

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

JO ANN HOWARD AND ASSOCIATES, P.C.,)
SPECIAL DEPUTY RECEIVER OF LINCOLN)
MEMORIAL LIFE INSURANCE COMPANY,)
MEMORIAL SERVICE LIFE INSURANCE)
COMPANY, AND NATIONAL)
PREARRANGED SERVICES, INC., ET AL.,)

Plaintiffs,)

Case No. 09-CV-1252-ERW

v.)

J. DOUGLAS CASSITY; RANDALL K.)
SUTTON; BRENT D. CASSITY; J. TYLER)
CASSITY; RHONDA L. CASSITY; ET AL.,)

Defendants.)

**PLAINTIFFS’ MOTION TO AMEND JUDGMENT TO INCLUDE PREJUDGMENT
INTEREST UNDER MISSOURI REVISED STATUTES SECTION 408.020**

Plaintiffs Jo Ann Howard, Special Deputy Receiver of Lincoln Memorial Life Insurance Company, Memorial Service Life Insurance Company, and National Prearranged Services, Inc.; the National Organization of Life and Health Insurance Guaranty Associations; and the State Guaranty Associations hereby move to amend judgment to include prejudgment interest under Mo. Rev. Stat. § 408.020.

1. Plaintiffs prevailed against Defendants National City Bank and PNC Bank on their tort claims for breach of fiduciary duty and negligence and are entitled to prejudgment interest under Mo. Rev. Stat. § 408.020.

2. Missouri’s prejudgment interest statute, Mo. Rev. Stat. § 408.020, states in relevant part:

Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

3. For tort claims, prejudgment interest must be awarded if the defendant benefits from the tortious conduct and the requirements of section 408.020 are met.

4. Allegiant and National City benefitted from Allegiant's tortious conduct by collecting trustee fees, creating the perception of having a trust department, completing the merger between Allegiant Bank and National City, and avoiding a \$25 million break-up penalty.

5. All requirements for an award of prejudgment interest under section 408.020 are present here because: (1) Plaintiffs prevailed at trial; (2) Plaintiffs' damages were reasonably ascertainable by computation or reference to recognized standards; and (3) Plaintiffs' August 2009 complaint constitutes the necessary demand on National City.

6. Consistent with numerous Missouri decisions, Plaintiffs' damages were readily ascertainable by either computation or application of recognized actuarial standards.

7. "The mere fact that a party denies liability or defends a claim against him [or her], or even the existence of a bona fide dispute as to the amount of the indebtedness does not preclude recovery of interest." *Columbia Mut. Ins. Co. v. Long*, 258 S.W.3d 469, 480 (Mo. Ct. App. 2008). "To hold otherwise would allow [the opposing party] to accrue pecuniary benefit unfairly by the simple expedient of producing conflicting estimates of value." *Id.* "[D]amages may be ascertainable even if there is a dispute over monetary

value or the parties' experts compute different estimates of the loss." *Jablonski v. Barton Mut. Ins. Co.*, 291 S.W.3d 345, 350 (Mo. Ct. App. 2009).

8. Plaintiffs are entitled to prejudgment interest on the jury's \$355.5 million compensatory damage award at the statutory rate of 9% from August 6, 2009, the filing date of Plaintiffs' original complaint, until the Court entered judgment on March 9, 2015.

WHEREFORE, Plaintiffs respectfully request that the Court amend the judgment against National City and PNC to include prejudgment interest of \$178,821,369 thus resulting in a final judgment against National City and PNC of \$569,821,369 plus costs as set forth in Plaintiffs' bill of costs filed contemporaneously with this motion.

Dated this 6th day of April, 2015.

Respectfully submitted,

s/ Wendy B. Fisher

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Attorneys for Plaintiffs Jo Ann Howard and Associates, P.C., in its capacity as Special Deputy Receiver of Lincoln Memorial Life Insurance Company, Memorial Service Life Insurance Company, and National Prearranged Services, Inc.; the National Organization of Life and Health Insurance Guaranty Associations; the Missouri Life & Health Insurance Guaranty Association; the Texas Life & Health Insurance Guaranty Association; the Illinois Life & Health Insurance Guaranty Association; the Kansas Life & Health Insurance Guaranty Association; Oklahoma Life & Health Insurance Guaranty Association; the Kentucky Life & Health Insurance Guaranty Association; and the Arkansas Life & Health Insurance Guaranty Association

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015, **PLAINTIFFS' MOTION TO AMEND JUDGMENT TO INCLUDE PREJUDGMENT INTEREST UNDER MISSOURI REVISED STATUTES SECTION 408.020** was filed electronically with the Clerk of Court and served by operation of the Court's electronic filing system upon all counsel of record in this case participating in Electronic Case Filing.

s/ Wendy B. Fisher

Wendy B. Fisher
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Attorney for Plaintiffs