

ADJUSTING PRE- AND POST-JUDGMENT INTEREST RATES FOR CONSUMER DEBT COLLECTION ACTIONS

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This Article discusses how states can set fair, just, and equitable statutory pre- and post-judgment interest rates in the context of consumer debt collection litigation. Where states set pre- and post-judgment interest rates applicable to state civil actions, they generally choose one of the two following methods: (1) a fixed rate of interest, in some cases set decades ago and far exceeding the current market rate; or (2) a floating rate with a fixed percentage of interest added. Federal courts in civil actions with federal question jurisdiction apply a purely floating rate of interest tracking a market benchmark to calculate post-judgment interest. This Article considers the implications of state statutory pre- and post-judgment interest rates in the specific context of consumer debt collection actions. Fixed interest rates are clearly problematic when they are set high above current market interest rates because they have the potential to provide a windfall to prevailing litigants at the expense of consumer borrowers. With respect to many state pre- and post-judgment interest statutes, the only intent of state legislatures in implementing such laws was to compensate prevailing parties for the loss of use of judgment funds. Thus, a high fixed interest rate creates a mismatch between the original intent of such state legislatures and the effect of pre- and post-judgment interest when assessed. This issue is exacerbated in today's environment of historically low interest rates. In the context of debt collection actions, these often-excessive sums of interest may be demanded from those least able to bear their cost. These borrowers may also be those least likely to have opportunities to generate a return on the judgment funds higher than a prevailing market rate of return on debt or equity during the time the judgment funds are in their possession.

A floating interest rate with a fixed premium added may also in some instances fail to meet the purpose of those state statutes where pre- and post-judgment interest assessments are intended to be purely compensatory in nature. A fixed premium of interest will necessarily fail to maintain the same proportion to a floating market rate as that market rate varies; the relationship between the fixed and floating elements of the judgment interest rate will become further distorted in environments of very high or very low interest rates. By its nature, therefore, a rate consisting of a fixed premium added to a floating rate cannot be as flexible in a variety of interest rate settings as a floating rate alone necessarily is. This Article contends that a purely floating market rate of pre- and post-judgment interest best meets the goals of fairness and equity with respect to consumer debt collection litigation in particular. Where state legislatures have deemed an additional premium over the market rate of interest necessary to meet other goals besides that of compensation, however, this Article recommends that that premium be set as a percentage of the current market rate, rather than as a fixed premium, in order to maintain the nature of its intended effect in a variety of market conditions. Moreover, should states decide to retain fixed premiums in today's environment of low interest rates, the premium in many instances should be reduced to a lower proportion of the market rate than such fixed premiums currently reflect in order to fulfill the same considerations of fairness and equity as are present when considering the amendment of high fixed interest rates.

INTRODUCTION

A variety of state statutes allow for the imposition of interest on the sum of money due to a successful claimant up until the time of a judgment (pre-judgment interest) as well as interest accruing between the time of the judgment and the time the judgment is actually paid (post-judgment interest). Awards of pre- and post-judgment interest are also available in federal civil actions.¹ Depending on the jurisdiction, pre- and post-judgment interest may be mandatory.² The rates at which awards of pre- and post-judgment interest are calculated, however, may vary between state and federal actions as well as between different states. While federal courts apply

1. *Post Judgment Interest Rate*, U.S. CTS., <https://www.uscourts.gov/services-forms/fees/post-judgment-interest-rate> (last visited Nov. 15, 2020).

2. See, e.g., *Sikorsky Fin. Credit Union, Inc. v. Butts*, 108 A.3d 228, 233 (Conn. 2015).

the one-year treasury constant maturity rate,³ thereby tracking a market interest benchmark, states generally apply either a high fixed interest rate or use a floating rate with a set number of percentage points added to a market interest rate.⁴

This Article considers the effects of the particular types of pre- and post-judgment interest rates selected by various states, specifically in the context of consumer debt collection actions. First, this Article discusses the use of fixed interest rates, which are often set substantially above the present market interest rate. Because the stated purpose of pre- and post-judgment interest is often solely to compensate a prevailing party for the loss of use of funds before and after a judgment is rendered, this Article argues that maintaining high fixed statutory rates in the current environment of historically low market interest rates does not satisfy the intent of such statutes.⁵ High fixed interest rates can also be particularly ill-suited to consumer debt collection actions, where a judgment debtor can be especially unlikely to earn a rate of return on funds exceeding a market rate of interest during the judgment period and where assessing amounts in excess of a market interest rate can impose a heavy financial burden on such litigants. The particular burden of high post-judgment interest on consumer debtors has been noted by those few states who have recently either enacted or considered judgment interest statutes specifically applying a lower rate of post-judgment interest to consumer debt actions.

3. Constant Maturity Treasury (“CMT”) yields:

are interpolated by the Treasury from the daily yield curve. The curve, which relates the yield on a security to its time to maturity is based on the closing market bid yields on actively traded Treasury securities in the over-the-counter market. These market yields are calculated from composites of indicative, bid-side market quotations (not actual transactions) obtained by the Federal Reserve Bank of New York at or near 3:30 PM each trading day. The CMT yield values are read from the yield curve at fixed maturities [including one year].

Daily Treasury Yield Curve Rates, U.S. DEP’T TREASURY, <https://www.treasury.gov/resource-center/data-chart-center/interest-rates/pages/textview.aspx?data=yield> (last updated Jan. 22, 2021).

4. See *infra* Table 1 and Table 2.

5. See, e.g., *Post-Judgment Interest*, NOLO’S PLAIN-ENG. L. DICTIONARY, <https://www.nolo.com/dictionary/postjudgment-interest-term.html> (last visited Sept. 29, 2020); *Prejudgment Interest*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/prejudgment%20interest> (last visited Sept. 29, 2020).

This Article also examines the use of pre- and post-judgment interest rates that are constructed as fixed premiums added to a floating market rate of interest. This Article suggests that where states have selected such a pre- or post-judgment interest rate, the effect of imposing pre- or post-judgment interest in such instances is greater than the amount necessary to merely compensate the prevailing party. Therefore, if a state is revisiting its pre- or post-judgment interest rate statute, the state legislature should look to its original intent in enacting the statute and consider its own current policy goals in order to determine whether to shift to a market interest rate or to maintain the premium added to the market rate. A purely market rate of judgment interest might be especially appropriate for consumer debt collection cases, where the failure of a borrower to pay a judgment can often be due to circumstances beyond the borrower's control; a fixed premium in such cases, where intended to punish a defendant, would certainly be less appropriate than in other contexts. In consumer debt collection cases, there may also be a strong public policy interest in ensuring that the borrower has a full opportunity to litigate a case before a judgment is rendered, and thus, any purpose of the fixed premium to speed litigation would be less suited to such cases.

Where the intent of the state legislature is indeed to punish the judgment debtor, provide incentives to hasten litigation, or satisfy other non-compensatory purposes, this Article discusses how the approach of adding a fixed premium to a market rate of interest has the potential to become distorted over time as the market interest rate changes. This Article proposes an alternative approach to pre- and post-judgment interest rates that add an additional premium to a floating market rate; namely, the premium added should be a percentage of the market rate of interest, rather than a fixed amount, in order to maintain a constant relationship between the amount of the premium and the market rate, regardless of the particular level of the market rate at any given time.

I. BACKGROUND AND RELEVANT STATUTES

Pre-judgment interest is “interest awarded to the prevailing party in a lawsuit” from some determined date before trial “to the time final judgment is entered.”⁶ The start date of pre-judgment interest might be set by statute to occur at some point after notice of a claim or at the

6. *Prejudgment Interest*, *supra* note 5.

time a suit is filed, as is the case in Texas.⁷ Pre-judgment interest may also, in some cases, be ordered from the date of the wrongful acts,⁸ or the pre-judgment interest may be ordered from the date of loss.⁹ The particular start date chosen for pre-judgment interest will depend on the governing law of the jurisdiction of the particular suit.

Post-judgment interest is “[i]nterest on a court judgment that a creditor can collect from the time the judgment is entered in the court clerk’s record until it is paid.”¹⁰ Generally, post-judgment interest continues to accrue during the pendency of an appeal if a judgment is subsequently upheld.¹¹

A. Federal Actions

1. Post-judgment Interest

In the federal system, post-judgment interest is assessed in bankruptcy matters and civil actions based on federal question jurisdiction (28 U.S.C. § 1961), criminal judgments (18 U.S.C. § 3612(f)(2)), and deficiency judgments in condemnation proceedings (40 U.S.C. § 3116).¹² Each of these statutes applies the “weekly average [one]-year constant maturity (nominal) [t]reasury yield as published by the Federal Reserve System.”¹³ In diversity cases, federal law “governs the calculation of post-judgment interest.”¹⁴ When post-judgment interest is calculated pursuant to § 1961, “the

7. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 529 (Tex. 1998) (citing TEX. STAT. ANN. art. 5069-1.05, § 6(a) (West 1997)).

8. *See, e.g., S.E.C. v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996) (noting that the court was not “persuaded that it was inappropriate to order that pre-judgment interest” in a securities law case “be paid for the entire period from the time of the defendants’ unlawful gains to the entry of judgment”).

9. *Reeled Tubing, Inc. v. M/V Chad G*, 794 F.2d 1026, 1028–29 (5th Cir. 1986).

10. *Post-Judgment Interest*, *supra* note 5.

11. FED. R. APP. P. 37 advisory committee’s note to 1967 amendment (“The first sentence makes it clear that if a money judgment is affirmed in the court of appeals, the interest which attaches to money judgment by force of law . . . upon their initial entry is payable as if no appeal had been taken”) (citing *Blair v. Durham*, 139 F.2d 260, 261 (6th Cir. 1943)).

12. *Post Judgment Interest Rate*, *supra* note 1.

13. *Id.*

14. *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 633 (4th Cir. 1999); *see also Northrop Corp. v. Triad Int’l Mktg., S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988) (“It is settled that even in diversity cases [p]ost-judgment interest is determined by federal law.”) (citing *James B. Lansing Sound, Inc. v. Nat’l Union Fire Ins. Co.*, 801 F.2d 1560, 1570 (9th Cir. 1986)).

interest rate for any particular judgment is to be determined as of the date of the judgment, and that is the single rate applicable for the duration of the interest accrual period.”¹⁵

2. Pre-judgment Interest

Unlike post-judgment interest, there is no federal statute mandating the imposition or setting a rate for pre-judgment interest.¹⁶ A federal court may decide to award pre-judgment interest if the federal statute that created the cause of action does not preclude pre-judgment interest and depending on “whether pre[-]judgment interest will further the congressional policies underlying the statute.”¹⁷ “Where jurisdiction is predicated on a federal question,” the federal post-judgment interest statute “does not preclude . . . [an] award of pre[-]judgment interest,”¹⁸ and pre-judgment interest is awarded at the discretion of the trial court.¹⁹ Also unlike post-judgment interest, state law governs the application of pre-judgment interest in diversity cases: “[t]he recognized general rule is that state law determines the rate of prejudgment interest in diversity actions.”²⁰

15. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838–39 (1990).

16. Jeffrey M. Colon & Michael S. Knoll, *The Calculation of Prejudgment Interest* 2 (Univ. Pa. L. Sch. Pub. L. Working Paper, Paper No. 06–21, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=732765.

17. *Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion Cnty.*, No. 1:15CV106, 2017 WL 1455023, at *1 (N.D. W. Va., Apr. 12, 2017) (first citing *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336–39 (1988); and then citing *Carpenters Dist. Couns. of New Orleans & Vicinity v. Dillard*, 15 F.3d 1275, 1288 (5th Cir. 1994)).

18. *Guidry v. Booker Drilling Co. (Grace Offshore Co.)*, 901 F.2d 485, 488 (5th Cir. 1990).

19. *Equal Emp. Opportunity Comm’n v. Wooster Brush Co. Emps. Relief Ass’n*, 727 F.2d 566, 578–79 (6th Cir. 1984) (first citing *Taylor v. Phillips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979); and then citing *Bricklayers Pension Tr. Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982)).

20. *Northrop Corp. v. Triad Int’l Mktg. S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988); see also *United States v. Dollar Rent A Car Sys., Inc.*, 712 F.2d 938, 939–40 (4th Cir. 1983); Dustin K. Palmer, *Should Prejudgment Interest Be a Matter of Procedural or Substantive Law in Choice-of-Law Disputes?*, 69 U. CHI. L. REV. 705, 712 (2002) (“Federal courts sitting in diversity and applying state law have resolved the procedural/substantive debate by choosing to use the prejudgment interest rule of the state in which they sit, not any federal rule.”).

B. State Actions

State legislatures have enacted a variety of statutes setting pre- and post-judgment interest rates, as described within the tables contained in the Appendix to this Article.²¹ These statutes generally fall into one of the two following categories: those in which pre- and post-judgment interest rates are set at a fixed level and those which assess a fixed percentage of interest in addition to a market rate.²² Some states apply either a fixed or floating interest rate to both pre- and post-judgment interest, while some states used a fixed approach for one type of interest and a floating rate for the other.²³ Contract and tort actions can sometimes be subject to separate pre- or post-judgment interest rates. In some jurisdictions, contracts can set the applicable pre- or post-judgment interest rate by their own terms; states sometimes set upper limits on the rates that contracts are permitted to apply.²⁴ The upper limit for contract actions may differ from the set rate for tort actions.²⁵ States may apply different interest rates in certain circumstances, such as if a municipality is a party to the litigation.²⁶ In many instances, pre- and post-judgment interest cannot be assessed on punitive damages.²⁷ These particular nuances of state pre- and post-judgment interest law are not fully reflected in the Appendix as the goal of the Appendix is to set forth a broad comparison of the types of pre- and post-judgment interest rates across jurisdictions and to make recommendations specific to the context of consumer debt collection litigation and to the adjustment of pre- and post-judgment rates to be useful in a variety of market interest rate settings.²⁸

The Appendix to this Article organizes pre- and post-judgment interest rates by type.²⁹ It also describes the different types of market interest rates used by states that choose to employ a market interest rate as part of their applicable pre- or post-judgment interest rate.³⁰ This Appendix serves as the basis for the discussion in this Article of

21. See *infra* Appendix.

22. See *infra* Table 1 and Table 2.

23. See *infra* Table 1 and Table 2.

24. See discussion *infra* Part I.C.4.

25. See, e.g., ALA. CODE § 8-8-1 (2017); CAL. CIV. CODE §§ 3287(c), 3289 (West 2016).

26. See, e.g., 735 ILL. COMP. STAT. 5/2-1303(a) (2020).

27. See, e.g., *Brown v. Off. of the Comm'r of Prob.*, 35 N.E.3d 1, 4–5 (Mass. App. Ct. 2015).

28. See *infra* Appendix.

29. See *infra* Appendix.

30. See *infra* Appendix.

current types and levels of pre- and post-judgment interest rates.

C. Other Considerations

1. Measures of Market Interest Generally

As noted above, the post-judgment interest rate used in federal civil actions is the “weekly average [one]-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.”³¹ The one-year constant maturity treasury yield is “[a]n index published by the Federal Reserve Board based on the average yield of a range of treasury securities, all adjusted to the equivalent of a one-year maturity” and is “an index that is used to set the cost of variable-rate loan”³² Before December 21, 2001, the applicable post-judgment interest rate in federal civil actions “was based on the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 week t-bills settled immediately preceding entry of the judgment.”³³

As noted in the tables contained in the Appendix, while some states that set a floating interest rate do so using the same average one-year constant maturity treasury yield used in the federal system, other states have selected different rates.³⁴ Another common measure used is the Federal Reserve Discount Rate, which is “the interest rate charged to commercial banks and other depository institutions on loans they receive from their regional Federal Reserve Bank’s lending facility—the discount window.”³⁵ Other states base their rates on market benchmarks more closely geographically linked with their own particular jurisdiction, such as Nevada applying the prime rate at the largest bank in Nevada (plus a fixed rate) or West Virginia using the Fifth Federal Reserve District rate (likewise adding a fixed percentage of interest).³⁶ As Table 3 in the Appendix describes, the

31. 28 U.S.C. § 1961(a) (2018).

32. *One-Year Treasury Constant Maturity*, BANKRATE, <https://www.bankrate.com/rates/interest-rates/1-year-treasury-rate.aspx> (last updated Sept. 23, 2020).

