

## Obtaining pre-judgment interest on fiduciary surcharges

By Robert M. Harper

A number of remedies are available to estate and trust beneficiaries who suffer financial harm at the hands of the fiduciaries appointed to administer estates and trusts. Among the remedies that may be available to aggrieved estate and trust beneficiaries is the imposition of a surcharge against a fiduciary that performs poorly. In addition to a surcharge, estate and trust beneficiaries may seek an award of pre-judgment interest on a surcharge imposed against a fiduciary, personally, which can prove quite costly for an executor or trustee found to have violated a fiduciary duty. This article addresses the Surrogate's Court's discretion to award pre-judgment interest on surcharges against fiduciaries, and discusses a recent case in which Suffolk County Surrogate John M. Czygier, Jr. exercised such discretion.

CPLR 5001(a) provides that "[i]nterest shall be recovered upon a sum awarded . . . because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."<sup>1</sup> The discretion to award pre-judgment interest, and at what rate, for surcharges based upon a breach of fiduciary duty is a matter within the discretion of the court.<sup>2</sup>

"Pursuant to this power, the Surrogate's Court may properly impose interest on surcharges made against a petitioning [executor or] trustee when the interest is warranted to fully com-

pensate the [estate or] trust beneficiaries for any losses which they may have suffered or gains which they may not have fully realized due to" the fiduciary's misconduct.<sup>3</sup> Ample support exists for awarding pre-judgment interest against fiduciaries who are surcharged for violating the duty of loyalty.<sup>4</sup> Given the foregoing, it is worthy of note that Surrogate Czygier has recently awarded pre-judgment interest on surcharges imposed upon executors and trustees who breached their fiduciary duties.<sup>5</sup>

In *Matter of Taylor*, the petitioner, the decedent's son-in-law, procured Letters Testamentary to serve as executor of the decedent's estate, which was to pass, in equal shares, to the decedent's three children under her will. After the will was admitted to probate, the petitioner made disproportionately high distributions to his wife, one of the decedent's three children, and failed to make equal distributions to the decedent's other three children. The petitioner also failed to comply with an order directing him to account as executor, which resulted in a finding of contempt against him, the issuance of a warrant of commitment for him, and the petitioner being taken into custody by the Suffolk County Sheriff's Office.

Ultimately, the petitioner rendered his accounting as executor and petitioned to have it settled by the Surrogate's Court, Suffolk County. The accounting and pre-objection discovery resulted in the filing of objections by the respondent, one of the decedent's sons, which gave rise to a summary

judgment motion requesting the imposition of a surcharge and pre-judgment interest on the surcharge against the petitioner, personally.

In granting summary judgment to the respondent, Surrogate Czygier explained that the petitioner had a fiduciary duty to make equal distributions to each of the estate's three beneficiaries. The surrogate also found that the petitioner breached that duty by making disproportionately high distributions to his wife and directed the petitioner to make an immediate distribution to the respondent in an amount equal to the distributions the petitioner made to his wife.

But Surrogate Czygier did not end his analysis there. Instead, the surrogate correctly held that the circumstances warranted the imposition of pre-judgment interest on the surcharge against the petitioner. Surrogate Czygier required the petitioner to pay the interest award (which was imposed at a rate of six (6%) percent per annum, for a period of approximately five years), personally, reasoning that interest was warranted to compensate the respondent for any losses which he suffered or gains he may not have fully realized due to the petitioner's conduct.

When representing objectants in accounting proceedings, practitioners should not stop at seeking surcharges against errant fiduciaries. Instead, objectants' counsel should be sure to seek the imposition of pre-judgment interest on a surcharge, which can be quite substantial over time. In doing so, attorneys will take steps to ensure that their clients receive the highest monetary recoveries possible



Robert M. Harper

under the circumstances.

*Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in the field of trusts and estates litigation. In addition to his work at Farrell Fritz, Mr. Harper serves as a Special Professor of Law at Hofstra University, Officer of the Suffolk Academy of Law, and Co-Chair of the Legislation and Governmental Relations Committee of the New York State Bar Association's Trusts and Estates Law Section.*

1 *Matter of Cogliano*, N.Y.L.J., Sept. 29, 2008, at 46, col. 5 (Sur. Ct., Suffolk County).

2 *Matter of Janes*, 90 N.Y.2d 41, 55-56 (1997).

3 *Matter of Rubenstein*, N.Y.L.J., June 16, 2004, at 20, col. 3 (Sur. Ct., Kings County); *Matter of Ryan*, N.Y.L.J., Dec. 31, 2012, at 29, col. 2 (Sur. Ct., Suffolk County).

4 *Matter of Tollner*, N.Y.L.J., June 7, 1995, at 43, col. 3 (Sur. Ct., Nassau County) (awarding pre-judgment interest at the "legal rate" of nine (9%) per annum).

5 *Matter of Taylor*, N.Y.L.J., Mar. 26, 2013, at 25, col. 2 (Sur. Ct., Suffolk County).