

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

HOUSTON CASUALTY COMPANY,	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	CIVIL ACTION H-05-1804
	§	
LEXINGTON INSURANCE COMPANY,	§	
<i>Defendant.</i>	§	

MEMORANDUM AND RECOMMENDATION

This dispute involving reinsurance is before the court on plaintiff Houston Casualty Company's (HCC's) motion to alter or amend the final judgment entered on July 27, 2007 (Dkt. 53). HCC seeks to include in the final judgment awards for attorneys' fees of \$181,882.04,¹ pre-judgment interest of \$313,641.39 plus \$133.35 per day since July 27, 2007 until entry of amended final judgment, and \$594.15 in costs. The court recommends that HCC's motion be granted in almost all respects.

Background

The undisputed facts of this case are set forth in prior opinions (Dkts. 33, 48), and will not be repeated in detail here. The procedural posture of the case is as follows. In HCC's original petition, as well as the prayer for relief in its cross-motion for summary judgment on its breach of contract claim (Dkt. 19), HCC sought an award of damages, attorneys' fees, pre-judgment interest, and costs. The district court granted HCC summary judgment on its

¹ HCC's initial motion sought fees and expenses of \$212,980.00. After this court ordered HCC to submit further evidence and allocate its fees between successful and unsuccessful claims, HCC modified its request (Dkt. 59).

breach of contract claim. (Dkt. 35). Because that was an interlocutory order, the court did not enter a judgment.² Lexington subsequently moved for summary judgment on HCC's claim for violation of art. 21.55 of the Texas Insurance Code, and HCC filed a cross-motion (Dkt. 44). HCC's cross-motion sought an award of 18% "penalty" interest on HCC's damages award, and "such other relief as the Court deems just and equitable under the circumstances," but did not expressly repeat its request for attorneys' fees, costs, and pre-judgment interest (Dkt. 44, at 16). The district court granted Lexington summary judgment on HCC's art. 21.55 claim. (Dkt. 51). Because all of HCC's substantive causes of action had been resolved, the district court issued a final judgment. The final judgment awards HCC damages of \$589,977.00 and post-judgment interest at the rate of 4.99%, but does not include an award for attorneys' fees, costs, or pre-judgment interest (Dkt. 52).

HCC now moves pursuant to Federal Rules of Civil Procedure 54 and 59(e) to alter or amend the final judgment. Lexington counters that HCC has waived any claim for attorneys' fees and pre-judgment interest by not asking for them and submitting evidence prior to entry of final judgment. Lexington further argues that fact questions regarding the reasonableness of HCC's fees and the date from which pre-judgment interest should run, as well as interests of judicial economy and finality of judgments, preclude entry of an award at this time. Lexington also objects to HCC's bill of costs.

² The court denied Lexington's motion for interlocutory appeal. (Dkt. 40).

Analysis

Pre-judgment interest. Texas law governs whether an award of pre-judgment interest is available in a diversity case. *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1057 (5th Cir. 1996). “Prejudgment interest is compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.” *Johnson & Higgins of Tex. v. Kenneco Energy*, 962 S.W.2d 507, 528 (Tex. 1998). Under Texas law, pre-judgment interest may be awarded pursuant to either an enabling statute or general principles of equity. *Id.*; *Int’l Turbine Svcs., Inc. v. VASP Brazilian Airlines*, 278 F.3d 494, 499 (5th Cir. 2002). Because no statute authorizes pre-judgment interest in a breach of contract case, common law principles of equity apply in this case.

Equity provides for prejudgment interest where “necessary to fully compensate injured plaintiffs.” *Primrose Operating Co. v. Nat’l Am. Ins. Co.*, 382 F.3d 546, 565 (5th Cir. 2004); *Kenneco*, 962 S.W.2d at 529. Awards of pre-judgment interest should be granted as a matter of course, not of discretion, where damages accrued prior to judgment. *Bituminous Gas. Corp.*, 75 F.3d at 1057. The law of pre-judgment interest is designed to advance two ends: “(1) encouraging settlements and (2) expediting both settlements and trials by removing incentives for defendants to delay without creating such incentives for plaintiffs.” *Kenneco*, 962 S.w.2d at 529.

A demand for pre-judgment interest may be made under Federal Rule of Civil Procedure 59(e). *Osterneck v. Ernst Whinney*, 489 U.S. 169, 175 (1989); *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Authority*, 925 F.2d 812, 814 (5th Cir. 1991). Thus, the court rejects Lexington's argument that HCC cannot seek pre-judgment interest by post-judgment motion.