33. *Post Judgment Interest Rate*, *supra* note 1.

34. *See infra* Appendix.

35. *The Discount Window and Discount Rate*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://www.federalreserve.gov/monetarypolicy/discountrate.htm> (last updated Aug. 25, 2020); *see also Current Interest Rates*, FED. RSRV.: DISC. WINDOW/PAYMENT SYS. RISK, <https://www.frbdiscountwindow.org/> (last updated Sept. 25, 2020) (showing current interest rates).

36. NEV. REV. STAT. § 99.040 (2013); W. VA. CODE § 56-6-31 (2017).

alternative rates used are sometimes higher than the weekly average one-year constant maturity (nominal) treasury yield used in federal civil actions and by several states; that federal rate was 1.55% as of January 3, 2020.³⁷ The different market interest rates used by various jurisdictions can produce identical results, such as the 12th Federal Reserve District Discount Rate used by Alaska and the Federal Reserve Discount Rate used in multiple jurisdictions, which were both 2.25% as of January 3, 2020.³⁸ Sometimes, however, these rates can vary from each other and the rate used in federal civil matters, such as the prime rate at the largest bank in Nevada, which was 4.75% as of January 3, 2020.³⁹

2. Market Interest Rates over Time

As noted above, federal actions apply the one-year treasury constant maturity rate.⁴⁰ This rate reached historic lows in the early part of the 2010s and remains persistently low. As noted above, as of January 3, 2020, the interest one-year treasury constant maturity rate was 1.55%; this rate had sunk below 0.2% by August 2020.⁴¹ Other interest rate benchmarks also remain low, such as the Federal Reserve Discount Rate, which, as noted above, was 2.25% on January 3, 2020.⁴² The current market rate remains far below its highs of the late 1970s and early 1980s.⁴³ For example, on October 26, 1979, the one-year treasury constant maturity rate was 12.76%; on September 4, 1981, it was 17.24%; on July 3, 1984, it was 12.19%; and on March 17, 1989, it was 9.72%.⁴⁴ As of the writing of this Article, it appears that low interest rates may persist for some time, as considered even before the shock of the pandemic occurred.⁴⁵

37. See *infra* Table 3.

38. See *infra* Table 3.

39. NEV. FIN. INSTS. DIV., PRIME INTEREST RATE (2020).

40. *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 633 (4th Cir. 1999).

41. *Daily Treasury Yield Curve Rates*, *supra* note 3.

42. *Historical Discount Rates: Primary and Secondary Credit*, FED. RSRV.: DISC. WINDOW/PAYMENT SYS. RISK, <https://www.frbdiscountwindow.org/pages/discount-rates/historical-discount-rates> (last updated Mar. 16, 2020).

43. *1-Year Treasury Constant Maturity Rate*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/DGS1> (last updated Sept. 24, 2020).

44. *Id.*

45. Michael S. Derby, *Fed's Williams Says World Will Be Dealing with Low Interest Rates for a Long Time*, WALL ST. J. (Jan. 9, 2020), <https://www.wsj.com/articles/fed-s-williams-says-world-will-be-dealing-with-low-interest-rates-for-a-long-time-11578587400> (“Federal Reserve Bank of New York President John Williams said Thursday low interest rates are likely to be a persistent issue for some time to come The low level of rates now seen in the economy ‘are largely a result of global,

3. Compounding

In some jurisdictions, pre-judgment interest is calculated without compounding, as this was also the common law rule.⁴⁶ In other jurisdictions, however, pre-judgment interest is compounded.⁴⁷ “[C]ompound prejudgment interest is the norm in federal litigation.”⁴⁸ In his 1996 article, Knoll argued that “fairness and efficiency require that [pre-judgment] interest be compounded,” and that simple interest does not fully compensate the plaintiff.⁴⁹

Post-judgment interest is also calculated without compounding in federal question cases in federal court.⁵⁰ The Delaware Chancery Court has noted, in considering whether post-judgment interest should be compounded, that “[a]n award of simple interest allows the obligor to gain something of a cumulative advantage by delaying payment of its obligation.”⁵¹

4. Waiver of the Statutory Post-judgment Interest Rate

As discussed above, the statutory rate of pre- or post-judgment interest can often be waived where the contract itself states the applicable rate of pre- or post-judgment interest. As the Fifth Circuit stated, “[w]hile 28 U.S.C. § 1961 provides a standard rate of post-judgment interest, the parties are free to stipulate a different rate,

longer-term structural factors,” Mr. Williams said. “They’re driven by demographic changes, slow productivity growth, and demand for safe assets—all of which are unlikely to reverse any time soon.”)

46. Colon & Knoll, *supra* note 16, at n.4; John Keeling Baker & Devin R. Bates, *What is Arkansas’ Pre-Judgment Interest Rate? A Vexing Question with No Clear Answer*, MITCHELL WILLIAMS BLOG (Feb. 1, 2018), <https://www.mitchellwilliamslaw.com/what-is-arkansas-pre-judgment-interest-rate-a-vexing-question-with-no-clear-answer>.

47. Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 294, 306 (1996).

48. *Am. Nat’l Fire Ins. v. Yellow Freight Sys.*, 325 F.3d 924, 937 (7th Cir. 2003) (citing *In re Oil Spill by the Amoco Cadiz off the Coast of Fr. on March 16, 1978*, 954 F.2d 1279, 1331–32 (7th Cir. 1992)).

49. Knoll, *supra* note 47, at 308.

50. *Hylind v. Xerox Corp.*, No. PJM 03-116, 2014 WL 1660128, at *4 (D. Md. Apr. 24, 2014) (“[T]he federal legal rate of [post-judgment] interest . . . is simple interest and not compounded interest”); *see also* TEX. FIN. CODE ANN. § 304.104 (West 1999) (“Prejudgment interest is computed as simple interest and does not compound.”).

51. *ReCor Med., Inc. v. Warnking*, C.A. No. 7387-VCN, 2015 WL 535626, at *1 (Del. Ch. Jan. 30, 2015) (citing *Brandin v. Gottlieb*, No. 14819, 2000 WL 1005954, at *23 (Del. Ch. July 13, 2000)).

consistent with state usury and other applicable laws.”⁵² Federal courts have reached different conclusions as to the standard necessary for a contract to effectively waive the post-judgment interest rate set in 28 U.S.C. § 1961.⁵³ With respect to post-judgment interest, the Fifth and Tenth Circuits follow the general rule that parties “must specifically contract around the general rule that a cause of action reduced to judgment merges into the judgment and the contractual interest rate therefore disappears for post-judgment purposes.”⁵⁴ The Second Circuit found that the intent of the contracting parties to modify the federal rate of post-judgment interest “must be clear and unequivocal.”⁵⁵

II. INTENDED PURPOSES OF PRE- AND POST-JUDGMENT INTEREST IN GENERAL

A. Intended Purposes of Pre-judgment Interest

Some states have created or interpret their pre-judgment interest statutes such that the only legitimate purpose of those laws is to compensate plaintiffs for the loss of the use of money before judgment. This purpose of compensation has two aspects: one “that the successful plaintiff be fully compensated for its losses and that the defendant pay this amount,” and second, to prevent a situation whereby “the losing defendant” becomes “unjustly enriched.”⁵⁶ According to Knoll, “The payment of prejudgment interest, therefore, ensures that the plaintiff receives full compensation for its losses and that the defendant pays the full penalty, thereby putting both parties in the same position that they would have been in if the judgment had been paid immediately.”⁵⁷

52. *In re Lift & Equip. Serv., Inc.*, 816 F.2d 1013, 1018 (5th Cir. 1987) (first citing *Inv. Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir. 1975); then citing *Bank of New Orleans v. H.P.B. Jr. Dev. Co., Inc.*, 439 So. 2d 1269, 1270 (La. Ct. App. 1983); and then citing *Mount Airy Refin. Co. v. Clark Acquisition, Inc.*, 470 So. 2d 890, 893 (La. Ct. App. 1985)).

53. Jacob Maskovich & Bob Miller, *A Lender's Federal Post-Judgment Interest Quandary*, BRYAN CAVE LEIGHTON PAISNER'S GLOBAL RESTRUCTURING & INSOLVENCY DEV. BLOG (Feb. 11, 2017), <https://bclpgrid.com/a-lenders-federal-post-judgment-interest-quandary>.

54. *Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 457 (5th Cir. 2013) (citing *Johnson v. Riebesell*, 586 F.3d 782, 794 (10th Cir. 2009)).

55. *FCS Advisors, Inc. v. Fair Fin. Co., Inc.*, 605 F.3d 144, 145 (2d Cir. 2010).

56. Knoll, *supra* note 47, at 295–96.

57. *Id.* at 296.

Many state courts have confirmed in judicial opinions that this compensatory purpose is the only consideration on which awards of pre-judgment interest should be based. The Washington Supreme Court has stated that “[p]rejudgment interest awards are based on the principle that a defendant ‘who retains money which he ought to pay to another should be charged interest upon it,’”⁵⁸ and that “[t]he plaintiff should be compensated for the ‘use value’ of the money representing his damages for the period of time from his loss to the date of judgment.”⁵⁹ Likewise, Louisiana considers that pre-judgment interest is compensatory in nature only, as it “is meant to fully compensate the injured party for the use of funds to which he is entitled but does not enjoy because the defendant has maintained control over the funds during the pendency of the action.”⁶⁰

The Connecticut Supreme Court has provided additional explanation of the solely compensatory purpose of pre-judgment interest.⁶¹ That court discussed that the primary purpose of pre-judgment interest is “not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money.”⁶² It therefore suggested that Connecticut courts in the future “refrain from characterizing the standard for an award of prejudgment interest under [the relevant statute] as requiring a determination that the liable party’s detention of money was *wrongful*.”⁶³

Likewise, in the case of *Evans v. Lorillard*,⁶⁴ the Massachusetts Defense Lawyers Association submitted an *amicus curiae* brief arguing that the imposition of a 12% fixed pre-judgment interest rate was both unconstitutional and violated due process as an excessive punitive award.⁶⁵ The association pointed to Massachusetts case law finding that compensation for the loss of judgment funds is the only

58. Hansen v. Rothaus, 730 P.2d 662, 665 (Wash. 1986) (quoting Prier v. Refrigeration Eng’g Co., 442 P.2d 621, 627 (Wash. 1968)).

59. *Id.* (citing Mall Tool Co. v. Far W. Equip. Co., 273 P.2d 652 (Wash. 1954)).

60. Sharbono v. Steve Lang & Son Loggers, 696 So. 2d 1382, 1386 (La. 1997).

61. DiLieto v. Cnty. Obstetrics & Gynecology Grp., P.C., 74 A.3d 1212, 1221 n.13 (Conn. 2013).

62. *Id.*

63. *Id.*

64. This case was a wrongful death action brought by the estate of a deceased cigarette smoker against the designer and manufacturer of the brand of cigarettes she smoked. *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1005 (Mass. 2013).

65. Brief of Mass. Def. Laws. Ass’n as Amicus Curiae on Issue of Constitutionality of 12% Int. Rate at 34, *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1005 (Mass. 2013) (No. SJC-11179).

purpose of pre-judgment interest.⁶⁶ The association therefore contended a 12% pre-judgment interest rate would compensate plaintiffs beyond the loss of the use of judgment funds and would result in a windfall to those plaintiffs.⁶⁷ These arguments, however, were unsuccessful in relieving the amount of statutory pre-judgment interest assessed on the defendants.⁶⁸

In the federal system, the purpose of pre-judgment interest is also to compensate rather than to punish. The Ninth Circuit in 2001 found that an abuse of discretion had occurred in connection with an award of 16% pre-judgment interest where the district court had “made it clear that it wanted [the defendant] to pay *more* than it could have earned to make amends for its bad faith conduct.”⁶⁹ The Ninth Circuit therefore remanded the case “to allow the district court to choose a prejudgment interest rate that compensates [the plaintiff] for the losses he incurred as a result of [the defendant’s] nonpayment of benefits, rather than a rate that doubles [the defendant’s] portfolio return in order to punish it.”⁷⁰

Some states, however, have found that pre-judgment interest has other purposes beyond purely compensatory ones. In certain jurisdictions, states allow for pre-judgment interest to help “ensur[e] that prospective parties have the appropriate incentives to take precautions when engaging in the same activity that produced the judgment,” as well as to “reduc[e] the defendant’s incentive to delay judgment.”⁷¹ Pre-judgment interest may also be intended “to alleviate delay in the courts, and . . . to encourage defendants to settle meritorious claims as soon as reasonably possible.”⁷² Pennsylvania’s

66. *Id.* at 7–12 (first citing *McEvoy Travel Bureau, Inc. v. Norton Co.*, 563 N.E.2d 188, 196 (Mass. 1990) (“The purpose behind the prejudgment interest statute is not to penalize the wrongdoer, or to make the damaged party more whole.”); and then citing *Lou v. Otis Elevator Co.*, 933 N.E.2d 140, 152 (Mass. App. Ct. 2010) (“[T]he policy and purpose underlying the issue of prejudgment interest is one of compensation or loss distribution, rather than conduct regulation.”)).

67. See Brief of Mass. Def. Laws. Ass’n as Amicus Curiae on Issue of Constitutionality of 12% Int. Rate, *supra* note 65, at 34.

68. On appeal, the Massachusetts Supreme Judicial Court vacated the jury’s punitive damages award while upholding the compensatory portion and statutory interest. *Evans*, 990 N.E.2d at 1041. The case eventually settled.

69. *Dishman v. Unum Life Ins. Co.*, 269 F.3d 974, 988 (9th Cir. 2001).

70. *Id.*

71. Knoll, *supra* note 47, at 296–97.

72. *Arthur v. Kuchar*, 682 A.2d 1250, 1253 (Pa. 1996) (citing PA. R. CIV. P. 238 1988 explanatory comment). However, it has also been stated that Pennsylvania’s:

[d]elay damages [i.e., prejudgment interest assessments] do not penalize a defendant that chooses to go to court; they simply do not

pre-judgment interest rule has a “twofold” purpose: “(1) to alleviate delay in the courts, and (2) to encourage defendants to settle meritorious claims as soon as reasonably possible.”⁷³ The New Mexico Supreme Court has stated that one of the state’s pre-judgment interest statutes allowing for a discretionary award of pre-judgment interest “provides for prejudgment interest from the date of filing of the complaint not as damages, but as a management tool or penalty to foster settlement and prevent delay in all types of litigation.”⁷⁴

B. Intended Purposes of Post-judgment Interest

Post-judgment interest pursuant to 28 U.S.C. § 1961 is intended to compensate the prevailing party in litigation for the loss of the use of funds from the time the judgment is rendered until the judgment is paid.⁷⁵ In the various states, post-judgment interest is most often intended to provide “compensation to the judgment creditor for not having use of the money owed,” and in rarer instances is intended to serve as “punishment of the judgment debtor to encourage him or her to pay the judgment without undue delay.”⁷⁶

As is the case with respect to pre-judgment interest, many courts have expressly found that the purpose of post-judgment interest should not be to punish the judgment debtor. The Supreme Court of Missouri has noted that “[t]he purpose of post-judgment interest is to

permit a defendant to profit from holding money that belongs to the plaintiff, by requiring the defendant to compensate the plaintiff for the loss of the use of that money during the time the defendant held it.

Costa v. Lauderdale Beach Hotel, 626 A.2d 566, 570 (Pa. 1993).

73. *Arthur*, 682 A.2d at 1253.

74. *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 872 P.2d 346, 351 (N.M. 1994).

75. *See, e.g., Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 834 (1990) (“[T]he policy underlying the postjudgment interest statute [is] compensation of the plaintiff for the loss of the use of the money.”); *Air Separation, Inc. v. Lloyds of London*, 45 F.3d 288, 290 (9th Cir. 1995) (citing *Turner v. Japan Lines, Ltd*, 702 F.2d 752, 756 (9th Cir. 1983)).

