

## TO AWARD OR NOT TO AWARD: PREJUDGMENT INTEREST IS ULTIMATELY THE COURT'S CALL

On December 12, 2012, the Indiana Supreme Court issued four opinions related to the broad discretion of the trial court in awarding prejudgment interest. In Indiana, the Tort Prejudgment Interest Statute ("TPIS") (or IC § 34-51-4-1 et. seq.), was enacted to "encourage settlement and to compensate the Plaintiff for the lost time value of money." Moreover, TPIS preempts common law prejudgment interest in tort cases. In *Margaret Kosarko v. William A. Padula, Administrator of the Estate of Daniel L. Herndobler, Deceased*, the Indiana Supreme Court held that the plaintiff's motion for prejudgment interest should have been evaluated as provided in the TPIS, and not on abrogated common law. According to the TPIS, the court may award prejudgment interest in a tort action of 6-10% per year, for a period not exceeding 48 months. Prejudgment interest begins to accrue either 15 months after the cause of action accrued, or six months after the claim is filed, whichever date is later. The TPIS is only applicable if the plaintiff makes a written offer of settlement to the defendant(s) within one year after filing, the terms of the offer provide for payment of settlement within 60 days after the offer is accepted, and the amount of the offer must not exceed one and one third (1 1/3) of the amount of the judgment awarded. Despite the confines of the TPIS, Chief Justice Dickson wrote that, "On remand, the trial court has broad discretion to determine whether to award prejudgment interest, what interest rate to use, what time period to use, and whether to calculate interest on the full \$210,000 awarded by the jury, or on the amount of \$100,000, representing insurance liability coverage limits, that was deposited with the clerk and released to Kosarko." The Indiana Supreme Court held that the only limits to the trial court's discretion are those enacted by the legislature in the TPIS.

Similarly, in *Jacqueline Wisner, M.D. and The South Bend Clinic, L.L.P. v. Archie L. Laney*, one of the issues decided by the Indiana Supreme Court was whether the trial court erred when it refused to grant plaintiff prejudgment interest. The Indiana Supreme Court affirmed the trial court's decision to deny the discretionary award of prejudgment interest.

The discretionary nature of an award of prejudgment interest was also explored in *Hassan Alsheik v. Alice Guerrero, Individually and as Administratrix of the Estate of I.A., Deceased*. In *Alsheik*, the Indiana Supreme Court held that Guerrero's settlement letter complied with Indiana Code § 34-51-4-6 and its requirements for an award of prejudgment interest. However, the Court noted that the award of prejudgment interest is neither required nor automatic. Prejudgment interest, regardless of statutory compliance, is left to the discretion of the trial court. The case was remanded to the trial court for a determination of prejudgment interest for Guerrero.

In *Kathy Inman v. State Farm Mutual Automobile Insurance Company*, the last of the companion cases decided on December 12, Inman challenged the trial court's denial of her motion for prejudgment interest. The two issues before the Indiana Supreme Court were (1) whether the TPIS applies to an action by an insured against an insurer to recover benefits under the insured's underinsured motorist (UIM) policy, and (2) whether prejudgment interest can be awarded in excess of the policy limits set forth in an insured's UIM policy. The Indiana Supreme Court held that the TPIS does apply to UIM coverage disputes. Because UIM coverage disputes are "civil actions arising out of tortious conduct" per Indiana Code Section 34-51-4-1, the TPIS would apply. Also, the Court held that prejudgment interest can be awarded in excess of an insured's UIM policy limits, because it is a collateral litigation expense. However, the Court concluded that Inman is still not entitled to prejudgment interest because the trial court acted within its discretion when it denied her request for prejudgment interest.

Although the Indiana legislature has enacted a law that allows for an award of prejudgment interest in civil tort actions, the trial court has the broad discretion to decide whether or not it will make such an award. As the aforementioned cases demonstrate, the trial court has the sole discretion to determine not only whether to award prejudgment interest, but also what time period to apply and what interest rate to use. Insurance policy limits, common law, good-faith conduct of the parties, and other considerations do not limit the court's discretion regarding prejudgment interest. The only limits to the trial court's discretion are the statutory requirements of the Tort Prejudgment Interest Statute.

Health care providers and insurers must be aware of the TPIS and the broad discretion of a court to award prejudgment interest. Offers of settlement made in accordance with Indiana Code 34-51-4-6 must be addressed promptly and analyzed properly in light of the pertinent facts and defenses. Defendants and counsel should conduct themselves professionally and responsibly during the course of a lawsuit and

before the court. Careful analysis, appropriate behavior, and good-faith attempts at resolving a case may aid in swaying the court's discretion to your favor when deciding prejudgment interest.

Should you have any questions, please contact your regular Hall Render attorney.