedural deficiencies and assure full payment of compensation when due." *Id.* This statement of a willingness to change by the Pennsylvania legislature in the face of outdated and inequitable statutory procedure is refreshing, though somewhat ironic, given the recalcitrance exhibited by the lawmakers on the subject of postjudgment interest.

See also the interest rate section of the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 Pa. Cons. Stat. Ann. 1009.106(2) (Purdon Supp. 1984-85), *repealed by* Motor Vehicle Financial Responsibility Law, No. 1984-11, 1984 Pa. Legis. Serv. 41, 91 (Purdon), which states in pertinent part that "[o]verdue payments bear interest at the rate of eighteen per cent (18%) per annum." *Id.* There is no need to show bad faith on the part of the insurer; the interest payment is applied when payments are "overdue." Hill v. Midland Ins. Co., ___ Pa. Super. ___, 467 A.2d 324, 328 (1983).

38. Pa. R. Civ. P. 238.

39. *See* Peterson v. Crown Fin. Corp., 661 F.2d 287, 292-94 (3d Cir. 1981), *aff'g in part, vacating in part* 498 F. Supp. 1177 (E.D. Pa. 1980) (*on remand* 553 F. Supp. 114 (E.D. Pa. 1982)). In *Peterson*, 661 F.2d 287, the circuit court reversed the district court and allowed the discretionary award of interest above the six percent legal rate where a restitution award is at issue. *Id.* at 293-98. The court noted the problematical issue involved:

We concede . . . that it is difficult to draw a logical distinction between the present

death, bodily damage or property damage to ten percent.[40] The explanatory comments by the Civil Procedure Rules Committee to the proposed rule note that "[t]en percent is considered a more meaningful figure in the light of present high interest rates at which a defendant can earn eight percent or more on reserve or retained funds with reasonable safety. There is no financial incentive to the defendant to settle early."[41] Similarly, there is a huge incentive for the defendant to take any possible appeal, under the present postjudgment rates, to retain the plaintiff's award as long

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case—a wrongful demand and acceptance of a sum paid under protest—and the refusal to pay funds due under a contract. It may be inequitable to require debtors to pay only six percent under Pennsylvania law yet force creditors who have made wrongful demands to disgorge at money-market rates. As to the former situation, however, Pennsylvania has provided clear—if questionable—precedent to which a federal court sitting in diversity is bound. In the present case, to the contrary, we find support in the Pennsylvania case law for the proposition that prejudgment interest in restitution awards can be set at the trial court's discretion, and find no conclusive precedent to the contrary. Mindful of "those considerations of basic fairness and equity which suggest a more flexible rule . . . , [and] not unmindful of the fact that at the currently high money-market rates [a contrary] ruling appears to create a built-in incentive to withold sums due, and indeed, to prolong litigation," 498 F. Supp. at 1180 n.5, we will remand the case for a redetermination by the district court of the damages for delay, which may be set at a rate greater than Pennsylvania's legal rate of interest.

Id. at 297-98.

The interest rate of six percent is thus chastised by yet another forum. The district court on remand awarded prejudgment interest of two and one-half percent above the prime rate of interest, simple interest method. 553 F. Supp. at 116, 117-18. The court was bound by the six percent postjudgment interest rate because the entry of judgment came before the amendments to the federal postjudgment interest statute, 28 U.S.C. § 1961 (1983), which provides a rate of interest based on the Treasury Bill rate. 553 F. Supp. at 116, 116-17 n.4. *See supra* notes 28-35 and accompanying text.

40. PA. R. CIV. P. 238. Pertinent sections of Rule 238 include the following provisions:

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court . . . shall

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

. . . .

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

Id.

41. 8 Pa. Admin. Bull. 2668 (1978).

as possible, and earn money on it in the process.[42] Rule 238, promulgated by the Pennsylvania Supreme Court under its constitutional rulemaking power, reflects at least a judicial recognition of the need for some semblance of reality in the area of judicial interest.[43]

B. *Method of Change*

The Pennsylvania Supreme Court, in *Laudenberger v. Port Authority of Allegheny County*,[44] found that the court was within its constitutional power in promulgating Rule 238,[45] which allowed delay damages in certain types of cases at a ten percent rate, running before entry of judgment at specified times.[46] In the process of defending its right to make such a rule, the court noted that "[i]n Pennsylvania . . . interest on verdicts and judgments has always been governed by statute,"[47] and cited to the postjudgment interest statute.[48]

While this postjudgment interest statutory authority was raised to exhibit legislative usurpation of the area of interest in Pennsylvania, it was not controlling upon the court, which noted that the existence of statutory activity in an area does not preclude the existence of court rules on the subject.[49] The notice taken of the legislative control of the postjudgment rate, however, indicates that a change in that rate must likely come from the legislature, as opposed to a rule from the court.