76. Brian P. Miller, *Statutory Post-Judgment Interest: The Effect of Legislative Changes After Judgment and Suggestions for Construction*, 1994 BYU L. REV. 601, 609; *see, e.g., Trinity Church v. John Hancock Mut. Life Ins. Co.*, 544 N.E.2d 584, 585 (Mass. 1989) (“Interest is paid as compensation for delay.”); *I.W. Berman Props. v. Porter Bros.*, 344 A.2d 65, 79 (Md. 1975) (“The purpose of post-judgment interest is obviously to compensate the successful suitor for the same loss of the use of the monies represented by the judgment in its favor, and the loss of income thereon, between the time of the entry of the judgment *nisi* – when there is a judicial determination of the monies owed it – and the satisfaction of the judgment by payment.”).

award just compensation that ensures a money judgment will be worth the same when it is actually received as it was when it was awarded” and that additionally, “the award ‘compensate[s] the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant.’”⁷⁷ The Texas Supreme Court has stated that “[p]ost-judgment interest is not a punishment inflicted on a judgment debtor for exercising the right to appeal. Instead, like pre-judgment interest, post-judgment interest is simply compensation for a judgment creditor’s lost opportunity to invest the money awarded as damages at trial.”⁷⁸ Likewise, the Connecticut Supreme Court highlighted that “the purpose of postjudgment interest is not to punish defendants but, rather, to compensate plaintiffs for the loss of the use of their money, after the fact finder has determined that the money is due and owing, during the pendency of any appeals.”⁷⁹

Some states, however, use assessments of post-judgment interest for other, non-compensatory purposes as well, such as ensuring the speedy payment of judgments. For example, even though Louisiana’s pre-judgment interest statute is used for compensatory purposes only, the Louisiana Supreme Court has stated that “[i]n contrast, postjudgment interest is a prospective award whose purpose is to encourage prompt payment of amounts awarded in the judgment, and to compensate the victorious party for the other party’s use of funds to which the victor was entitled under the judgment.”⁸⁰ A Wisconsin appeals court has noted that in addition to the compensatory purpose of post-judgment interest, “the accumulation of interest on an unpaid obligation can also serve to motivate the debtor to pay. This is not punishment . . . but incentive.”⁸¹

As discussed above for pre-judgment interest, states that use a floating post-judgment interest rate select a market rate and then add a fixed amount of interest percentage points to that rate. This may suggest that at least some states have determined that the function of post-judgment interest is not merely to compensate the judgment

77. *Dennis v. Berger*, P.C., 529 S.W.3d 318, 321 (Mo. 2017) (quoting *Bonjorno*, 494 U.S. at 835–36).

78. *Miga v. Jensen*, 96 S.W.3d 207, 212 (Tex. 2003).

79. *DiLieto v. Cnty. Obstetrics & Gynecology Grp.*, P.C., 74 A.3d 1212, 1225 n.18 (Conn. 2013).

80. *Sharbono v. Steve Lang & Son Loggers*, 696 So. 2d 1382, 1386 (La. 1997) (emphasis omitted). Louisiana, however, uses the same rate for both pre- and post-judgment interest (a market rate with a fixed premium added). See LA. STAT. ANN. § 13:4202 (2020).

81. *Zintek v. Perchik*, 471 N.W.2d 522, 538 (Wis. Ct. App. 1991) (citing *Nelson v. Travelers Ins. Co.*, 306 N.W.2d 71, 76 (Wis. 1981)).

debtor for the time during which he or she did not have use of the funds, but to award the prevailing party an additional sum of money above the level of lost interest in order to meet some non-compensatory purpose. As the additional rate of fixed interest increases, the practical result is that more weight is given to the non-compensatory effect of the post-judgment interest statute. For example, Michigan, which adds 1% to a market interest rate, is closer to a purely compensatory post-judgment interest regime than is Maine, which adds 6% to a floating market rate.⁸² However, the particular fixed premium or particular fixed interest rate chosen by a state legislature does not necessarily serve as a reliable indicator of what the legislature intended and what courts have interpreted to be the governing purpose of the pre- or post-judgment interest statute in that jurisdiction. Sometimes, for example, a high fixed rate can be found in a jurisdiction where the only purpose of judgment interest is meant to be compensatory, as the Massachusetts Defense Attorneys Association argued was the case in Massachusetts.⁸³ This issue is further addressed in the next Section of this Article, which discusses interpreting the legislative intent of pre- and post-judgment interest statutes.

C. Interpreting Legislative Intent of Pre- and Post-judgment Interest Statutes

Where evidence as to the intended purpose of pre- and post-judgment interest is not available, some other indicators besides the absolute rates of interest could possibly be helpful in interpreting legislative intent. For example, some states use different fixed interest rates for assessments of pre- and post-judgment interest. This difference in rates might signal that the purposes of imposing either pre- or post-judgment in that state may not be limited merely to compensating a party for the loss of use of judgment funds because a purely compensatory purpose would not explain the differential between pre- and post-judgment rates.⁸⁴ Likewise, those jurisdictions

82. MICH. COMP. LAWS § 600.6013 (2020); *see also* ME. REV. STAT. ANN. tit. 14 § 1602-C (2018).

83. *See* Brief of Mass. Def. Laws. Ass'n as Amicus Curiae on Issue of Constitutionality of 12% Int. Rate, *supra* note 65, at 23.

84. *See* ARK. CODE ANN. § 16-65-114 (2014); 815 ILL. COMP. STAT. 205/1 (2020); 735 ILL. COMP. STAT. 5/2-1302 (2020); IND. CODE § 24-4.6-1-101 (2018); IND. CODE § 34-51-4-9 (2008); KY. REV. STAT. ANN. § 360.010, 360.040 (West 2008); MD. CODE ANN., COM. LAW § 12-102 (West 1975); WYO. STAT. ANN. § 40-14-106 (2019); WYO. STAT. ANN. § 1-16-102 (2003).

that apply a higher interest rate for intentional acts or actions taken in bad faith show that in such cases, pre- or post-judgment interest is assessed at higher rate to achieve something more than merely compensating the plaintiff for the loss of the use of judgment funds.⁸⁵

These types of potential clues as to the purpose of pre- and post-judgment interest statutes, however, are sometimes inadequate to fully clarify legislative intent. Louisiana's post-judgment interest statute has a purpose beyond a compensatory one, while the purpose of pre-judgment interest in Louisiana is purely compensatory.⁸⁶ Yet the same interest rate is applied for both pre- and post-judgment interest within that state.⁸⁷ A particular pre- or post-judgment interest rate also might have been set as a result of lobbying efforts without a specific determination by a state legislature as to the intended goals a particular interest rate was intended to promote. For example, when Washington revised its post-judgment interest statute downward for consumer debt collection actions from the then-existing rate of 12%, a bill was initially considered "that would have set the rate at 7.5 percent," but that amount was "scaled . . . back" to a 9% rate "after pushback from the industry, which has developed into a powerful lobbying force in recent years with particular focus on maintaining allies in the [Washington] state Senate."⁸⁸ The particular rate of interest used by a state, therefore, cannot be taken as a clear indication of what the state legislature intended as the purpose of pre- or post-judgment interest, and thus only clear statements from the legislature or courts interpreting the pre- and post-judgment interest rate statutes can suffice to demonstrate what the actual intended purpose or purposes of those statutes were. Moreover, when considering whether to amend its pre- and post-judgment interest rate statutes, a state legislature should also consider its own current policy goals and act with those goals as guidance.

85. See, e.g., N.M. STAT. ANN. § 56-8-4 (2004).

86. LA. STAT. ANN. § 13:4202 (2020).

87. *Id.*

88. Mike Baker, *Washington Senate Passes Bills Aimed at Helping Consumers Break out of Debt*, SEATTLE TIMES (Apr. 23, 2019), <https://www.seattletimes.com/seattle-news/politics/washington-senate-passes-bills-aimed-at-helping-consumers-break-out-of-debt/>.

D. Incentives in Litigation Created or Amplified by Pre- and Post-judgment Interest Rates

1. Consequences of High Fixed Rates

a. Pre-judgment

The appropriateness of high fixed rates of pre-judgment interest, and whether the incentives in litigation created by pre-judgment interest are desirable ones, depend on the goals of the particular jurisdiction in enacting its pre-judgment interest statute. As described in the amicus brief in *Lorillard*, where the goal of pre-judgment interest is only to compensate plaintiffs for the loss of the use of judgment funds, a high fixed rate of pre-judgment interest results in a windfall to such plaintiffs.⁸⁹ Where courts have had discretion to select a particular pre-judgment rate of interest, some judges have noted that high fixed interest rates create a windfall for plaintiffs.⁹⁰ For example, the United States District Court for the Eastern District of Tennessee considered a matter which arose in late 2009 “during one of the worst economic downturns in history.”⁹¹ The court stated that the case occurred during a period of “historically-low interest rates” and as a result declined a request to grant a 10% pre-judgment interest rate.⁹² Likewise, the Delaware Chancery Court noted in 2015 that “with interest rates at low levels, the legal rate of interest of the discount rate plus [5%] may overstate the value accruing to Defendants from possessing the funds owed to” the plaintiff.⁹³

A high fixed rate could also distort litigation incentives by putting excessive pressure on a defendant to settle if he or she has limited funds beyond a proposed settlement amount, is aware of the accruing

89. See Brief of Mass. Def. Laws. Ass’n as Amicus Curiae on Issue of Constitutionality of 12% Int. Rate, *supra* note 65, at 23.

90. See *MAKS, Inc. Gen. Trading & Contracting Co. v. Sterling Operations, Inc.*, No. 3:10-CV-443, 2014 WL 297291, at *2 (E.D. Tenn. Jan. 27, 2014) (citing *Krystal Co. v. Caldwell*, No. 1:11-CV-81, 2012 WL 876793, at *11 (E.D. Tenn. Mar. 13, 2013)); *Nat’l Fitness Ctr. Inc. v. Atlanta Fitness*, No. 3:09-CV-133, 2013 WL 6231774 (E.D. Tenn. Dec. 2, 2013); *Dorothy J. v. City of New York*, 749 F. Supp. 2d 50, 80 (E.D.N.Y. 2010) (stating that a pre-judgment interest rate of 9% “would produce a windfall for the plaintiffs in light of the historically low rates of interest and inflation that have prevailed over much of the relevant period.”).

91. *Nat’l Fitness Ctr. Inc.*, 2013 WL 6231774, at *3.

92. *Id.*

93. *ReCor Med., Inc. v. Warnking*, C.A. No. 7387-VCN, 2015 WL 535626, at *1 (Del. Ch. Jan. 30, 2015).

pre-judgment interest, and decides to settle as a result. Whether such a situation could in fact arise would likely depend on, at a minimum, the identities of the litigating parties, the disparity between the market rate of interest and the fixed rate, and the amount of funds at stake compared with the amount of pre-judgment interest being generated over time. The plaintiff's pre-trial decision-making could also be affected, depending on whether they have the procedural and financial capacity to delay an eventual judgment in the suit in order to accrue pre-judgment interest far exceeding the market rate and the importance to the plaintiff of obtaining a rapid judgment versus a larger one.⁹⁴ Whether such a situation would in fact occur would depend on the plaintiff's likelihood of overall success in litigation and whether an award of pre-judgment interest is mandatory or likely to be awarded in the particular jurisdiction.⁹⁵

In some jurisdictions, the purpose of pre-judgment interest is also to encourage settlement and the rapid resolution of claims. Where a fixed interest rate is far above the market rate, defendants have a greater incentive than they would in the context of a market rate of interest to ensure that litigation occurs in a rapid manner and to shorten the phases of pre-trial litigation, including discovery and motion practice.⁹⁶ Where the pre-judgment interest rate is fixed at a high level and especially where a large sum of money is at stake in a potential judgment, a greater incentive to settle is also created.⁹⁷ However, where fixed interest rates are set far above the market rate of interest, the question is whether those fixed rates go too far in encouraging settlement and speedy litigation and perhaps put undue pressure on a defendant to limit pre-trial litigation or enter into a settlement the defendant feels is not entirely fair or reasonable. While speedy litigation and settlement are certainly positive goals to encourage over the course of litigation, it is also important that all parties have a full opportunity to litigate and present legitimate claims and defenses without the specter of excessive pre- and post-judgment interest rates possibly curtailing that opportunity.

94. PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 17 (2020).

95. Knoll, *supra* note 47, at 297.

96. *Id.* at 318.

97. *Id.* at 319.

b. Post-judgment

Most often, the purpose of post-judgment interest is to compensate the prevailing party for the use of the judgment funds in the time between the issuance of the judgment and the time at which the judgment is paid.⁹⁸ As is the case for pre-judgment interest, applying a fixed interest rate set high above the market rate would over-compensate the prevailing party and grant it a windfall; that windfall would be largest in times of extremely low market interest rates.⁹⁹ Fixed post-judgment interest rates far exceeding the market rate of interest are an incentive against pursuing appeals in order to avoid the accrual of interest above what a judgment debtor might expect to earn by investing those funds.¹⁰⁰ While such rates might be helpful in discouraging frivolous appeals, they might also dissuade appeals made on reasonable grounds as well.

Less commonly, post-judgment interest may also serve to punish the judgment debtor and encourage the rapid payment of judgment debt. Where the interest rate exceeds the market rate of interest, either by using a high fixed rate or adding a premium to the market rate, the purposes of the post-judgment interest statute beyond the purely compensatory one would presumably be encouraged.¹⁰¹ Again, the issue is whether a fixed rate is so high above the market rate of interest that it overly punishes a judgment debtor.

In some instances, the accrual of post-judgment interest can be halted by tendering the full amount of the judgment as well as all interest accrued to the time of tender.¹⁰² In order to do so, however, the judgment debtor must have the ability to pay the judgment in full or have the ability to access funds to satisfy the judgment.¹⁰³ A party who pursues an appeal without being able to make such a tender will

98. *Becker Holding Corp. v. Becker*, 78 F.3d 514, 516 (11th Cir. 1996).

99. Knoll, *supra* note 47, at 318.

100. It has been argued that “[a] market rate [of post-judgment interest] . . . neither favors one party nor disfavors another. Otherwise, ‘a losing defendant may have an economic incentive to appeal a judgment . . . to retain his money and accumulate interest on it at the commercial rate during the pendency of the appeal.’” *Burke v. Groover*, 26 A.3d 292, 300 (D.C. 2011) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 839 (1990)).

101. Knoll, *supra* note 47, at 359.

102. See, e.g., 735 ILL. COMP. STAT. 5/2-1303 (2020); *In re Liquidation of Pine Top Ins. Co.*, 749 N.E.2d 1011, 1114–15 (Ill. App. Ct. 2001); see also Scott L. Howie, *Unwanted Interest: How to Stop the Accrual of Postjudgment Interest*, IDC Q., 2013, at 1, 1.

103. Howie, *supra* note 102, at 2 (citing *Poliszczuk v. Winkler*, 962 N.E.2d 610, 616 (Ill. App. Ct. 2011)).

generally not have the ability to halt the accrual of post-judgment interest.¹⁰⁴ Thus, the concerns about the incentives created by high levels of post-judgment interest remain even in those jurisdictions that allow for post-judgment interest to be halted by way of tender.

III. CONSUMER DEBT COLLECTION ACTIONS

A. Background

Consumer debt collection lawsuits are a significant area of litigation in the United States. The National Consumer Law Center (“NCLC”), arguing that “[s]tate courts are clogged with millions of suits by debt collectors,” cited sources describing over 160,000 such cases in Alabama in 2017; over 170,000 cases in Texas in fiscal year 2015; 79,000 in Nebraska and 30,000 in New Mexico in 2013; at least 1.2 million small claims and district court cases in Massachusetts from 2004 to 2013; and 300,000 lawsuits per year in New York City between 2006 and 2008.¹⁰⁵ “[A]n estimated 77 million Americans—one in three adults—have a debt that has been turned over to a private collection agency.”¹⁰⁶ Changes to rules governing debt collection suits, including pre- and post-judgment interest statutes, therefore have the potential to affect a significant number of defendants.

Judgments in debt collection suits are often obtained by default. The NCLC claims that “[l]ess than 10% of consumers are represented by an attorney when they are sued on a debt,” which “mak[es] it virtually impossible for these consumers to present their defenses.”¹⁰⁷ The Conference of Chief Justices/Conference of State Court Administrators in 2018 adopted a resolution asserting that “the vast majority of debt collection cases result in default judgments” and that “defendants in debt collection cases often lack the resources to hire counsel and may not understand their rights and defenses, or know

104. *Id.* at 3 (citing *Halloran v. Dickerson*, 679 N.E.2d 774, 780 (Ill. App. Ct. 1997)).

