

**TRENDING****When Trade Secrets or Confidential Business Information Are Stolen, Can You Recover Pre-Judgment Interest in Massachusetts?**

If your company's confidential business information or trade secrets [1] are stolen, in Massachusetts you may not be entitled to statutory pre-judgment interest based on an unjust enrichment award. The recent Superior Court decision in Governo Law Firm, LLC v. CMBG3 Law, LLC, No. 1684CV03949BLS2, 2019 WL 3801560, at \*1 (Mass. Super. July 29, 2019) highlights this point and the rationale behind whether to award statutory interest following a finding of misappropriation of either trade secrets or confidential business information.

From an initial reading of the statute, it would not be unreasonable to think that Massachusetts' catch-all statute on pre-judgment interest, M.G.L. c. 231 § 6H [2], applies to successful actions related to theft of trade secrets or confidential business information. However, as Governo and USM Corp. v. Marson Fastener Corp., 392 Mass. 334, 351, 467 N.E.2d 1271, 1283 (1984) (USM Corp. II) make clear, the Court retains discretion to award pre-judgment interest in these cases when the award is calculated based not on what the plaintiff lost, but on what the defendant gained.

As the Court in Governo points out, M.G.L. c. 231 § 6H "provides for an award of pre-judgment interest whenever compensatory damages are awarded" ...[b]ut not all verdicts that order a defendant to pay money to a successful plaintiff constitute an award of 'damages' within the meaning of § 6H. Governo at \*7. Where, as in Governo, the court's award required the "defendant to disgorge and pay the plaintiff part or all of **their profit or gain** from certain conduct," it is an "equitable remedy for unjust enrichment, not an award of 'damages' to compensate" the plaintiff for economic injury that it suffered. Id. (emphasis added). Part of the logic behind this reasoning is that the damages in these cases were calculated from the profits or gains enjoyed by the defendant in the years **after** the harm occurred, and therefore, starting the interest clock on the date the wrongful conduct occurred would pre-date the time that the profits were actually earned by the defendant.

The Court retains the power to award pre-judgment interest under common law principles, requiring a balancing of equities of the particular case. USM Corp. II, 392 Mass. at 350. In both USM Corp II and Governo, the Court declined to award pre-judgment interest because "the monetary relief...is based on the defendants' gain and not on [plaintiff's] losses." USM Corp. II at 350 n. 14. The key issue, therefore, is whether the damages are based upon the plaintiff's losses that occurred starting at the time of the wrongful conduct, or upon the profits earned by the defendant after the initial wrongful act occurred. In the latter case, pre-judgment interest from the date of the wrongful act is generally not awarded in Massachusetts.

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Despite a seemingly on-point statute, in cases involving stolen trade secrets or confidential information, Massachusetts courts look to the equities of a particular case and the rationale behind a calculation of financial award when determining whether pre-judgment interest will be awarded.

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[1] Massachusetts defines a “**trade secret**” at M.G.L. c. 93 § 42(4). Massachusetts also protects **confidential business information**, which does not rise to the level of a trade secret, from those who improperly procure such information. USM Corp. v. Marson Fastener Corp., 379 Mass. 90, 104, 393 N.E.2d 895, 903 (1979).

[2] M.G.L. c. 231 § 6H provides: In any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law, there shall be added by the clerk of court to the amount of damages interest thereon at the rate provided by section six B to be determined from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law.

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