The *Laudenberger* court stated the applicable scope of the judicial and legislative branches of the Commonwealth: "We certainly do not intend to, and will not, promulgate rules in contravention of the constitutional prohibition against abridging, enlarging or modi-

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42. See *supra* note 16 and accompanying text for a discussion of authorities consistent with this position.

43. *See* Laudenberger v. Port Authority of Allegheny Co., 496 Pa. 52, 436 A.2d 147 (1981), where this authority granted by the Pennsylvania Constitution, article V, section 10(c) is discussed in reference to Rule 238. 496 Pa. at 55-56, 436 A.2d at 149.

44. 496 Pa. 52, 436 A.2d 147 (1981).

45. *Id.*, at 54-56, 436 A.2d at 149.

46. *Id.* See *supra* note 40 for pertinent textual provisions of the rule.

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

48. *Id.* The statute is 42 PA. CONS. STAT. ANN. § 8101 (Purdon Supp. 1984-85). *See supra* note 3 and accompanying text.

49. 496 Pa. at 64-65, 436 A.2d at 154. The court noted the existence of Pennsylvania statutory authority in the area of counsel fee awards, citing to 42 PA. CONS. STAT. ANN. § 2503(6), along with the concomitant promulgation of rules of civil procedure in the area of costs for delay, which include attorneys' fees. 496 Pa. at 64-65, 436 A.2d at 154 (citing PA. R. CIV. P. 217 & 4019).

fying substantive rights," and that "the legislature is forbidden to act in the field of procedure; we are bound to do so by the terms of our authority."[50] The court also noted that the delay damages, while in the nature of interest, were actually an extension of compensatory damages,[51] and hence although the rule has both procedural and substantive elements, its purpose and goal is toward orderly and efficient administration of justice in the Commonwealth and thus is within the court's auspices.[52]

Clearly, analogies can be drawn from the *Laudenberger* decision to the area of postjudgment interest, but, primarily because of the prior legislative action in the field,[53] it is doubtful that the Pennsylvania Supreme Court would make such a postjudgment rule, notwithstanding the fact that other state courts have done so.[54] It might be advisable for the court to do so if only to force the legislature's hand by embarrassing it into action. Perhaps even more appropriate would be a strong message to the legislature, achieved through a direct letter of address to the members of the legislative branch, as was done in *In re 42 Pa. C.S. § 1703.*[55] The court, as

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50. 496 Pa. at 67, 436 A.2d at 155.

51. *Id.* at 66, 436 A.2d at 154.

52. *Id.* at 67, 436 A.2d at 155.

53. *See supra* note 3 and accompanying text. Furthermore, there is early Pennsylvania authority explicitly identifying postjudgment interest as substantive in nature. *See* Watson v. McManus, 223 Pa. 583, 588, 72 A. 1066, 1067 (1909).

54. *See* N.J. RULES 4:42-11(a) (Pamph. 1985); VT. RULES OF APP. PROC. tit. 9, § 41(a). The case of Busik v. Levine, 63 N.J. 351, 307 A.2d 571 (1973), *appeal dismissed*, 414 U.S. 1106 (1973), affirmed the constitutionality of the New Jersey rule allowing pre- and postjudgment interest. The *Busik* court emphasized the fact that no conflict arises between rule and statute, because there was no pre- or postjudgment statutory authority in New Jersey. *Id.* at 358, 307 A.2d at 575. This issue was raised and distinguished by the *Laudenberger* court, see the discussion *supra* notes 51-52 and accompanying text.

55. 482 Pa. 522, 394 A.2d 444 (1978). The supreme court wrote to explain its noncompliance with the statute in question, the Public Agency Open Meeting Law, 1978 Pa. Laws 486, No. 175 (codified at 42 PA. CONS. STAT. ANN. § 1703 (Purdon Supp. 1984-85)). 482 Pa. at 524, 394 A.2d at 445-46. The court noted by way of introductory explanation that:

> The submission of this direct letter of address in no way suggests any departure from firm precedent against rendering of advisory opinions. Neither does this letter signal any weakening in our commitment that the judiciary not unnecessarily intrude in legislative matters. Rather, in the special situation in which we, as an institution, are constrained not to follow an expressed mandate of the General Assembly, we feel it incumbent on ourselves as a matter of deepest respect to our coordinate branches to explain that position as promptly as possible.