105. *Consumer Debt Collection Facts*, NAT'L CONSUMER L. CTR. (Feb. 2018), <https://www.nclc.org/issues/consumer-debt-collection-facts.html>.

106. AM. C.L. UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 4 (2018); Stu Kantor, *1 in 3 Americans with a Credit File Has Debt Reported in Collections*, URB. INST. (July 29, 2014), <http://www.urban.org/1-3-americanscredit-file-has-debt-reported-collections>.

107. *Consumer Debt Collection Facts*, *supra* note 105 (citing Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 288 (2011)).

how to assert those rights and defenses.”¹⁰⁸ The resolution further asserted that “plaintiffs who obtain default judgments in debt collection cases often invoke powerful post-judgment collection remedies, including wage garnishments, and additional court actions that can result in civil arrest warrants.”¹⁰⁹ Moreover, “debt collection complaints are often served at addresses where the debtor no longer resides and therefore are never received by the debtor.”¹¹⁰ Various studies cited by the ACLU found default rates of up to 95%.¹¹¹ The dissent in the Supreme Court case of *Midland Funding v. Johnson* also commented on the high default rate in consumer debt collection actions, stating that “consumers do fail to defend themselves in court,” and cited the Federal Trade Commission for the statistic that “over 90% fail to appear at all.”¹¹² In a 2018 report on the criminalization of private debt, the ACLU found that “[i]n the cases [it] documented, debtors failed to appear at hearings for various reasons” including “work, child care responsibilities, lack of transportation, physical disability, illness, or dementia.”¹¹³ Consumer debt collection actions are therefore a special set of litigation matters where the rights of defendants, including allowing those defendants a full opportunity to litigate their claims, perhaps warrant greater consideration and protections than they might in certain other contexts.

B. Fairness Issues Around High Fixed Judgment Interest Rates in the Context of Debt Collection Actions

Concerns around the persistence of high fixed post-judgment interest rates have been noted before. For example, Miller argued in a 1994 law review article that “when interest rates are as low as 6% and 7%, it is unreasonable for a judgment debtor to be required to pay post-judgment interest at rates of 10% in states like Tennessee, Wyoming, Arizona, and Montana, and 12% in South Dakota, Vermont, Alabama, and Rhode Island.”¹¹⁴ More recently, as of January 3, 2020, the one-year constant maturity treasury is below 2%, and well below

108. NAT’L CTR. FOR STATE CTS., CONFERENCE OF CHIEF JUSTICES CONFERENCE OF STATE COURT ADMINISTRATORS: IN SUPPORT OF RULES REGARDING DEFAULT JUDGMENTS IN DEBT COLLECTION CASES 1 (2018) [hereinafter CONFERENCE OF CHIEF JUSTICES].

109. *Id.*

110. *Id.*

111. AM. C.L. UNION, *supra* note 106, at 22.

112. *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1417 (2017) (Sotomayor, J., dissenting).

113. AM. C.L. UNION, *supra* note 106, at 5.

114. Miller, *supra* note 76, at 612 n.50.

the 6% or 7% market rates noted by Miller.¹¹⁵ Yet a number of the same fixed post-judgment interest rates, such as 12% in Vermont and Rhode Island, persist.¹¹⁶ Consequently, the concerns about fairness in applying those high fixed interest rates have even greater relevance today.

The use of a fixed interest rate set high above the market rate punishes the judgment debtor beyond the imposition of the judgment itself. If the judgment debtor does not have the funds readily available, then the punishment is even greater because post-judgment interest will continue to accrue until the judgment is satisfied in full.¹¹⁷ The fixed interest rate thereby serves to create a difference in punishment between judgment debtors with resources who are able to satisfy a judgment quickly and those who cannot do so. Differences in access to lending might also create a greater burden for those judgment debtors who are able to borrow funds to satisfy the judgment at a lower market rate than the high fixed statutory judgment interest rate and those judgment debtors who lack the opportunities to be able to borrow in this manner or to invest their money in equity in order to generate a rate of interest sufficient to satisfy the assessed amounts of pre- or post-judgment interest. A high rate of post-judgment interest may also have a disproportionate effect where a judgment debtor is in a more financially precarious position than other types of judgment debtors and where a difference between a market and fixed interest rate may mean the difference in being able to satisfy the judgment with all assessed interest and thereby halt the accrual of post-judgment interest and also being able to afford necessities at the same time.

High fixed post-judgment interest rates can also raise concerns where a particular judgment has been entered by default. In the absence of actual knowledge of the judgment, a defendant might incur a significant financial burden in addition to the underlying judgment itself.¹¹⁸ This burden is of particular concern in the context of individuals who have fewer resources to obtain legal representation in order to reverse a default judgment or otherwise successfully challenge a judgment.¹¹⁹ Changing a high fixed interest rate to a market rate, which currently would reflect a much lower rate of

115. *1-Year Treasury Constant Maturity Rate*, *supra* note 43.

116. *Id.*; see also Miller, *supra* note 76, at 612 n.50.

117. Knoll, *supra* note 47, at 359.

118. AM. C.L. UNION, *supra* note 106, at 12.

119. *Id.*

interest in many states, could therefore serve as a tool for social justice.

Moreover, while a tender of the full judgment amount can be used to halt the accrual of post-judgment interest, a party must have the financial means to accomplish that tender.¹²⁰ The judgment debtor must also have the knowledge that such a procedure exists in order to be able to weigh the costs of tendering a judgment in full at an earlier date against the ongoing accrual of interest.¹²¹ These factors are not always guaranteed in the context of consumer debt collection suits, especially where defendants represent themselves pro se or where a judgment has been obtained by default.¹²² In such settings, the power of the tender mechanism to mitigate the effects of post-judgment interest would not always be enough to offset the presence of high fixed post-judgment interest rates.

The individual borrower in a consumer debt collection case might not have investments in place that could allow it to raise income above the market rate of interest. “Roughly half of all households” in the United States do not “have a cent invested in stocks, whether through a 401(k) account or shares in General Electric.”¹²³ Further, “[84%] of all stocks owned by Americans belong to the wealthiest [10%] of households.”¹²⁴ Moreover, research by the Pew Charitable Trusts has found that “one in three American families had no savings at all, and that [41%] of households did not have \$2,000 to cover an emergency expense.”¹²⁵ These households, presumably, are not using their limited funds to generate investment returns above a market rate of interest. Indeed, even keeping the judgment funds in a savings account would not necessarily generate the interest necessary to meet the one-year treasury constant maturity rate; for the week of January 6, 2020, the non-jumbo (less than \$100,000) deposit national rate for savings accounts was 0.09%.¹²⁶ To require individual consumers to

120. Howie, *supra* note 102, at 1.

121. *Id.*

122. AM. C.L. UNION, *supra* note 106, at 22.

123. Patricia Cohen, *We All Have a Stake in the Stock Market, Right? Guess Again*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/business/economy/stocks-economy.html>.

124. *Id.*

125. AM. C.L. UNION, *supra* note 106, at 9–10 (quoting *What Resources Do Families Have for Financial Emergencies?*, PEW CHARITABLE TRS. (Nov. 18, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/emergency-savingswhat-resources-do-families-have-for-financial-emergencies>).

126. *Weekly National Rates and Rate Caps – Weekly Update*, FED. DEPOSIT INS. CORP. (Jan. 6, 2020), <https://www.fdic.gov/regulations/resources/rates/historical/2020-01-06.html>.

pay pre- and post-judgment rates above a market interest rate, then, is to most likely require them to compensate a prevailing party beyond the amount of income they themselves could have generated during the relevant time period.

Allowing high fixed rates of pre- and post-judgment interest in consumer debt collection actions may also involve racial disparities. A 2015 analysis of debt collection lawsuits by ProPublica found that even accounting for income, the rate of judgments in debt collection actions “was twice as high in mostly black neighborhoods as it was in mostly white [neighborhoods].”¹²⁷ “[T]he FDIC has found that payday borrowers are disproportionately Latino or African-American.”¹²⁸ Where a high fixed rate of interest is awarded either pre- or post-judgment, a financial burden exceeding the mere loss of the use of funds would therefore disproportionately be assessed against those households against whom judgments have been obtained.

In debt collection actions, the secondary purpose of punishment seems that it would be far less valid than it might be in other instances. Debtors fail to repay funds in many cases not through active wrongdoing, but because their financial circumstances are such that they are simply unable to repay a loan. Congress recognized this fact in creating the Fair Debt Collection Practices Act (“FDCPA”) in 1977, noting that “[w]hen default [on consumer credit] occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.”¹²⁹ There are already consequences to the borrowers in debt collection suits that harm the well-being of borrowers, as in damage to credit scores or the loss of a home in a foreclosure action.¹³⁰ Debtors can even be subject in some instances to imprisonment: “[t]hough *de jure* debtors’ prisons are a thing of the past, *de facto* debtors’ imprisonment is not.”¹³¹

127. Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>.

128. AM. C.L. UNION, *supra* note 106, at 82 n.29 (quoting FED. DEPOSIT INS. CORP., FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS: APPENDICES 83–84 (2014)).

129. AM. C.L. UNION, *supra* note 106, at 9 (quoting S. REP. NO. 95-382 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695).

130. SARAH D. WOLFF, THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS 13 (2015).

131. Eli Hager, *Debtors’ Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq>.

In the context of private debt collection: “[T]he creditor . . . may . . . take the debtor straight to civil court. If the debtor fails to show up, or if the judge deems that the debtor is ‘willfully’ not paying the debt, the judge may [order] the debtor’s arrest [for] ‘contempt of court.’”¹³² In such instances, “[t]he debtor is then held in jail until he or she posts bond or pays the debt, in a process known as ‘pay or stay.’”¹³³ The ACLU has also commented that “[t]he criminalization of private debt happens when judges, at the request of collection agencies, issue arrest warrants for people who failed to appear in court to deal with unpaid civil debt judgments.”¹³⁴ There are already significant disincentives to defaulting on consumer debt; a high-rate of pre- or post-judgment interest therefore seems ill-suited as a policy mechanism to punish those who defaulted due to unforeseen life events rather than by any intended act.

The incentives to ensure speedy litigation must be weighed against the interests of ensuring that borrowers receive an adequate opportunity to contest claims made against them and attempting to prevent the other negative consequences a judgment would entail. Prior to Washington lowering its post-judgment interest rate for consumer debt collection matters,¹³⁵ a Seattle Times investigation found that “[w]ith the ability to add fees and interest . . . some companies have filed lawsuits for debts less than \$100 and as low as \$31.”¹³⁶ Likewise, “[t]he ACLU found cases in which threatening letters were sent for bounced checks as low as \$2,” and an attorney “told the ACLU he has documented over 10,000 checks for under \$10 that triggered letters threatening consumers with jail, including bounced checks for as little as one penny,” even where such amounts were too low for criminal prosecution.¹³⁷ High interest rates might encourage the filing of consumer debt collection suits, thus resulting in excessive interest burdens even when the underlying debt is small.

Additional concerns of fairness and equity are present where a high rate of pre-judgment interest can be allowed in the context of a charge-off of the original debt. Different jurisdictions have reached different results as to whether pre-judgment interest can be assessed

132. *Id.*

133. *Id.*

134. AM. C.L. UNION, *supra* note 106, at 4.

135. *See infra* Part III.C.2.

136. Mike Baker, *Debt Collectors that ‘Sue, Sue, Sue’ can Squeeze Washington State Consumers for More Cash*, SEATTLE TIMES (Mar. 25, 2019, 9:57 AM), <https://www.seattletimes.com/seattle-news/times-watchdog/with-a-chance-to-sue-sue-sue-debt-collectors-squeeze-washington-consumers-for-more-cash/>.

137. AM. C.L. UNION, *supra* note 106, at 7.

on consumer debt after a charge-off has occurred and where periodic statements were not sent as required by the FDCPA. The Sixth Circuit first considered the *Stratton* case in 2014.¹³⁸ In that matter, a consumer's credit card debt had been charged off, that is, deemed "uncollectible and at least partially worthless," and sold to a debt buyer.¹³⁹ The court determined that the consumer stated under a claim under the FDCPA where the debt buyer filed a complaint seeking to collect the debt and included a claim for statutory pre-judgment interest for the time subsequent to the charge-off in its collection complaint.¹⁴⁰ It reached this conclusion because "[u]nder Kentucky law a party has no right to statutory interest if it has waived the right to collect contractual interest," and "any attempt to collect statutory interest when it is 'not permitted by law' violates the FDCPA."¹⁴¹ Later, however, the Sixth Circuit found that a choice-of-law provision in the original contract brought the question under Utah, rather than Kentucky, law and "the contractual Utah choice-of-law provision" authorized the claimed interest under Utah law.¹⁴² Another court, however, found that pre-judgment interest can be assessed in compliance with the FDCPA even when not disclosed in a collection letter.¹⁴³

Likewise, some courts do allow for the assessment of pre-judgment interest at the statutory rate in the context of a loan charge-off.¹⁴⁴ In *Haney*, the Eighth Circuit considered the case of a consumer who incurred credit card debts that were charged off by the issuers and

138. *Stratton v. Portfolio Recovery Assocs., LLC*, 770 F.3d 443, 452 (6th Cir. 2014).

139. *Id.* at 445; *see also* NAT'L CONSUMER L. CTR., SIXTH CIRCUIT: DEBT BUYER CANNOT STATE PREJUDGMENT INTEREST OWED FOR PERIOD AFTER DEBT CHARGED OFF 3–4 (2012). The court noted that "GE's decision [to stop charging interest on the debt] was neither irrational nor altruistic: By charging off the debt and ceasing to charge interest on it, GE could take a bad-debt tax deduction . . . and could avoid the cost of sending Stratton periodic statements on her account." *Stratton*, 770 F.3d at 445.

140. *Stratton*, 770 F.3d at 452.

141. *Id.* at 445.

142. *Stratton v. Portfolio Recovery Assocs., LLC*, 706 F. App'x. 840, 847 (6th Cir. 2017).

143. *See Altieri v. Overton, Russell, Doerr, & Donovan, LLP*, No. 1:17-CV-303, 2017 WL 6543819, at *1, *3 (N.D.N.Y. Dec. 20, 2017); *see also* Stephen Lozier & Jim Trefil, *Northern District of New York: No FDCPA Violation Where Pre-Judgment Interest Not Disclosed in Collection Letters*, CONSUMER FIN. SERVS. L. MONITOR (Dec. 21, 2017), <https://www.consumerfinancialserviceslawmonitor.com/2017/12/northern-district-of-new-york-no-fdcpa-violation-where-pre-judgment-interest-not-disclosed-in-collection-letters>.

144. *See, e.g., Haney v. Portfolio Recovery Assocs., LLC*, 895 F.3d 974, 983 (8th Cir. 2016); *Cavalry SPV I, LLC v. Watkins*, 249 Cal. Rptr. 3d 334, 355 (Cal. Ct. App. 2019).

later sold and assigned to the defendant.¹⁴⁵ The defendant sent letters demanding the balance “plus [9%] statutory prejudgment interest from the . . . charge-off to the date of the letter,” which amount of interest “was significantly below an amount that would have resulted from the continued accrual of contractual interest.”¹⁴⁶ After the borrower filed suit, the court found that “Missouri statutory prejudgment interest remains available following the charge-off of a credit-card debt.”¹⁴⁷ Where pre-judgment interest can be assessed in the context of a charge-off, concerns about whether a borrower is properly made aware that a charged-off loan can still be collected are even greater where a high fixed rate of pre-judgment interest can be assessed and where the financial implications of collecting a charged-off loan are correspondingly greater.

Pre-judgment interest can also impose a burden on consumers when demanded on time-barred debt (although this is now much less common) or is demanded prior to a judgment even being obtained. As the CCJ/COSCA Resolution discussed earlier in this Article stated, “debt collection complaints are sometimes initiated after the statute of limitations for such actions has expired,” and so the timeframe relevant to assessing pre-judgment interest is especially long in such instances.¹⁴⁸ However, as Justice Sotomayor’s dissent noted in *Midland Funding*, “[t]he FDCPA’s prohibitions on ‘misleading’ and ‘unfair’ conduct have largely beaten back this particular practice” because “[e]very court to have considered the question has held that a debt collector that knowingly files suit in court to collect a time-barred debt violates the FDCPA.”¹⁴⁹ Further, at least in some instances, courts have held that a creditor can demand pre-judgment interest from a debtor before a judgment has been obtained.¹⁵⁰ Consumers can therefore face the burden of pre-judgment interest even before they have been found responsible for that debt by way of a judgment.¹⁵¹

Pre- and post-judgment interest may also raise issues in the context of consumer debt collection actions because in many jurisdictions the award of such interest is not discretionary but

145. *Haney*, 895 F.3d at 978.