The question remaining is the date on which pre-judgment interest began to accrue. In *Kenneco*, the Texas Supreme Court established that the accrual rules for equitable pre-judgment interest conform with the statutory pre-judgment interest scheme. Thus, pre-judgment interest begins to accrue on the earlier of (1) 180 days after the defendant receives written notice of a claim; or (2) the date suit is filed. *Kenneco*, 962 S.W.2d at 531.

HCC made its written claim for coverage to Lexington on August 18, 2000, and so argues that pre-judgment interest should commence on the 180th day after that date. Lexington counters that pre-judgment interest begins to run on the 180th day after HCC's contract cause of action accrued, and because Lexington never finally denied HCC's claim, there are factual issues about the accrual date of HCC's cause of action. Lexington's position rests on a legal misconception; the trigger date for pre-judgment interest is not the date when the cause of action accrues, but rather the date when notice of the claim is received.

A "claim" is a "demand for compensation or an assertion of a right to be paid." *Kenneco*, 962 S.W.2d at 531. It is undisputed that HCC made (and Lexington received) such

a demand on August 18, 2000. Lexington at that time had notice and opportunity to settle HCC's claim. Lexington's repeated argument that it did not have enough information to evaluate the claim at that time is irrelevant to prejudgment interest accrual. Lexington lost that argument when HCC prevailed on its breach of contract claim.

Pre-judgment interest accrues at the same rate as post-judgment interest and is computed as simple interest. *Kenneco*, 962 S.W.2d at 532; *Int'l Turbine Svcs.*, 278 F.3d at 500. The Texas post-judgment interest rate is governed by § 304.003 of the Texas Finance Code.³ The current Texas pre-judgment interest rate is 8.25%.⁴ Therefore, HCC is entitled to prejudgment interest on its damages award from May 19, 2005 through the date of amended final judgment at the rate of 8.25%.

Attorneys' Fees. HCC seeks an award of \$181,882.04 for its attorneys' fees and expenses. A successful litigant in a breach of contract case is entitled to an award of reasonable attorneys' fees. TEX CIV. PRAC. & REM. CODE § 38.001; *Grapevine Excavation, Inc. v. Maryland Lloyd's*, 35 S.W.3d 1, 5 (Tex. 2000). HCC has presented the amended affidavit of Brian Antweil in support of its claim. Lexington argues that HCC has waived

³ The Texas post-judgment interest rate is equal to (1) the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation; (2) five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is less than five percent; or (3) 15 percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is more than 15 percent. TEX. FIN. CODE § 304.003.

⁴ This was also the applicable rate on July 27, 2007, when judgment was originally entered.

its right to attorneys' fees, and further argues that HCC has not met its burden to prove its fees are reasonable.

There are two prerequisites for an attorneys' fees award: a party must request them in its pleadings, and file a timely motion under Rule 54(d)(2) within 14 days after entry of final judgment. *Romaguera v. Gegenheimer*, 162 F.3d 893, 895 (5th Cir. 1995). HCC did both. The court rejects Lexington's waiver argument.

Calculation of a reasonable attorneys' fee is guided by the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974) and *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).⁵ Ordinarily this is accomplished by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. This normally provides a reasonable fee, subject to adjustment based on the other factors. *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

HCC has requested attorneys fees in the amount of \$ 174,104.99 based on 736.70 hours, plus \$7,777.05 in expenses. While this is a substantial request, the case has been pending for over two years and has required extensive briefing on aspects of reinsurance law not well developed in the case law. The result obtained justifies a substantial award. HCC

⁵ Such factors include: (1) the fees and expenses customarily charged in this area for the same or similar services for attorneys with similar experience, reputation, and ability; (2) the time and labor required; (3) the difficulty of the questions involved in the litigation; (4) the skills required to perform the legal services properly; (5) the type of controversy and the amounts involved; (6) client-imposed time limitations; (7) the results obtained; and (8) the nature and length of counsel's relationship with the client.

has segregated from its request the fees and expenses devoted to its unsuccessful art. 21.55 claim, as required by *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991).

Lexington does not challenge the hours expended on particular tasks. However, it does argue that HCC's segregation of fees is "dubious" because the § 21.55 claim was the more novel and complex of HCC's two claims, yet HCC claims to have spent the vast majority of its time on the breach of contract claim.⁶ Upon review, this court finds nothing to indicate that HCC's allocation of fees between the two claims was inappropriate.

Lexington's main complaint is that the hourly rates claimed are excessive for insurance defense work in Texas.⁷ Lexington points to a 2005 Texas Bar survey showing that the average hourly rate for a lawyer with 16-20 years experience is \$244.00, much less than the \$375-490 charged by HCC's lead counsel, and that the requested \$190 hourly fee for paralegal time exceeds the state-wide average hourly rate for insurance lawyers.

