

**TESTIMONY OF CARY SILVERMAN  
IN SUPPORT OF S.B. 75  
ON BEHALF OF THE  
AMERICAN TORT REFORM ASSOCIATION  
BEFORE THE KANSAS SENATE COMMITTEE ON JUDICIARY  
FEBRUARY 2, 2023**

On behalf of the American Tort Reform Association (ATRA), thank you for the opportunity to express our support for S.B. 75, which would establish a pre-judgment interest rate that fairly reflects market conditions.

I am a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P.'s Washington, D.C. office. My practice focuses on liability law and civil justice issues. I received my law degree and a Master of Public Administration from George Washington University, where I serve as an adjunct law professor. I serve as co-counsel to ATRA, a broad-based coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation.

In Kansas, as in many states, plaintiffs may recover interest on certain damages claimed in lawsuits. States that allow pre-judgment interest do so to compensate the plaintiff for the lost time value of money while litigating claims to the trial court and potentially on appeal. In light of this purpose, pre-judgment interest rates should reflect real-world marketplace conditions.

When a pre-judgment interest rate significantly exceeds market rates, defendants are in effect punished for exercising their right to defend themselves in court or for exercising their right to appeal. Interest on a judgment can accumulate quickly. The time to litigate and appeal a case is often based on factors beyond a defendant's control, such as the complexity of the issues involved, cooperativeness of plaintiff's counsel, the trial court's docket, the timing of the court in deciding an appeal, or delays that a defendant did not cause (e.g., court closures due to COVID-19). Excessive judgment interest rates unfairly discourage civil defendants from mounting a fair defense, and, instead, increase pressure on defendants to settle claims quickly, regardless of the merits.

Kansas has a pre-judgment interest rate that is among the highest in the nation. The fixed 10% interest rate used to calculate pre-judgment interest has no connection to economic circumstances. This rate is simply too high for pre-judgment interest purposes.

Many states that had fixed pre-judgment interest rates at similar double-digit levels, which were often set when rates skyrocketed in the 1970s and early 1980s, have since abandoned them. Kansas' statutory interest rate, set in 1980, does not fairly reimburse the lost time value of money when the interest rates on savings accounts and government bonds have hovered below 4% for a long time. Interest at a whopping 10% amounts to a windfall to plaintiffs and penalizes defendants that exercise their right to defend claims.

A variable rate would better reflect prevailing economic conditions than a fixed 10% rate. Because the recent history of interest rates has involved both very low market rates and significant upswings, several state legislatures have adopted market-based pre-judgment interest rates to match the changing economic reality. Doing so ensures that judgment interest rates do not greatly differ from average investment returns, and that neither plaintiffs nor defendants receive an unexpected benefit from artificially high or low rates.

Kansas' post-judgment interest rate statute, K.S.A. § 16-204(e)(1), employs a market-based rate four percentage points above the New York federal reserve discount rate, which is currently 4.5%. The additional four percentage points provides an incentive to judgment debtors (those who have been found liable) to pay the amount owed with minimum delay. That purpose is not reflected in the case of pre-judgment interest when liability has not yet been established and the duration of litigation can be driven by factors beyond a defendant's control. A lower rate, such as the discount rate plus 2%, is more appropriate in this situation.

Several states, including Iowa, Nebraska, Nevada, Utah and Washington, use a market rate plus 2% for prejudgment interest. A number of states have set even lower levels, including:

- Arizona replaced its 10% fixed rate with a rate set at the *lesser* of the prime rate plus 1% or 10% in 2011.<sup>1</sup>
- Wisconsin eliminated its 12% fixed interest rate and adopted the prime rate plus 1% in 2011.<sup>2</sup>
- Oklahoma: Treasury Bill rate pre-judgment; Federal prime plus 2% post-judgment.<sup>3</sup>
- Pennsylvania: Federal prime rate plus 1%.<sup>4</sup>
- Michigan: Treasury note rate plus 1%.<sup>5</sup>

S. 75 would bring Kansas in line with the vast majority of other states by abandoning an inordinately high, fixed double-digit interest rate in favor of one that better reflects the market. This legislation will replace the fixed 10% pre-judgment interest rate with one that adjusts to reflect the federal discount rate plus 2%. The bill will ensure plaintiffs are able to recover a fair rate of interest on judgments awarded in their favor without unduly imposing a punitive rate on defendants. It strikes the right balance between a plaintiff's right to be made whole and a defendant's right to vigorously defend against claims.

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<sup>1</sup> S.B. 1212 (Ariz. 2011) (amending Ariz. Rev. Stat. § 44-1201).

<sup>2</sup> S.B. 14 (Wis. 2011) (amending Wis. Stat. §§ 807.01(4), 814.04(4) and 815.05(8)).

<sup>3</sup> Okla. Stat. tit. 12 § 727.1(I).

<sup>4</sup> Pa. R. Civ. P. 238(a)(3).

<sup>5</sup> Mich. Comp. Laws § 600.6013(8).