146. *Id.* at 978–79.

147. *Id.* at 983.

148. CONFERENCE OF CHIEF JUSTICES, *supra* note 108, at 1.

149. *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1417 (2017) (Sotomayor, J., dissenting) (first citing *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); and then citing *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987)).

150. *Provo v. Rady Children’s Hosp.-San Diego*, No. 15cv0081, 2015 WL 3648845, at *3–4 (S.D. Cal. June 11, 2015).

151. *Id.*

mandatory.¹⁵² For example, the Connecticut Supreme Court found that “an award of prejudgment and postjudgment interest on a loan that carries postmaturity interest is not discretionary; it is an integral part of enforcing the parties’ bargain.”¹⁵³ As the Connecticut Supreme Court stated, “[t]he trial court must, therefore, as part of any judgment enforcing a loan, allow prejudgment and postjudgment interest at the agreed rate, or the legal rate if no agreed rate is specified.”¹⁵⁴ Where an award of pre- or post-judgment interest is mandatory and a state statute applies a high rate of interest, or if the rate provided in the contract is high and not limited by state law, a court might not have discretion to modify that high fixed rate for the particular consumer debtor litigant, even if the court is aware of unique financial burdens or limitations of the consumer.¹⁵⁵

As discussed above, the financial impact of pre- and post-judgment interest when assessed at a high rate depends on the ability of a judgment debtor to quickly pay the judgment funds or, in the alternative, to borrow funds at a lower rate with which to satisfy the judgment or invest funds in order to raise a comparable amount of funds.¹⁵⁶ Amending state statutory pre- and post- statutory interest rates may thereby allow consumers to reduce their judgment interest debt burdens.

C. Why Do High Fixed Interest Rates Persist?

Given the self-evident wide disparity between current market interest rates and the high fixed interest rates applied by numerous states for pre- and post-judgment interest,¹⁵⁷ why do these high fixed interest rates still persist? The reason seems to be ease of application. Fixed interest rates that remain fixed over a long period of time have the advantage of allowing litigating parties to have settled expectations around what the applicable pre- and post-judgment interest rates will be at the time a judgment is reached.¹⁵⁸ This advantage, however, must be balanced against the disparity between

152. See, e.g., *Sikorsky Fin. Credit Union, Inc. v. Butts*, 108 A.3d 228, 233 (Conn. 2015).

153. *Id.*

154. *Id.*

155. See *id.* at 232–33.

156. See discussion *supra* Part II.D.1.

157. See *1-Year Treasury Constant Maturity Rate*, *supra* note 43.

158. See *infra* Part III.C.1.

market rates and the fixed rate that is exacerbated in today's environment of low interest rates.¹⁵⁹

As described further within this Section, some states have considered or enacted post-judgment interest rates specifically applicable to consumer debt collection actions in order to address the issues discussed above and to relieve the interest burden on those litigants. These legislative examples are particularly useful for considering how pre- and post-judgment interest rates can be amended in order to relieve the financial burden of high interest assessments on consumer debtors without causing unintended consequences in other types of cases by amending pre- and post-judgment rates more broadly. However, in some instances the new post-judgment interest rate applicable to consumer debtors still appears in the form of a fixed interest rate set above the level of current market interest rates, although that new fixed rate is lower than the previously applicable general fixed rate of post-judgment interest. Although adopting a new, lower rate of interest is certainly a positive start towards alleviating the burden of pre- and post-judgment interest on consumer debtors,¹⁶⁰ retaining an interest rate above the market rate of interest still raises issues of equity and fairness. Moreover, it is still unlikely that individual consumer debtors would be able to generate a return on the judgment funds to match even the new, lower fixed rate of post-judgment interest applicable solely to consumer debt actions. Thus, some legislatures have considered and, in some cases, adopted lower fixed post-judgment interest rates for consumer debt collection actions that somewhat relieve the consumer judgment interest burden. Nevertheless, adoption of floating pre- and post-judgment market interest rates in consumer debt collection actions would be preferable from a standpoint of maximizing consumer welfare and in promoting fair pre- and post-judgment interest rates in such types of cases.¹⁶¹

1. Ease of Application and Settled Expectations

Fixed interest rates in pre- and post-judgment interest statutes have the advantage of simplicity over floating rates in that they are,

159. See Derby, *supra* note 45.

160. NAT'L CONSUMER L. CTR., NO FRESH START IN 2019: HOW STATES STILL ALLOW DEBT COLLECTORS TO PUSH FAMILIES INTO POVERTY 3 (2019) ("Every state has a set of exemption laws, intended to prevent creditors from pushing consumers . . . into destitution.").

161. See *infra* Part IV.

by their nature, fixed over time.¹⁶² The applicable interest rate is extremely simple to ascertain as the process requires no more than reference to the governing pre- or post-judgment interest statute. Applying a correct floating interest rate involves determining the applicable market interest rate in effect at the operative time and then applying that rate to the judgment.¹⁶³ This extra step may explain why fixed judgment interest rates are attractive to legislators.

Fixed interest rates, however, can also lead to disputes and litigation when the selected rate is amended. Miller argued that the ideal post-judgment interest statute was one that used a floating interest rate to closely approximate a market interest rate, such that the purpose of post-judgment interest “is to compensate the judgment creditor for the time during which he or she does not have use of the money” would be best satisfied.¹⁶⁴ He further noted that “fixed-rate statutes are the most likely to result in litigation when a change in the rate is made.”¹⁶⁵

In the current era of low market interest rates, it seems that high fixed interest rates are ill-suited to present conditions, and so the question arises of why such high fixed interest rates persist. Where a state pre- or post-judgment interest statute was originally written as applying a fixed interest rate, the issue of why high fixed interest rates persist may be simply one of practicality. Statutes require legislative action in order to be amended, and the legislature may not have the capacity or inclination to amend its pre- and post-judgment interest statutes every time there is a significant change in market interest rates.¹⁶⁶ What in fact would be a significant change in interest rates calling for legislative action is itself ambiguous and not clearly defined by statute. Moreover, as discussed above, amendments to fixed judgment interest rates set by states can lead to litigation about when those changes should be applied and to which judgments.¹⁶⁷

The issue of practicality does not mean that states have always left their pre- and post-judgment interest statutes unchanged since enactment. For example, Virginia amended its statute setting the pre- and post-judgment interest rate in 2004 to decrease the rate from 9% to 6% and had previously lowered the rate from 12% to 8% in 1987.¹⁶⁸

162. See *Fixed Interest Rate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

163. See *Variable Rate*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“An interest rate that varies at present intervals in relation to the current market rate.”).

164. Miller, *supra* note 76, at 612.

165. *Id.* at 613.

166. See RICHARD S. BETH, HOW BILLS AMEND STATUTES 1 (2003).

167. See Miller, *supra* note 76, at 613.

168. VA. CODE ANN. § 6.2-302 (2016).

Kentucky amended its post-judgment interest rate from 12% to 6% in 2017.¹⁶⁹ Amending a fixed interest statute, however, is a constantly ongoing process. The Massachusetts pre-judgment interest statute was amended six times after its enactment in 1946 but has not been amended since 1982, leaving its current rate of 12% far above the market rate of interest.¹⁷⁰

2. Separate Rates for Consumer Debt Collection Actions

In some jurisdictions, fixed interest rates that apply in general to most types of cases may still remain in place because new legislation has been enacted setting separate, lower rates of judgment interest applicable to consumer debt collection actions. For example, Washington in 2019 lowered its post-judgment interest rate applicable to judgments for unpaid consumer debt to 9%.¹⁷¹ The Washington statute defines consumer debt as “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes[,]” and includes medical debt.¹⁷² The 9% rate imposed by the Washington statute, however, is still far above the market rate applicable to tort actions and thus may not be enough to ease the potential burden caused by post-judgment interest.¹⁷³ The response to that legislation might be indicative of the resistance amendments to post-judgment interest statutes in other jurisdictions could face, whether or not specifically limited to consumer debt actions. In Washington, as described earlier in this Article, a post-judgment interest rate of 7.5% was initially considered, but the 9% rate was eventually adopted after industry resistance.¹⁷⁴

Similarly in 2019, Illinois lowered its post-judgment interest rate for consumer debt collection judgments of \$25,000 or less from 9% to

169. KY. REV. STAT. ANN. § 360.040 (West 2019); *see also* William Abbey, *Kentucky Law Changes Judgment Interest Rate*, SLOVIN & ASSOCS. BLOG (Apr. 3, 2017), <http://www.sclpa.com/kentucky-law-changes-judgment-interest-rate/> (noting that the new interest rate does not apply to contractually-agreed rates or judgments for child support and disability payments).

170. MASS. GEN. LAWS ch. 231, §§ 6B–6C (2020); *see also* Brief of Mass. Def. Laws. Ass’n as Amicus Curiae on Issue of Constitutionality of 12% Int. Rate, *supra* note 65, at 17–18 (discussing the statute’s legislative history to support the argument that the changes to the rate were made “to keep up with economic times”).

171. *See Baker, supra* note 88.

172. WASH. REV. CODE § 6.01.060(2) (2019).

173. *See Baker, supra* note 88.

174. *Id.*

5%.¹⁷⁵ “Consumer debt” is defined in the revised statute as “money or property, or the equivalent, due or owing, or alleged to be due or owing, from a natural person by reason of a transaction in which property, services, or money is acquired by that natural person primarily for personal, family, or household purposes.”¹⁷⁶ This Illinois law was “tout[ed] . . . as a way to protect low-income Illinois consumers from cumbersome debts.”¹⁷⁷

Massachusetts considered changing the post-judgment interest rate applicable to consumer debt collection actions through the Family Financial Protection Act.¹⁷⁸ Max Weinstein, Chief of the Consumer Protection Division of the Office of the Attorney General, testified in 2015 in support of the bill.¹⁷⁹ He stated, “The statutory rate of interest that applies to consumer debt collection judgments is very high at 12%. The Act would fairly compensate creditors for the time-value of money by instead fixing the rate to an index that reflects current interest rates.”¹⁸⁰ The text of the bill provided that post-judgment interest in consumer debt collection actions would be limited to the rate of interest equal to the weekly average one-year constant maturity treasury yield but not less than 2% per year or more than 5% per year.¹⁸¹ The Act precluded contracts from setting their own applicable rate of post-judgment interest.¹⁸² The Massachusetts Senate passed the Family Financial Protection Act in July 2016, but the Act was not passed in the Massachusetts House of

175. 735 ILL. COMP. STAT. 5/2-1303(b)(2) (2020); cf. H.B. 0281, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (introducing on January 10, 2019, a proposal to lower the post-judgment interest rate applicable to consumer debt judgments of \$25,000 or less to 2% per annum).

176. 735 ILL. COMP. STAT. 5/2-1303(b)(1).

177. *Illinois Reducing Interest Rate, Revival Deadline on Consumer Debt Judgments*, WALINSKI & ASSOCS., P.C. (June 27, 2019), <https://www.walinskilaw.com/chicago-collections-lawyer/illinois-reducing-interest-rate-revival-deadline-on-consumer-debt-judgments> (noting that the law also “cut by [ten] years the amount of time that a creditor has to revive a judgment that has become dormant”).

178. See S. 2409, 189th Gen. Ct., 2015–2016 Sess. (Mass. 2016); see also Press Release, Off. of Att’y Gen. Maura Healey, AG Healey’s Office Urges Greater Protection for Consumers Against Abusive Debt Collection Practices (Oct. 27, 2015), <https://www.mass.gov/news/ag-healeys-office-urges-greater-protection-for-consumers-against-abusive-debt-collection> (giving support to the proposed bill “for consumers in Massachusetts who are pursued by abusive debt collectors”).

179. See generally *An Act Relative to Family Financial Protection: Hearing on S.B. 146/H.B. 804 Before the J. Comm. on Fin. Servs.*, 189th Gen. Assemb., Reg. Sess. (Mass. 2015) (statement of Max Weinstein, Chief, Office of the Att’y Gen.: Consumer Protection Division).

180. *Id.* at 2.

181. See S. 2409.

182. *Id.*

Representatives.¹⁸³ In addition to these proposed changes regarding post-judgment interest, a reduced pre-judgment interest rate in consumer debt actions has also been considered in Massachusetts.¹⁸⁴ Namely, a bill was introduced in the Massachusetts Senate in January 2019 (similar to legislation filed in the 2017–2018 session) proposing amending the general 12% pre-judgment interest rate with a rate calculated at a weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding date of the judgment.¹⁸⁵

The NCLC has published a Model Family Financial Protection Act, which is “model language for states to achieve [the] goals” relating to NCLC’s recommendations for consumer financial protection, and “includes steps that states can take to reduce the pervasive abuse of the court system by debt buyers.”¹⁸⁶ The model legislation calls for pre- and post-judgment interest to be limited to the rate of interest equal to the weekly average one-year constant maturity treasury yield, and also to be limited to not less than 2% and not more than 5% per year.¹⁸⁷ The Commentary to the model legislation states that this provision “is necessary because in some states, post-judgment interest laws were passed during times of high inflation, and can be as high as 12%, which essentially doubles the amount of the debt after five years.”¹⁸⁸ Moreover, “without these [proposed] limits, creditors may seek to impose the contract interest rate, which may be much higher.”¹⁸⁹ The model legislation also provides that “[a]ny pre[-] or post-judgment interest awarded by the court shall not be compounded.”¹⁹⁰

3. Interest Rates Governed by Contractual Rates

Another reason why high fixed interest rates may persist in the context of consumer debt collection actions is that consumer debt

183. See S. 2409 (noting that on July 13, 2016, the bill was passed by a vote of twenty-nine to nine in the Senate, but no further action has been taken in the House).

184. See S.B. 967, 191st Gen. Ct., 2019–2020 Sess. (Mass. 2019) (changing the rate of interest to be “calculated at a weekly average [one]-year constant maturity treasury yield”).

185. *Id.*

186. See NAT’L CONSUMER L. CTR., *supra* note 160, at 6.

187. ROBERT J. HOBBS ET AL., MODEL FAMILY FINANCIAL PROTECTION ACT 34 (2019).

188. *Id.* at 35.

189. *Id.*

190. *Id.* at 34.

contracts might be subject to pre- and post-judgment interest rates set by the terms of those contracts themselves rather than by a pre- or post-judgment interest statute.¹⁹¹ In a multitude of states, contracts can set the applicable rate of judgment interest by their own terms.¹⁹² A number of jurisdictions set maximum levels of pre- and post-judgment interest, including both jurisdictions with fixed and floating rates of pre- and post-judgment interest. For example, Alabama sets a maximum contractual pre-judgment interest rate of 8%.¹⁹³ The 8% limit does not apply, however, with respect to post-judgment interest for which either the contractual rate applies or, in the alternative, a statutory 12% interest rate applies.¹⁹⁴ A contractual rate of pre-judgment interest in Alaska cannot exceed 10.5%.¹⁹⁵ Some of the states with similar limits on maximum contractual rates for pre- or post-judgment interest are Iowa,¹⁹⁶ Kentucky,¹⁹⁷ North Dakota,¹⁹⁸ Tennessee,¹⁹⁹ and Indiana.²⁰⁰ The Family Financial Protection Act considered in Massachusetts,²⁰¹ as well as the Model Family Financial Protection Act published by the NCLC,²⁰² go even further and contain provisions precluding contracts from setting their own rates of post-judgment interest.

Other states, however, do not have specified ranges over which contractual pre- and post-judgment interest rates may not exceed.²⁰³ Thus, in many instances, amending pre- and post-judgment interest rates relative to consumer debt collection actions or other types of contract suits might not significantly affect the pre- or post-judgment interest rate in a practical manner where a contract sets its own pre- or post-judgment rate. As described further within this Article, an area for future research would be to determine how often contracts do state their own applicable pre- and post-judgment interest rates and

191. See, e.g., MASS. GEN. LAWS ch. 231, § 6C (2020) (noting interest on damages should be calculated “at the contract rate . . . or at the rate of [12%] per annum”).