HCC's counsels' fees do exceed the averages reported by the State Bar, but there are several reasons why this survey is not determinative on this question. First of all, it is based on 2005 market data, which predates some of the attorney time at issue. Second, the survey's average rates do not constitute the upper limit on a reasonable hourly rate. The standard is reasonableness, not lock-step conformity. Third, upon closer examination of the survey's

⁶ The segregated amount for the unsuccessful art. 21.55 claim is \$46,281.01 in fees and \$4,569.31 in expenses. Dkt. 60, ¶ 7.

⁷ Lexington relies on the State Bar of Texas Department of Research and Analysis Hourly Rates in 2005 Report (State Bar Report), Exhibit A to their supplemental response (Dkt. 62).

detailed breakdowns by law firm size, years of experience, area of practice, and geographical region, the disparities claimed by Lexington are not so stark. The median hourly rate for general civil litigation in the Houston-Sugar Land-Baytown MSA is \$250.00,⁸ which exceeds the 2005 rate claimed for the attorney with the most hours on the file (Madriz). The median hourly rate for all lawyers in firms of more than 200 lawyers, such as Haynes & Boone, was \$375.00,⁹ very comparable to the 2005 rates claimed here. Finally, the sample sizes are relatively small: for example, only 12 responses are recorded for attorneys having between 16 to 20 years experience in the Houston-Sugar Land-Baytown MSA.¹⁰ Only 13 responses for law firms over 200 attorneys were recorded for the same MSA.¹¹ For all these reasons, the State Bar Report may be instructive but it cannot be regarded as the final word on reasonable hourly rates.

HCC has presented the affidavit of counsel Brian Antweil, as well as copies of detailed monthly invoices, in support of its request. The court finds that HCC has presented

⁸ State Bar Report, at 32 (MSA stands for Metropolitan Statistical Area). Lexington argues that the “Insurance” area of practice is most relevant for comparison’s sake, but it is not clear what this category encompasses, or whether it is more appropriate than “Litigation: General Civil” category.

⁹ *Id.* at 9.

¹⁰ *Id.* at 30. The low response rate yields some anomalies. For example, in law firms with over 200 attorneys, the median hourly rate for lawyers with 7-10 years experience (\$375) was substantially higher than that for 11-15 year lawyers (\$293). *Id.* at 10. This counter-intuitive result shows the hazard of relying too heavily on small samples (in this case, n=10 and 14, respectively).

¹¹ *Id.* at 31.

sufficient evidence that the fees and expenses it requests are reasonable and necessary.¹²

Costs. Lexington complains, with some justification, that it cannot determine whether the costs HCC seeks are related to the breach of contract claim or the art. 21.55 claim. HCC argues that it is entitled to all its costs notwithstanding the fact that it did not prevail on its art. 21.55 claim. HCC relies on *Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991), in which the Fifth Circuit held that “the case must be viewed as a whole to determine who was the ‘prevailing party’; a party need not prevail on every issue in order to be entitled to costs.” HCC fails to recognize the distinction between “issues” and “claims.” HCC is entitled to an award of costs related to its successful breach of contract claim. 28 U.S.C. § 1920. HCC is entitled to recover its filing and service fees of \$172.00 and \$107.50, respectively, because such costs are self-explanatory and were necessary to pursue the breach of contract claim. However, HCC has not presented any itemization or documentation in support of the \$314.65 it seeks for “fees and disbursements for printing.” Thus, the court recommends awarding only \$279.50 in costs.

Conclusion

The court recommends that an amended final judgment be issued awarding HCC:

- (1) damages of \$589,977.00;

¹² The court further finds that \$50,000 would be a reasonable and necessary fee in the event HCC is successful on appeal. Dkt. 60, ¶ 13; *See Cap Rock Elec. Co-Op, Inc. v. Texas Util. Elec. Co.*, 874 S.W.2d 92, 102 (Tex. App. – El Paso 1994, no writ) (“once a right to attorney’s fees is established, the award may include attorney’s fees for any appeal”).

- (2) prejudgment interest of \$313,641.39, plus \$133.35 per day from July 27,2007 until the date of entry of the amended final judgment;
- (3) attorneys' fees and expenses in the amount of \$181,882.04, plus \$50,000 in the event it is successful on appeal;
- (4) costs in the amount of \$279.50; and
- (5) post-judgment interest at the rate in effect on the date of entry of the amended final judgment.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas on October 30, 2007.



Stephen Wm Smith
United States Magistrate Judge