Id. at 524-25, 394 A.2d at 446.

The supreme court held that the statute was inconsistent with the provision of the Pennsylvania Constitution which grants power to the supreme court to promulgate rules regulating practice, procedure, and conduct of courts. *Id.* at 526, 394 A.2d at 446 (citing PA. CONST., art. V, § 10(c)).

While the issue of postjudgment interest involves an area traditionally governed by stat-

witnessed by Rule 238 and *Laudenberger*, is cognizant of the reality of present interest rates; perhaps it should bring the legislature up to date.

C. *Proposed Changes*

Since Pennsylvania has waited until all the other states and the federal government have acted in the area of postjudgment interest, it is not an unreasonable demand that the change, when made, be an effective one. Although *any* increase in the rate would be an improvement, an increase of one or two percentage points in an effort to "get out of the cellar" would not be meaningful in the long run. Insurance companies and the defense bar, long the recipients of the legislature's six percent bounty, would likely protest long and hard over any substantial increase, no matter how realistic, because of the fear of falling interest rates in the future. The fairest method creating the most durable result would be to adopt a variable rate that would reflect prevalent commercial rates of interest. Such a system has been adopted by five states[56] and the federal courts[57] thus far, and could hardly be objectionable on any grounds. While certainty of the rate is not maintained, such rate uniformity is not a desired end in itself. Rather, the goal of postjudgment interest is uniformity of treatment to adequately and fairly compensate the plaintiff for time spent in the often time-consuming postjudgment process.[58] A variable rate, perhaps modeled after the federal provision,[59] would seem to be the most equitable method of dealing with a problem that was not present in 1700, when the Pennsylvania statute was first promulgated.

IV. Conclusion

When Pennsylvania courts are faced with a problem of interest rate levels, the safest and fairest method of resolution is to be "ac-

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ute, it is submitted that an analogy—albeit a strained one—may be drawn from *Laudenberger* in order to bring postjudgment interest within the ambit of the rulemaking power. While the Pennsylvania Supreme Court is unlikely to walk into a constitutional hornet's nest in such a way, at least a strongly worded letter by the court, or the Chief Justice, to the Pennsylvania legislature would work to attract long-overdue attention to this issue.

56. The states are Arkansas, Colorado, Delaware, Minnesota, Texas and Washington. See *supra* note 9 for codifications and details of the respective rates.

57. *See supra* notes 28-35 and accompanying text.

58. *Cf. Laudenberger*, 496 Pa. at 66, 436 A.2d at 154 ("Although the award for delay of time may be 'in the nature of interest,' in reality it is merely an extension of the compensatory damages necessary to make a plaintiff whole.").

59. *See supra* note 3.

cording to a plain and simple consideration of justice and fair dealing."[60] Where the problem of an antiquated interest statute is at issue, the legislature—the most likely avenue of amendment—should take notice of the same considerations. Pennsylvania has stood by while its sister states and the federal government have made revisions in postjudgment interest rates consistent with economic realities, with increases to levels, without exception, above six percent. This discussion will hopefully lose its relevance in the near future when a change is indeed effected, but its present purpose is to serve notice on the legislature (and on the judiciary with its persuasive voice), that change is needed to rectify the pervasive problems caused by the substandard rate currently employed.[61]

As has been stated in the analogous context of penalties on unsuccessful appeals, "when forty-eight of fifty states choose to follow one approach there is usually a valid reason, and the states in the insular minority might do well to reexamine the policies behind their peculiar statutory schemes."[62] In the realm of postjudgment interest, Pennsylvania is a minority of one, clinging to a rate from another time. Appropriate action by the legislature is long overdue.

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60. Remic v. Berlin, 284 Pa. Super. 489, 492, 426 A.2d 153, 154 (1981).

61. A frequent comment heard during the research undertaken in the course of this project was that the Pennsylvania legislature would change the six percent rate eventually—that it was merely a "matter of time." In response to this proposition, it is submitted that, indeed, it is hoped and believed that the legislature will be roused from its inertia—eventually. If this comment can hasten the eventuality in any way, it will have served its purpose. It is further submitted that the change proposed herein has not been advocated merely for the sake of change; rather, a *meaningful* amendment in the form of a *realistic* variable rate has been urged. *See supra* notes 56-59 and accompanying text.

62. Comment, *Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama—Constitutional and Policy Considerations*, 32 ALA. L. REV. 197, 197 (1980).