192. *Id.*

193. ALA. CODE § 8-8-1 (2017) (“[T]he rate of interest by written contract is not to exceed \$8 upon \$100 . . .”).

194. *Id.* § 8-8-10.

195. ALASKA STAT. §§ 09.30.070, 45.45.010 (2019).

196. IOWA CODE § 535.2 (2020) (pre-judgment).

197. KY. REV. STAT. ANN. § 360.010 (West 2008) (pre-judgment).

198. N.D. CENT. CODE § 47-14-09 (2013) (pre-judgment).

199. TENN. CODE ANN. § 47-14-123 (1979) (pre-judgment).

200. IND. CODE § 24-4.6-1-101 (2018) (post-judgment).

201. See S. 2409, 189th Gen. Ct., 2015–2016 Sess. (Mass. 2016).

202. HOBBS ET AL., *supra* note 187, at 34.

203. See MASS. GEN. LAWS ch. 231, § 6C (2020).

therefore what effect amending pre- and post-judgment interest rates would have in practice.²⁰⁴

4. Judgment Exemptions

Homestead and other judgment exemptions are also valuable tools to protect a certain amount of assets and income from the execution of a judgment. These laws can protect the value of a home, a motor vehicle, personal belongings such as apparel and household furniture, health and disability benefits, public assistance payments, and other sources of assets and types of income.²⁰⁵ Some states apply a homestead exemption automatically to a consumer's assets, while in other jurisdictions the individual must file for homestead protection.²⁰⁶ Homestead exemptions are therefore a useful consumer protection but do not always automatically protect the consumer.²⁰⁷ Despite the presence of the homestead exemption, concerns about the amount of interest allowed under pre- and post-judgment statutes still apply to unprotected portions of a consumer's income or assets or where homestead exemptions do not automatically apply and a consumer has not filed for such protection.²⁰⁸

204. See *infra* Part V.

205. KATHERINE DWYER, POST-JUDGMENT EXEMPTION LAW 2 (2018).

206. Kate Murphy, *Home Is Where the Tax Exemption Is*, N.Y. TIMES (Sept. 1, 2010), <https://www.nytimes.com/2010/09/02/garden/02homestead.html> ("Complicating things further is that in some states . . . the homestead protection from creditors is usually a default right, while in others . . . a legal filing is required in some instances."); see also Carolyn Carter, *Wage Garnishments and Bank Account Seizures: Consumer Debt Advice from NCLC*, NAT'L CONSUMER L. CTR. (June 18, 2018), <https://library.nclc.org/wage-garnishments-and-bank-account-seizures-consumer-debt-advice-nclc> ("In addition, in some states, to benefit from a homestead exemption, you must file a declaration of homestead with your registry of deeds office In other states, the protection is automatic.").

207. Carter, *supra* note 206 ("A homestead exemption can protect your home from seizure based on a judgment debt. However, a homestead exemption does not protect you if you are in default on a first or second mortgage, on a home equity line of credit, or on any other debt if your home is collateral for that debt.").

208. See NAT'L CONSUMER L. CTR., *supra* note 160, at 8 ([States'] exemption laws specify how much of the consumer's wages and property the creditor can seize and how much it cannot seize. . . . [I]n many states, the exemptions are not self-executing. The property will not be protected unless the debtor takes various procedural steps . . . to claim the exemptions.").

IV. ALTERNATIVES AND RECOMMENDATIONS

This Article recommends that, in the interests of fairness to litigants and legislative efficiency, in the context of consumer debt collection actions, those pre- and post-judgment interest rates that are currently solely set as fixed rates be amended to mirror a floating market interest rate. However, the particular goals of a current state legislature and the original intent of the legislature that enacted the judgment interest statutes will determine whether the rate set is purely a market interest rate or whether an additional amount of interest is added to that rate.²⁰⁹ It is the position of this Article that a rate more closely reflecting a market rate of interest, without a fixed premium added to that market rate, would likely serve to promote social justice in the context of consumer debt collection suits.

The following Sections discuss the potential alternatives to statutes using high fixed pre- and post-judgment interest rates and also to pre- and post-judgment interest statutes that use fixed rates added to floating premiums. While the intent of each particular state legislature will necessarily cause the appropriate pre- or post-judgment interest rate to vary, there are some common themes and considerations that apply across jurisdictions to setting pre- and post-judgment interest rates.²¹⁰ On the whole, this Article recommends that currently existing floating market rates of interest should have their fixed premiums reduced, and also converted to a floating premium, in order to meet the same concerns of fairness and equity and to preserve their intended effect in a variety of market interest rate settings.

*A. Setting and Modifying a Fixed Rate of Interest
Mirroring a Market Rate*

One potential course of action would be for state legislatures to modify their fixed rates of interest, but to change only the fixed rate of interest itself instead of changing the rate to a floating one.²¹¹ Such a change could be made in order to reflect current low market interest

209. See Knoll, *supra* note 47, at 319 (comparing floating and fixed rates of pre-judgment interest and how they support different legislative intentions).

210. See, e.g., Jorge A. López, *Prejudgment and Postjudgment Interest: What's in a Name?*, FLA. BAR J., MAR. 2002, at 20, 20 (discussing a common theme behind pre- and post-judgment interest as compensation for the loss of the use of funds while awaiting a judgment).

211. See, e.g., Act of Mar. 16, 2017, ch. 17, 2017 Ky. Acts 103 (lowering Kentucky's fixed pre-judgment interest rate from 12% to 6%).

rates.²¹² The set rate could then be revisited on a periodic basis to adjust the set interest rate to reflect intervening changes in the market interest rate.

The downside of this approach is that the more often the set fixed interest rate is revised, the efficiencies and clarity of the fixed interest rate approach diminish.²¹³ The more frequently the set rate is adjusted, the process essentially becomes a much less efficient alternative method of using a market interest rate for pre- and post-judgment interest. A case pending over a period of years might face an increased risk of litigation over the appropriate pre- or post-judgment interest rate.²¹⁴ Moreover, while a current legislature may be committed to mirroring a market interest rate in the fixed rate of interest, they have no guarantee that future legislatures will share that same commitment and consistently amend the fixed rate unless a floating mechanism is built into the rate itself. A more enduring strategy would be to adopt a market interest rate at the outset.²¹⁵ This Article therefore contends that fixed market interest rates are a sub-optimal approach to setting pre- and post-judgment interest rates, and that market rates of interest instead should be used where the sole intent of the legislature is to compensate a judgment debtor for loss of the use of judgment funds.

B. Allowing Courts Discretion in Setting Pre- and Post-judgment Interest

Some states apply higher pre- or post-judgment rates for recklessness, gross negligence, or other measures reflecting unusual

212. See, e.g., Heather Long, *Federal Reserve Slashes Interest Rates to Zero as Part of Wide-Ranging Emergency Intervention*, WASHINGTON POST (Mar. 15, 2020, 7:54 PM), <https://www.washingtonpost.com/business/2020/03/15/federal-reserve-slashes-interest-rates-zero-part-wide-ranging-emergency-intervention/>.

213. See, e.g., *McDowell v. Austin Co.*, 693 P.2d 744, 749 (Wash. Ct. App. 1985) (illustrating how an amendment to Washington's fixed pre-judgment interest rate led to confusion as to which rate should be applied).

214. See *id.* (demonstrating how the appropriate rate of pre-judgment interest became an issue when Washington's statutory fixed rate of pre-judgment interest was amended and increased).

215. See, e.g., John T. McDonald III, *Judgment Interest Rates – Time for a Change for the Taxpayers*, TIMESUNION (Feb. 16, 2020, 6:36 PM), <https://blog.timesunion.com/johnmcdonald/judgement-interest-rates-time-for-a-change/5997/> (advocating for a market-based interest rate applicable to judgments paid by municipal corporations to be used instead of the fixed 9% judgment interest rate currently used in New York).

behavior by the defendant.²¹⁶ Allowing courts discretion to adjust a pre- or post-judgment interest rate could allow for flexibility to reduce the financial burden on defendants in debt collection actions with respect to the amount of interest that could potentially accrue.²¹⁷ While such discretion could conceivably lead to judge-shopping, similar incentives might already exist with respect to the litigation of the underlying judgment itself.²¹⁸ Moreover, such incentives with respect to pre- and post-judgment interest would generally be lesser than those relating to the judgment because the size of the judgment in many cases would be expected to exceed the interest imposed.

It is the position of this Article, however, that on the whole the interests of fairness, equity, and judicial efficiency call for the application of uniform pre- and post-judgment interest rates when considered in the context of consumer debt collection actions. Using a single pre- and post-judgment rate within a specific type of action or actions would allow for judicial transparency, settled expectations, and clarify any incentives in litigation that a state legislature seeks to promote by allowing for pre- and post-judgment interest.²¹⁹

C. Limiting the Range of Potential Contractual Rates of Interest

As previously discussed, in many jurisdictions, parties are allowed to set pre- or post-judgment rates of interest as specified by the terms of a particular contract.²²⁰ In some cases, a range is set for allowable rates of contractual interest.²²¹ This Article recommends that in the context of consumer debt collection actions, states should consider further limiting the upper limit of permitted pre- and post-judgment interest rates. States might even consider precluding contracts from

216. See, e.g., N.M. STAT. ANN. § 56-8-4(2) (2004) (setting a judgment interest rate at 15% for “tortious conduct, bad faith[,] or intentional or willful acts,” compared to the normal rate of 8.75%).

217. See, e.g., CAL. CIV. CODE § 3287(b) (West 2016) (granting courts discretion to determine when pre-judgment interest will begin to accrue).

218. See, e.g., Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 88 (1999) (discussing how choice of law considerations, such as varying statutes of limitations, are the primary drivers of forum shopping).

219. See, e.g., 735 ILL. COMP. STAT. 5/2-1303(b)(2) (2020) (establishing a post-judgment interest rate of 5% for certain consumer debt judgments).

220. See, e.g., CAL. CIV. CODE § 3289(a) (allowing interest rates to be stipulated by contracts).

221. See, e.g., ALA. CODE § 8-8-1 (2017) (providing a range of interest rates stipulated in contracts with a maximum of 8%).

setting their own applicable pre- and post-judgment rates entirely as the NCLC's Model Family Financial Protection Act does.²²²

Consumers who borrow from large companies are inherently in a position of lesser bargaining power and generally do not seem have the opportunity to negotiate a pre- or post-judgment interest rate more in their own interests.²²³ Limiting potential judgment interest rates, or precluding contractually-set rates, could be a mechanism for consumer protection in consumer lending.²²⁴ The following Section discusses how state legislatures can act to lower interest rates applicable to consumer debt collection actions either where state statutes do not allow for contracts to set their own pre- and post-judgment interest rates or where a contract is silent on the applicable pre- or post-judgment interest rate, thus triggering the application of a fixed interest rate.

D. Lowering the Rate of Interest Assessed in Consumer Debt Collection Actions

Absent allowing a court discretion to impose an applicable interest rate, it might be considered unwieldy for a statute to impose different interest rates for different types of contract actions, such as consumer debt collection actions, business litigation matters, etc.²²⁵ States might prefer a single statutory pre- and post-judgment interest rate for all civil actions, or one for tort actions and one for contract actions.²²⁶ However, as described earlier in this Article, Washington, for example, assesses a floating rate of interest on tort actions but applies a fixed rate of 9% with respect to judgments for unpaid consumer debt.²²⁷ Likewise, as described earlier in this Article, Illinois applies a post-judgment interest rate of 5% to consumer debt judgments of \$25,000 or less, lower than its general post-judgment interest rate of 9%.²²⁸ Moreover, many states already set separate

222. See HOBBS ET AL., *supra* note 187, at 34.

223. See *id.* at 4.

224. See *id.* at 35 (noting that the commentary in the Model Family Financial Protection Act calls for limits on judgment interest rates in the context of protecting consumers).

225. See generally 735 ILL. COMP. STAT. 5/2-1303(b)(2) (2020) (establishing a separate post-judgment interest rate for consumer debt judgments under \$25,000).

226. See, e.g., ARK. CODE ANN. § 16-65-114(a)(1) (2019) (establishing that unless contracted otherwise, Arkansas applies a single rate of pre- or post-judgment interest based on the Federal Reserve primary credit rate and an added premium of 2%).

227. WASH. REV. CODE § 4.56.110 (2020).

228. 735 ILL. COMP. STAT. 5/2-1303(b)(2), 5/2-1303(a).

statutory rates for contract and tort actions;²²⁹ dividing the set of civil actions further may also be a workable solution.

Some states, however, may not wish to set separate judgment rates for consumer debt collection actions apart from other types of contract actions.²³⁰ While many debt collection suits involve low-income borrowers, large corporate lenders, and debt collection abuses, there could certainly be instances in which a matter that could be classified as a debt collection suit would not follow this fact pattern.²³¹ Where a statute imposes a single pre- or post-judgment interest rate without allowing courts the discretion to adjust it, the rate selected must suit a variety of fact patterns and types of litigating parties.²³² However, even if all consumer debt collection actions are not necessarily identical, a state could certainly conclude that the more important policy goal is protecting low-income, individual defendants from additional financial burden than allowing a high fixed rate or a premium to be added to market rate of interest with the goal of encouraging the speedy resolution of litigation matters or to satisfy other non-compensatory goals.²³³

Also, as discussed above, setting the pre- and post-judgment interest rates near the market rate of interest can help prevent the amplification of procedural errors as described above, including suits brought without actual knowledge of consumer debtors. While the ideal course of action might be to remedy these procedural inequities directly, setting the pre- and post-judgment rates of interest close to market rates will at least prevent these errors from being magnified and lowers the resulting financial burden in the form of pre- and post-judgment interest accrued. Pre- and post-judgment interest should not further magnify procedural defects present in the determination of the original judgment.

229. Compare CONN. GEN. STAT. § 37-1 (2019) (setting judgment interest rate for contracts at 8%), with *id.* § 37-3b (setting judgment interest rate for personal injury actions at 10%).

230. See, e.g., CAL. CIV. CODE § 3289(b) (West 2016) (setting a default interest rate of 10% for all types of contracts unless otherwise stipulated in the agreement).

231. See Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, PROPUBLICA (May 5, 2016, 7:57 AM), <https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine>.

232. See, e.g., *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 215 (Fla. 1985) (holding that the Florida pre-judgment interest statute does not permit discretion by the judiciary in setting a pre-judgment interest rate).

233. See, e.g., 735 ILL. COMP. STAT. 5/2-1303(b)(2) (adopting a lower rate of interest for debt collection actions under \$25,000 in order to protect low-income individual defendants).

This Article contends that the market interest rate for pre- and post-judgment interest is the optimal solution in the context of consumer debt collection actions even though the market rate might not compensate a prevailing party for the full amount of interest it might have been able to generate either before or after the judgment is entered. Knoll recognized in 1996 that “when one of the parties is an individual, it is unlikely there will be a single correct interest rate to use”²³⁴ because the two parties would have different rates of borrowing, and in some cases “there can be a substantial deviation between these rates.”²³⁵ Thus, “granting interest at the defendant’s cost of borrowing might not fully compensate the plaintiff for the delay.”²³⁶ In the case of debt collection suits, such defendants are unlikely to be able to earn funds substantially above a market rate of interest. Where public policy calls for lower pre- or post-judgment interest rates in order to allow such defendants to fully satisfy judgments against them, the goal of fully compensating the plaintiff for the potential funds it could have itself earned during that time period and thus restoring the full time value of the judgment funds to the plaintiff might not be fully satisfied.²³⁷ Instead, it is the other part of compensation as described by Knoll—that of preventing unjust enrichment of the defendant²³⁸—that would be more fully honored by adjusting pre-judgment interest rates to track a market benchmark of interest.

It is possible that other consequences could result if a change in pre- and post-judgment interest rates were adopted more broadly than in the consumer debt collection context, both positive and negative. For example, lower pre- and post-judgment interest rates might provide less of an incentive to insurers to quickly pay claims and instead encourage protracted litigation.²³⁹ However, additional research would be necessary to determine what effects such a broader change would have. This Article limits itself to recommending changes solely in the context of consumer debt collection actions.

