



August 31, 2021

**CONSTRUCTION CONTRACTS: CAN INTEREST BE COLLECTED
IF AN OWNER OR CONTRACTOR FAILS TO TIMELY MAKE A
DOWNSTREAM PAYMENT UNDER A CONSTRUCTION CONTRACT**

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We often get asked by contractors, subcontractors, or materialmen whether they are also entitled to recover interest when a payment is late from the owner or upstream contractor. The answer is usually yes, but the question of how much interest can be more difficult to determine. Below is an abbreviated explanation of how interest can be collected when a payment is late or not made.

Interest is a form of damages that will compensate a party for the loss of use of funds. Under the doctrine of the loss theory, the purpose of awarding pre-judgment interest is to make the plaintiff whole.

With respect to the date interest begins to accrue, generally, interest awarded as damages in a contract action runs from the date when the right to recover on the claim became vested or accrued. This is ordinarily the date of the breach or the date when payment was due under the contract. For progress payments on a construction contract, the interest accrues once each progress payment is due.

As for the rate of interest, the parties can specify the interest rate in their contract up to the maximum legal rate. For obligations under \$500,000.00, the maximum interest rate is simple interest of 18% per annum. As such, it is not uncommon for a construction contract to specify the interest rate "as the highest interest rate allowed by law", 1.5% per month, or 18% per annum. Note that if a construction contract does not specifically provide that the agreed upon rate applies post-judgment, the interest will accrue after the judgment at the statutory rate (see below).

If the contract does not specify the interest rate, pre-judgment interest will be collected at the statutory rate of interest. Pursuant to Section 55.03, Florida Statutes, the Chief Financial Officer for the State of Florida sets the rate of interest on December 1, March 1, June 1, and September 1 of each year that shall be payable on judgments or decrees for the calendar quarter beginning January 1, and adjust the rate quarterly on April 1, July 1, and October 1 by averaging the discount rate of the Federal Reserve Bank of

New York for the preceding 12 months, then adding 400 basis points to the averaged federal discount rate.

Interest on Construction Liens: With respect to a construction lien, there are a few additional items to be considered. For contractors in privity with the owner, the interest does not accrue until the Final Payment Affidavit is delivered pursuant to Section 713.06, Florida Statutes. For contractors and materialmen not in privity with the owner, Section 713.08, Florida Statutes, authorizes the inclusion of unpaid finance charges, which does not include interest. See *Fernandez v. Manning Building Supplies, Inc.*, 279 So. 3d 349 (Fla. 1st DCA 2019) (where the court ruled that a “finance charge,” for purposes of the statute authorizing a lien on real property for a materialman or laborer not in privity with the owner of real property for unpaid services or materials and for any unpaid finance charges due under the lien holder's contract, is the cost of credit, not the cost of paying late). Accordingly, for those lienors not in privity pre-judgment interest will be at the statutory rate.

Interest under Florida's Prompt Payment Laws: Effective July 1, 2021, new legislation substantially increased the minimum interest recoverable under Florida's public and private prompt payment statutes. For public construction projects that qualify under Section 218.735, Florida Statutes, of the Local Government Prompt Payment Act and Section 255.073, Florida Statutes, of the Florida Prompt Payment Act, the minimum interest rate was increased from 1% per month to 2% per month and it applies to both disputed and undisputed funds. For private construction contracts, the interest rate recoverable under Section 715.12, Florida Statutes (the Construction Contract Prompt Payment Law), was increased from the statutory rate to the statutory rate plus 12% per annum. These increases will generally only apply to contracts entered into after July 1, 2021.

In summary, contractors, subcontractors, and materialmen should not overlook the ability to charge and collect interest on late or missed payments. Contractors should consider specifying the interest rate in all of their contracts and including any interest owed on all invoices submitted. In addition, the statutory increase in interest for overdue payments is also another tool that can be used to pressure a delinquent contractor or owner to pay its debts, especially where there is no interest in the contract.

If you are in a payment dispute, the deadline to exercise all of your rights can be a matter of days so you should not delay contacting an experienced attorney familiar with construction payment disputes to avoid missing deadlines or waiving your rights.

A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

Questions regarding the content of this article may be emailed to Christopher Pope at chrispope@paveselaw.com. To view past articles, please click “Publications” on our firm website. Mr. Pope is one of only two attorneys in Florida that is Florida Bar Board Certified in both Construction Law and Condominium and Planned Development Law. He is a partner and an experienced construction and real estate attorney with the Pavese Law Firm, 1833 Hendry Street, Fort Myers, FL 33901; Telephone: (239) 334-2195; Fax: (239) 332-2243.

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