234. Knoll, *supra* note 47, at 309.

235. *Id.* at 345.

236. *Id.*

237. *See id.* at 302–03 (stating that the purpose of pre-judgment interest is to compensate the plaintiff for his or her loss of the use of funds and ability to earn a market return on them).

238. *See id.* at 347.

239. *See generally* R. Brent Cooper, *Understand the CGL Policy Post-Judgment Interest Provision*, IRMI (Mar. 2017), <https://www.irmi.com/articles/expert-commentary/post-judgment-interest-provision> (discussing how insurers may want to settle claims to avoid post-judgment interest).

E. Adjusting the Premium Added to a Floating Market Rate

Adding a fixed interest rate to a floating market rate deviates from this Article's recommended approach of setting pre- and post-judgment interest rates to track a market benchmark. Currently, however, in many states the amount of interest added to a floating market rate does not result in as great a deviation from present market interest rates as results in those states employing a high fixed rate of interest (although the opposite can also be true). For example, the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, is used as the market benchmark, and then 2% is added.²⁴⁰ As of July 1, 2019, that rate was 5.5%, so the applicable rate was 7.5% through the end of 2019.²⁴¹ This rate of 7.5% was higher than the pre- or post-judgment interest rates in Virginia or the pre-judgment interest rates of several other states applying fixed rates,²⁴² but the 7.5% rate was lower than that used in other jurisdictions, such as Vermont, New York, and Rhode Island.²⁴³

Yet whether a state uses a high fixed interest rate or a floating market rate with a premium added, a fundamental issue remains the same: the rate applied for pre- or post-judgment interest is greater than a current market benchmark, and so both the high fixed interest rate and the market rate with an added premium assess an additional financial burden on the judgment debtor beyond that necessary to compensate the prevailing party.²⁴⁴ Therefore, while laws using floating rates that add a fixed premium might not need to be amended as urgently as those statutes applying high fixed rates, this Article argues that the fixed premiums added to floating rates should also be reduced in the context of debt collection actions.

Further, even where a state has determined that pre- or post-judgment interest should serve additional purposes beyond that of serving to compensate the prevailing party and thus consciously adds or retains a premium over the market interest rate, the relationship between the premium and the market interest rate can potentially

240. NEV. REV. STAT. § 17.130(2) (2019).

241. *Id.*; see NEV. FIN. INSTS. DIV., *supra* note 39.

242. See, e.g., VA. CODE ANN. § 6.2-302 (2016) (setting the judgment rate of interest at 6%).

243. See N.Y. C.P.L.R. 5004 (MCKINNEY 2007); 9 R.I. GEN. LAWS. § 9-21-10(a) (2020); VT. STAT. ANN. tit. 12, § 2903(c) (2019).

244. See, e.g., ALA. CODE § 8-8-1 (2017) (allowing a fixed interest rate of up to 8% in certain actions); ARK. CODE ANN. § 16-65-114 (2019) (establishing an interest rate based on the Federal Reserve primary credit rate plus a 2% fixed premium, which would yield a rate of 2.25% as of October 2, 2020).

become distorted over time as the market interest rate changes.²⁴⁵ For example, a premium of 5% over a market interest rate, such as that used by Idaho, is a comparatively greater burden in today's environment of low interest rates than it would be were interest rates were higher.²⁴⁶ Thus, in a low interest rate environment such as the current one,²⁴⁷ the non-compensatory purposes of a pre- or post-judgment interest statute are given greater weight than would occur in a setting of higher market interest levels. The relative importance given to the non-compensatory goals of a judgment interest statute should remain consistent over time and should not vary depending on the current market interest rate. This problem could be avoided if the interest rate were set first as a floating market interest rate with the addition of a certain percentage to the floating market rate.²⁴⁸ This would meet the goals of setting the rate above the current market rate but would retain its intended effect, and give the weight originally intended by a state legislature to the non-compensatory purposes of the pre- or post-judgment interest statute. While this Article argues that such an approach is a second-best solution to the optimal choice of setting a purely floating market rate, it is nevertheless preferable to maintaining a currently existing fixed premium.

V. FUTURE AREAS OF RESEARCH

The issues of pre- and post-judgment interest in the context of consumer debt collection actions present additional research questions that might be explored in the future. Such research is outside of the scope of this Article but might provide useful information to illustrate the historical background of pre- and post-judgment interest as well as the practical effects that the recommendations proposed in this Article might have.

For example, a sample of consumer debt collection contracts or cases could be examined to determine how often those contracts articulate an applicable pre- or post-judgment rate of interest.²⁴⁹ In

245. Cf. Robert L. Losey et al., *Prejudgment Interest: The Long and Short of It*, 15 J. FORENSIC ECON. 57, 65–67 (2002) (discussing the rationale and difficulties behind a rate of pre-judgment interest derived from the market rate plus an additional premium).

246. See IDAHO CODE § 28-22-104(2) (2020).

247. See Long, *supra* note 212.

248. Cf. Losey et al., *supra* note 245, at 67 (advocating for an added premium derived from a historical measurement of the market interest rate).

249. See, e.g., HUM. RTS. WATCH, RUBBER STAMP JUSTICE US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 24 (2016) (discussing the common application of contractual interest rates to judgments in consumer debt collection actions).

many jurisdictions, that contractual rate of interest will supplant the statutory rate of interest.²⁵⁰ The extent to which the recommendations proposed in this Article will relieve a financial burden actually assessed against consumers will therefore depend on how often a statutory rate of interest is applied instead of a contractual one in debt collection matters.

An analysis could also be undertaken showing the relationship between fixed rates of pre- or post-judgment interest at the time they were originally set with the market interest rate at the time.²⁵¹ Such research might also provide some indication as to why each particular state chose to enact a pre- or post-judgment interest statute.²⁵² Was the original purpose of such interest to punish the judgment debtor or otherwise provide incentives to speedy litigation? Or was it the intent of the legislature merely to provide compensation for the loss of use of the judgment funds?²⁵³ Such research, by revealing the differential between the market rate of interest and the fixed rate of interest selected at the time the statute was enacted, might indicate how each rate selected was intended to achieve the stated goals of the state legislature (or perhaps the range over which a state legislature expected that market interest rates might reach in the future). When a state is considering whether to amend pre- and post-judgment interest rates, how closely the original state rate matched the prevailing market rate of interest at the time the statute was enacted might provide useful information as to how state legislatures should act when setting new pre- and post-judgment interest rates and allow legislatures to combine such information with an understanding of their own policy goals.²⁵⁴

250. See, e.g., CAL. CIV. CODE § 3289 (West 2016) (allowing contractual rates of interest to be applied).

251. See IND. CODE § 24-4.6-1-101 (2020) (establishing a post-judgment interest rate of 8%, which was last amended in 1993); *Historical IRS Discount Rate*, PG CALC, <https://www.pgcalc.com/service/historical-irs-discount-rate> (last visited Oct. 2, 2020) (noting that the IRS discount rate for January 1993 was 7.6%, slightly less than the post-judgment interest rate provided by Indiana).

252 See Miller, *supra* note 76, at 601 (discussing why state legislatures have enacted post-judgment interest statutes).

253. See López, *supra* note 210, at 20 (discussing the compensatory purpose of pre- and post-judgment interest).

254. See, e.g., James T. Hart, *Kentucky Law Modification Cuts Statutory Interest Rates by Half*, WELTMAN (June 9, 2017), <https://www.weltman.com/publication-kentucky-law-modification-cuts-statutory-interest-rates-by-half-updated-june-9-2017> (discussing Kentucky's 2017 amendment to the post-judgment interest statute, which reduced the interest rate for most judgment types from the 12% rate established in 1982 to 6%).

Finally, in states where changes to the pre- or post-judgment interest rate have been made relatively recently (such as Washington for consumer debt collection matters, or Montana for civil matters generally),²⁵⁵ research could be undertaken to determine whether that change resulted in a restriction of credit available to consumers. Such research could examine the availability of credit to all consumers generally or with respect to certain subsets of consumers such as high-risk borrowers. That research would be important to determine whether the changes to pre- and post-judgment interest rates recommended by this Article would have unintended consequences for consumer welfare.

CONCLUSION

This Article recommends that in the interests of protecting consumers and promoting consumer welfare, states should consider amending their pre- and post-judgment interest rates where those rates are fixed at high levels and do not contain a separate provision allowing for a lower rate of interest to be assessed in consumer debt collection actions. As discussed within this Article, many states have articulated their policy that it is not the purpose of pre- or post-judgment interest to punish the judgment debtor; in such instances, pre- and post-judgment interest is intended only to compensate the prevailing party for the loss of the use of the judgment funds. Where such a policy has been articulated, it is especially important in the context of debt collection actions that an interest rate be selected that fairly reflects the market rate of interest. This is because the loss of funds to an individual debtor has (particularly in some instances where the income or savings of the borrower is limited and the borrower does not have the opportunity to make market investments and thus earn a higher rate of interest) the potential to cause a much greater detriment to individual debtors than might be the case in other types of actions.

Where a fixed premium has been added to a market interest rate, state legislatures should consider amending the fixed premium to a floating percentage of the market rate in order to retain the intended proportion of the fixed premium to the market rate over time. Further, in jurisdictions where the state legislature determines that the purpose of pre- and post-judgment interest is solely to compensate a prevailing party for the loss of use of judgment funds, the legislature

255. See MONT. CODE ANN. § 25-9-205(1) (2019); WASH. REV. CODE § 4.56.110(5) (2020).

should consider converting the applicable interest rates to purely market rates and removing the added premiums. At a minimum, states should consider reducing the levels of the fixed premiums to meet concerns of equity and fairness and to reflect that fixed premiums are relatively greater in today's environment of historically low interest rates.

The particular nature of debt collection suits drives the imperative to reduce pre- and post-judgment interest rates in such actions. Additional states should consider setting pre- and post-judgment interest rates applicable to only debt collection actions beyond the few jurisdictions that have already done so. The consumer debtor is a fundamentally different type of plaintiff than a publicly held corporation, for example, and faces a unique set of opportunities to earn a return on funds exceeding a market rate of interest and consequences as a result of a failure to satisfy a judgment. Amending pre- and post-judgment interest rates solely in the context of debt collection actions would allow a lower interest rate to be selected, and the financial burden of high interest assessments against consumer debtors to be alleviated. Such a change in pre- and post-judgment interest rates limited to these particular types of civil actions would allow a state legislature to quickly provide consumer debtors with such financial relief without the burden of the legislature having to investigate what broader effects a blanket change in pre- and post-judgment interest rates would have on other types of litigants and other varieties of civil actions.

Finally, an important area of future research will be to consider how often contractual rates of pre- and post-judgment interest are applied in consumer debt collection matters to determine the extent to which changes in statutory rates of interest will actually relieve an interest burden in such actions. If contractual rates of pre- and post-judgment interest are commonly set by the terms of the governing contracts, then states might also consider narrowing the upper limit of pre- and post-judgment interest that could be legally imposed or prohibiting contracts from setting their own judgment rates entirely. Changes to statutory pre- and post-judgment rates should be accompanied by these changes in the amount of interest allowed to be set by contracts in order to provide consumers with the full amount of protection available against excessive judgment interest rates.

APPENDIX: PRE- AND POST-JUDGMENT INTEREST RATES USED BY STATES²⁵⁶

This Appendix provides a summary of the pre- and post-judgment interest rate by state. The following tables are organized by states largely using fixed rates of interest; those generally using floating rates, even with the addition of a fixed premium to the floating benchmark; and those states that employ a combination of the two approaches.

For each of the tables within this Appendix, there may be separate interest rates in special circumstances, such as in cases involving municipal defendants.²⁵⁷ However, the purpose of these tables is to describe the pre- and post-judgment interest rates applicable to contract and tort actions in each jurisdiction generally.

Moreover, this Appendix does not capture the historical changes within pre- or post-judgment interest rates that may be reflected in the statutes of each jurisdiction; this Appendix describes only the currently existing pre- and post-judgment rates of interest that apply to litigation and actions giving rise to litigation occurring in the present.

256. The *Pre and Post Judgment Interest Analysis Matrix* prepared by the American Institute of CPAs was an extremely helpful resource in identifying the pre- and post-judgment interest statutes applicable to each jurisdiction. Although some of the rates noted in that matrix have since been amended and some additional citations have been made to the citations referenced in this Appendix, the author wishes to acknowledge the comprehensiveness of that resource. See generally *Pre and Post Judgment Interest Analysis Matrix*, AICPA, <https://web.archive.org/web/20180130165820/https://www.aicpa.org/interestareas/forensicandvaluation/resources/economic/amages/prejudgment-postjudgment-matrix.html> (last updated Feb. 1, 2012).

257. See, e.g., CAL. CIV. CODE § 3287(c) (West 2016).

Table 1: Fixed Pre- and Post-judgment Interest Rates

This Table describes states where the pre- and post-judgment interest rates are both set at fixed rates.

State	Pre-Judgment Interest Rate	Post-Judgment Interest Rate
Alabama	6% (not to exceed 8% if specified in contracts) ²⁵⁸	7.5% ²⁵⁹
California	7% tort (10% contract) ²⁶⁰	10% ²⁶¹
Connecticut	10% (tort) ²⁶² 8% (contract) ²⁶³	10% (tort) ²⁶⁴ 8% (contract) ²⁶⁵
Hawaii	10% ²⁶⁶	10% ²⁶⁷
Illinois	5% ²⁶⁸	9% ²⁶⁹ (5% for consumer debt judgments) ²⁷⁰
Indiana	6%, not to exceed 10% ²⁷¹	8% ²⁷²
Kentucky	8% ²⁷³	6% ²⁷⁴

258. ALA. CODE § 8-8-1 (2017).

259. *Id.* § 8-8-10(a).

260. CAL. CIV. CODE §§ 3287–3291. For tort actions against private parties, plaintiffs can obtain a 10% pre-judgment interest rate if they make a settlement offer that a defendant declines and then receive a more favorable judgement. In this instance, a 10% rate applies and accrues from the date of the settlement offer. *See id.* § 3291.

261. CAL. CIV. PROC. CODE § 685.010 (West 2009).

262. CONN. GEN. STAT. § 37-3a (2019); *see also* Sikorsky Fin. Credit Union, Inc. v. Butts, 108 A.3d 228, 233–34 (Conn. 2015) (“[Section] 37-3a applies to interest as damages and allows a trial court to award interest as compensation for the detention of money when the duty to pay arises from an obligation other than a loan of money or property, or when the parties to the loan have decided against interest on the loan. . . . The purpose of § 37-3(a) ‘is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money.’” (quoting *Sosin v. Sosin*, 14 A.3d 307, 323 (Conn. 2011))).

263. CONN. GEN. STAT. § 37-1; *see also* Little v. United Nat’l Invs. Corp., 280 A.2d 890, 892 (Conn. 1971) (using § 37-1’s legal rate of interest).

264. CONN. GEN. STAT. § 37-3b.

265. *Id.* § 37-1.

266. HAW. REV. STAT. § 478-2(1) (2019).

267. *Id.* § 478-3.

268. 815 ILL. COMP. STAT. 205/1 (2019).

269. 735 ILL. COMP. STAT. 5/2-1303(a) (2019).

270. *Id.* 5/2-1303(b)(2).

271. IND. CODE § 34-51-4-9 (2020).

272. *Id.* § 24-4.6-1-101.

273. KY. REV. STAT. ANN. § 360.010 (West 2019).

274. *Id.* § 360.040.

Maryland	6% ²⁷⁵	10% ²⁷⁶
Massachusetts	12% ²⁷⁷	12% ²⁷⁸
Mississippi	8% ²⁷⁹	8% ²⁸⁰
New Mexico	8.75% unless bad faith, intentional, or willful acts, then 15% ²⁸¹	8.75% unless bad faith, intentional, or willful acts, then 15% ²⁸²
New York	9% ²⁸³	9% ²⁸⁴
North Carolina	8% ²⁸⁵	8% ²⁸⁶
Oregon	9% ²⁸⁷	9% ²⁸⁸
Rhode Island	12% ²⁸⁹	12% ²⁹⁰
South Dakota	10% ²⁹¹	10% ²⁹²
Vermont	12% ²⁹³	12% ²⁹⁴
Virginia	6% ²⁹⁵	6% ²⁹⁶
Wyoming	7% ²⁹⁷	10% ²⁹⁸

275. MD. CODE ANN., COM. LAW. § 12-102 (West 2020).

276. MD. CODE ANN., CTS. & JUD. PROC. § 11-107 (West 2020).

277. MASS. GEN. LAWS ch. 231, §§ 6B–6C (2019).

278. *Id.*

279. MISS. CODE ANN. §§ 75-17-1, 75-17-7 (2016).

280. *Id.*

281. N.M. STAT. ANN. § 56-8-4 (2020).

282. *Id.*

283. N.Y. C.P.L.R. 5004 (MCKINNEY 2007).

284. *Id.*

285. N.C. GEN. STAT. § 24-1 (2019).

286. *Id.*

287. OR. REV. STAT. § 82.010 (2019).

288. *Id.*

289. 9 R.I. GEN. LAWS § 9-21-10(b) (2020).

290. *Id.*

291. S.D. CODIFIED LAWS §§ 21-1-13.1, 54-3-16 (2020).

292. *Id.*

293. VT. STAT. ANN. tit. 12, § 2903 (2020).

294. *Id.*

295. VA. CODE ANN. § 6.2-302 (2016).

296. *Id.*

297. WYO. STAT. ANN. § 40-14-106 (2020).

298. *Id.* § 1-16-102.

Table 2: Floating Pre- and Post-judgment Interest Rates

This Table lists those states that use a pre- and post-judgment interest rate that is tied to a floating interest rate benchmark. Additional percentages added to the floating benchmarks are also noted.

State	Benchmark
Alaska	“three percentage points above the 12th Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered” ²⁹⁹
Arkansas	“a rate equal to the Federal Reserve primary credit rate in effect on the date on which the judgment is entered plus [2%]” ³⁰⁰
Delaware	“not in excess of 5% over the Federal Reserve discount rate including any surcharge thereon” ³⁰¹
Florida	sets the rate of interest by “averaging the discount rate of the Federal Reserve Bank of New York for the preceding [twelve] months, then adding 400 basis points to the averaged federal discount rate” ³⁰²
Georgia	“prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, on the day the judgment is entered plus [3%]” ³⁰³
Idaho	“five percent . . . plus the base rate in effect at the time of entry of the judgment. The base rate shall be determined on July 1 of each year . . . and shall be the weekly average yield on United States treasury securities as adjusted to a constant maturity of one . . . year and rounded up to the nearest one-eighth percent . . .” ³⁰⁴ Idaho “allows for prejudgment interest at the rate of [12%] per annum in cases where money is due on an express contract.” ³⁰⁵
Iowa	“one-year treasury constant maturity published by the federal reserve in the [H.15] report settled immediately prior to the date of the judgment plus [2%]” ³⁰⁶

299. ALASKA STAT. § 09.30.070 (2019).

300. ARK. CODE ANN. § 16-65-114 (Supp. 2019).

301. DEL. CODE ANN. tit. 6, § 2301 (2019).

302. FLA. STAT. § 55.03(1) (2019).

303. GA. CODE ANN. § 7-4-12 (2015).

304. IDAHO CODE § 28-22-104(2) (2020).

305. *Id.* § 28-22-104(1); *see also* Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 130 P.3d 1127, 1130 (Idaho 2006) (“Idaho Code [§] 28-22-104 allows for prejudgment interest at the rate of [12%] per annum in cases where money is due on an express contract.”).

306. IOWA CODE §§ 535.3, 668.13 (2020).

Kansas	“four percentage points above the discount rate . . . as of July 1 preceding the date the judgment was rendered” ³⁰⁷
Louisiana	3.25% above the Federal Reserve Discount Rate of the first business day of October each year ³⁰⁸
Maine	one-year U.S. treasury bill rate plus 3% (pre-judgment) ³⁰⁹ or the one-year U.S. treasury bill rate plus 6% (post-judgment) ³¹⁰
Michigan	“[one percent] plus the average interest rate paid at auctions of [five]-years [U.S.] treasury notes during the [six] months immediately preceding July 1 and January 1 . . . and compounded annually” ³¹¹
Montana	rate for prime bank loans published by the Federal Reserve System in statistical release H.15 plus 3% ³¹²
Nevada	“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 . . . immediately preceding the date of [judgment], plus 2 percent” ³¹³
New Hampshire	“prevailing discount rate of interest on [twenty-six]-week United States treasury bills at the last auction thereof preceding the last day of September in each year, plus [two] percentage points, rounded to the nearest tenth of a percentage point” ³¹⁴
New Jersey	not exceeding monetary limit: “average rate of return, to nearest whole or [1/2%], for corresponding preceding fiscal year terminating on June 30, of the State of New Jersey Cash Management Fund (State accounts) as reported by the Division of Investment in the Department of the Treasury” ³¹⁵ exceeding monetary limit: average rate of return, to nearest whole or [one half percent], plus 2% ³¹⁶
Ohio	federal short-term rate as determined by the tax commissioner, rounded to the nearest whole number [percent], plus 3% ³¹⁷

307. KAN. STAT. ANN. § 16-204 (2019).

308. LA. STAT. ANN. § 13:4202 (Supp. 2020).

309. ME. STAT. tit. 14, § 1602-B (2019).

310. *Id.* § 1602-C.

311. MICH. COMP. LAWS § 600.6013 (2020).

312. MONT. CODE ANN. § 25-9-205 (2020). This statute was amended from a fixed rate of 10% by a 2017 amendment. *See* S.B. 293, 65th Leg., Reg. Sess. (Mont. 2017).

313. NEV. REV. STAT. § 99.040(1) (2019).

314. N.H. REV. STAT. ANN. § 336:1 (2020).

315. N.J. CT. R. 4:42-11(a)(ii–iii).

316. *See Id.* R. 4:42-11(b) (noting pre-judgment interest is allowed in tort cases in the same manner as post-judgment interest); *Crowley v. Chait*, No. 85-2441, 2005 WL 8165119, at *3 (D.N.J. Sept. 30, 2005) (“To guide courts’ discretion, New Jersey has adopted a general policy favoring awards of prejudgment interest in tort cases.”).

317. OHIO REV. CODE ANN. §§ 1343.03, 5703.47(b) (West 2016).

Oklahoma	prime rate as listed in the first edition of the Wall Street Journal published for each calendar year plus 2% ³¹⁸
Texas	prime rate as published by the Board of Governors of the Federal Reserve System, but not less than 5% or greater than 15% ³¹⁹
West Virginia	Two percentage “points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the judgment or decree is entered” (not to exceed 9% per annum or be less than 4% per annum) ³²⁰
Wisconsin	“annual rate equal to [1%] plus the prime rate in effect on January 1 of the year in which the judgment is entered if the judgment is entered on or before June 30 of that year or in effect on July 1 of the year in which the judgment is entered if the judgment is entered after June 30 of that year” ³²¹

Table 3: Interest Rate Benchmarks Used and Levels on January 3, 2020

This Table describes the different types of interest rate benchmarks used by various states listed in Table 2. Table 3 also compares the level of each of those interest rate benchmarks as of January 3, 2020 (in some cases rounded as per the statutes of the applicable jurisdiction).

State	Rate	Level on January 3, 2020
Federal, others	Weekly average one-year constant maturity (nominal) treasury yield	1.55% ³²²
Multiple	Federal Reserve Discount Rate	2.25% ³²³
Alaska	Twelfth Federal Reserve District Discount Rate	2.25% ³²⁴

318. OKLA. STAT. tit. 12, § 727.1(I) (2019).

319. TEX. FIN. CODE ANN. § 4.304.003(c) (West 2019).

320. W. VA. CODE § 56-6-31(c) (2018).

321. WIS. STAT. §§ 807.01(4), 814.04(4), 815.05(8) (2020). A statutory amendment amended the applicable rate from a fixed level of 12%. S.B. 14, 2011 Leg., Sept. Spec. Sess. (Wis. 2011).

322. *Selected Interest Rates (Daily) – H.15*, BD. OF GOVERNORS OF THE FED. RSRV., <https://www.federalreserve.gov/releases/h15/> (last visited Jan. 12, 2020).

323. *See generally Historical Discount Rates*, FED. RSRV.: DISC. WINDOW/PAYMENT SYS. RISK, <https://www.frbdiscountwindow.org/pages/discount-rates/historical-discount-rates> (last visited Jan. 3, 2020).

324. ALASKA CT. SYS., *HOW TO DETERMINE PRE- & POST-JUDGMENT INTEREST RATES IN 2020* (2020). For judgments entered in 2020, the pre- and post-judgment interest rate is 5.25%. *Id.*

Nevada	Prime rate at the largest bank in Nevada	4.75% ³²⁵
New Jersey	Rate of return of the State of New Jersey Cash Management Fund (state accounts)	2.50% ³²⁶ (rounded)
West Virginia	Fifth Federal Reserve District Secondary Discount Rate	2.75% ³²⁷
Texas	Prime rate (as reported by the Federal Reserve in H.15) ³²⁸	3.25% ³²⁹
Oklahoma	Prime rate (as reported by the Wall Street Journal) ³³⁰	4.75% ³³¹

325. *Legal Interest Rate*, SECOND JUD. DIST. CT.: STATE OF NEV., WASHOE CNTY., <https://www.washoecourts.com/TopRequests/InterestRates> (last updated Jan. 1, 2021). 4.75% is the current prime rate, to which 2% is added for to reach the applicable judgment interest rate, which is valid from January 1, 2020, through July 1, 2020. *Id.*

326. N.J. CTS., NOTICE TO THE BAR: POST-JUDGMENT RATE OF INTEREST FOR CALENDAR YEAR 2020 (RULE 4:42-11) (2019) (“[T]he post-judgment annual rate of interest for judgments not exceeding monetary limit of the Special Civil Part at the time of entry for calendar year 2020 (commencing on January 1, 2020) will be 2.50%.”).

327. Press Release, Sup. Ct. of Appeals of West Virginia, 2020 Interest Rate on Judgments and Decrees (Jan. 3, 2020), <https://advisornews.com/oarticle/w-va-supreme-court-of-appeals-2020-interest-rate-on-judgments-and-decrees#.YCGfsGhKhPY> (“The main bank for the Fifth Federal Reserve District is the Fifth Federal Reserve Bank in Richmond, Va. That bank’s secondary discount rate on January 2, 2020, was [2.75%].”).

328. TEX. FIN. CODE ANN. § 4.304.003(c) (2019).

329. *Selected Interest Rates (Daily) – H.15*, *supra* note 322; *see also* Esther Trattner, *What Is the Current Prime Rate?*, MONEYWISE, <https://moneywise.com/a/what-is-the-prime-rate> (last updated Nov. 10, 2020).

330. OKLA. STAT. tit. 12, § 727.1(I) (2019).

331. *Money Rates: Effective Oct. 13, 2019*, WALL ST. J.: MKTS., <https://www.wsj.com/market-data/bonds/moneyrates> (last visited Jan. 12, 2020); *see also* Julia Kagan, *Wall Street Journal Prime Rate*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/terms/w/wall-street-journal-prime-rate.asp> (“The Wall Street Journal Prime Rate is an aggregate average of the various prime rates that [ten] of the largest banks in the United States charge their highest credit quality customers for loans with relatively short-term maturities.” It is calculated by a market survey and published by *The Wall Street Journal* (WSJ). “The WSJ prime rate has historically been approximately 3% higher than the federal funds rate.”).

Table 4: Combinations of Fixed and Floating Pre- and Post-judgment Interest Rates

Table 4 lists those states that use some combination of fixed and floating interest rates with respect to their pre- and post-judgment interest statutes.

State	Pre-judgment Rate	Post-judgment Rate
Colorado	8% (contract) ³³² Torts: “[2] percentage points above the discount rate, which discount rate must be the rate of interest a commercial bank pays to the federal reserve bank of Kansas City using a government bond or other eligible paper as security, and rounded to the nearest full percent” ³³³	8% ³³⁴
Missouri	9% (contract) ³³⁵	9% (contract) Federal Funds Rate + 5% (torts) ³³⁶
Nebraska	12% ³³⁷	“two percentage points above the bond investment yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the first action of each annual quarter of the twenty-six-week United States treasury bills in effect on the date of entry of the judgment” ³³⁸
North Dakota	6% ³³⁹	After “January 1, 2006, the interest is payable at a rate equal to the prime rate published in the Wall Street Journal on the first Monday

332. COLO. REV. STAT. § 5-12-101 (2016).

333. COLO. REV. STAT. § 13-21-101(3) (2018).

334. *Id.* §§ 5-12-101–103.

335. MO. REV. STAT. § 408.040 (2015).

336. *Id.*

337. NEB. REV. STAT. § 45-104 (1980).

338. *Id.* § 45-103.

339. N.D. CENT. CODE § 47-14-05 (2020).

		in December of each year plus three . . . percentage points rounded up to the next one-half percentage point and may not be compounded” ³⁴⁰
Pennsylvania	6% (contract) ³⁴¹ “[P]rime rate listed in the first edition of the Wall Street Journal published for each calendar year” for which damages are awarded, “plus 1%, not compounded” (tort) ³⁴² Prime rate plus 3% (bad faith) ³⁴³	6% ³⁴⁴
South Carolina	8.75% ³⁴⁵	“prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually” ³⁴⁶
Tennessee	10% ³⁴⁷	two percent below the formula rate published by the Tennessee Department of Financial Institutions (ceiling of 4% over weekly average prime loan rate as published by the Federal Reserve System) ³⁴⁸
Utah	10% ³⁴⁹	“federal post-judgment interest rate as of January 1 of each year, plus 2%” ³⁵⁰

340. *Id.* § 28-20-34.

341. 42 PA. CONS. STAT. § 8559 (1990).

342. *Id.* § 8368.5(b).

343. *Id.* § 8371(1).

344. *Id.* § 8559.

345. S.C. CODE ANN. § 34-31-20(A) (2019).

346. *Id.* § 34-31-20(B).

347. TENN. CODE ANN. § 47-14-123 (1979).

348. TENN. CODE ANN. § 47-14-121 (2012); TENN. CODE ANN. § 47-14-102(7) (2006); *Formula Rate*, TENN. DEPT OF FIN. INSTS. (Sept. 22, 2020), <https://www.tn.gov/tdfi/tdfi-how-do-i/info/formula-rate.html>.

349. UTAH CODE ANN. § 15-1-1(2) (West 2019).

350. UTAH CODE ANN. § 15-1-4(3)(a) (West 2018).

Washington	12% ³⁵¹	“two percentage points above the equivalent coupon issue yield (as published by the board of governors of the federal reserve system) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry thereof” ³⁵² (Separate rate of 9% for unpaid consumer debt) ³⁵³
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Additional Comments

Further, other states allow for a choice in some way between a fixed and floating judgment interest rate. For example, Arizona (imposes either “the lesser of [10%] per annum” or a rate “equal to [1%] plus the prime rate as published by the board of governors of the federal reserve system in statistical release H.15”).³⁵⁴ Minnesota, for both pre- and post-judgment interest, uses a floating interest rate for judgments of or below \$50,000 and a fixed interest rate (of 10%) for judgments or awards over \$50,000 (other than judgments or awards for or against the state or a political subdivision of the state).³⁵⁵ The floating rate used is determined from the one-year constant maturity treasury yield for the most recent calendar month, rounded to the nearest 1%, or 4%, whichever is greater.³⁵⁶ (As noted above, New Jersey also uses a dollar threshold above and below which different interest rates apply, although New Jersey uses a floating benchmark both above and below that threshold).³⁵⁷

Finally, as described within this Article, many states allow for a written contract to specify the terms of pre- or post-judgment interest. Some of these states allow a contract to specify pre- or post-judgment interest to the extent such rate falls within a legal range, such as Alaska, Indiana, and Iowa.

351. WASH. REV. CODE § 4.56.110(2) (2020).

352. *Id.* § 4.56.115.

353. *Id.* § 4.56.110(5).

354. ARIZ. REV. STAT. ANN. § 44-1201(B) (2020).

355. MINN. STAT. § 549.09-1(c) (2019).

356. *Id.*

357. N.J. CT. R. 4:42-11.