RECOVERY OF INTEREST ON A TAX UNDERPAYMENT CAUSED BY A TAX ADVISOR'S NEGLIGENCE

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I. INTRODUCTION

When a tax advisor renders incorrect advice due to negligence and a plaintiff establishes all the requisite elements of a malpractice cause of action, the most frequently encountered direct damages consist of four elements: additional taxes caused by the negligence, interest on underpaid taxes, penalties, and corrective costs incurred in attempting to eliminate or mitigate all or some of the foregoing damages.[1] This article will focus on the recoverability of interest incurred by a plaintiff on a tax underpayment caused by the tax advisor's negligence. Such interest payment is present in many, if not most, tax malpractice situations because both federal[2] and state[3] laws impose an interest charge on the

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1. *See generally* Jacob L. Todres, *Tax Malpractice Damages: A Comprehensive Review of the Elements and the Issues*, 61 Tax Law. 705, 712 (2008) [hereinafter *Tax Malpractice Damages*]. It should be noted that additional consequential damages are also recoverable in appropriate circumstances. *Id.* at 736 *et. seq.*

2. *See, e.g.*, I.R.C. § 6621(a)(2) (2006) and I.R.C. § 6622(a) (2006).

3. *See, e.g.*, CAL. REV. & TAX CODE § 19101 (West 2001): N.Y. TAX LAW § 684; NY CLS Tax § 684 (2010); TEX. TAX CODE ANN. § 33.01 (Vernon 2009).

underpayment of a tax liability. While other types of interest payments incurred by a plaintiff may also be recoverable as consequential damages, such other interest payments will not be addressed in this article.[4]

There are several reasons why I wish to focus on this area. First, and foremost, to update the analysis I presented in a recent article[5] in light of new developments, especially in light of *Frank v. Lockwood*,[6] which finally got the issues right and in which the majority and the dissent disagree about appropriate matters. The second reason I will revisit this area is that certain courts appear not to appreciate the seriousness of the issues involved, and/or the existence of divergent views.[7] Instead, these courts simply assume the question of the recoverability of such interest is a routine matter to be dealt with summarily.[8] Finally, other courts inexplicably persist in perpetuating erroneous statements about this area of law.[9]

4. An example of such other types of interest is where a plaintiff incurs avoidable taxes due to a tax advisor's negligence and pays such taxes with borrowed funds thus incurring interest on such borrowing. Wynn v. Estate of Holmes, 1991 OK CIV APP 78, ¶¶ 31-34, 815 P.2d 1231, 1235-36, *overruled on another issue,* Stroud v. Arthur Anderson & Co., 2001 OK 76, 37 P.3d 783. Similarly, if a tax advisor's negligence prevents a plaintiff from obtaining low-cost, tax exempt financing, thereby forcing the plaintiff to incur higher, conventional market rate financing, the additional interest incurred might be recoverable. Billings Clinic v. Peat Marwick Main & Co., 797 P.2d 899, 913 (Mont. 1990).

5. *Tax Malpractice Damages*, *supra* note 1, at 723.

6. 749 N.W.2d 443 (Neb. 2008).

7. *See, e.g.*, Amato v. KPMG LLP, No. 06cv39, 2006 U.S. Dist. LEXIS 57091 (M.D. Pa. Aug. 14, 2006) in which the court granted the plaintiff's motion for reconsideration of an earlier motion in which the issue of the recoverability of such interest was entirely dealt with in two footnotes. The court acknowledged,

> [a] thorough review of our . . . [earlier order], submissions made by the parties, and applicable case law reveal that we glossed over what should have been a significant inquiry concerning the recoverability of interest as a proper measure of damages to Plaintiffs' claims. It is entirely appropriate for us to take this opportunity to comprehensively address the circuit split concerning this issue and to reconsider our prior erroneous determination that plaintiffs' claims for the recoupment of interest paid to the IRS ought to be dismissed at the pleadings stage . . . .

Id. at *8.

8. *Id.*

9. *See, e.g.*, Malone v. Clark Nuber, P.S., No. C007-2046RSL, 2008 U.S. Dist. LEXIS 48461 at *50 (W.D. Wash. June 23, 2008) in which the court's entire discussion of the recoverability of interest is the following: "similarly, Washington follows 'the majority of jurisdictions holding that interest owed to the IRS is not recoverable' from defendants." *Id.* (quoting Leendertsen v. Price Waterhouse, 916 P.2d 449 (Wash. App. 1996)). The only problems with this sentence are first, that in 2008 it is very clear that the no interest recovery view is not the majority view but very distinctly a minority view. *See Tax Malpractice Damages*, *supra* note 1, at 723 n.109. In addition, the view was also the minority view in 1996 when *Leendertsen* was decided. *See* Caroline Rule, *What and When Can a Taxpayer Recover from a Negligent Tax Advisor?*, 92 J. Tax'n 176, 177-78 (2000),

In my view, this area is relatively straightforward. There are three views that have developed. Once the views are apprehended, it should be relatively easy for a court to choose which view to follow. By presenting and analyzing the three views, this area will be appropriately elucidated and subsequently given the thoughtful attention it warrants.

In Part II, I will focus upon each of the three views and explore the rationale for each view. In Part III, I will trace the development of each of the views, especially the minority view and more modern, intermediate view. The goal of this discussion is to arrive at a tally of the jurisdictions following each view, remaining fully cognizant that such tallies are, at best, subject to dispute and also quite transient. My reflections on each of the three views and their approaches will be presented in Part IV. My conclusion is that the minority view, while having made an important contribution to the development of the law in this area, should give way to the modern, intermediate view and that the few states that continue to follow it should change and adopt the modern view. A brief conclusion will follow in Part V.

II. RECOVERABILITY OF INTEREST ON A TAX UNDERPAYMENT—THREE VIEWS[10]

Three views have developed with respect to the recoverability of interest on a tax underpayment. According to the more established traditional view that is the majority view,[11] such interest is recoverable from a defendant just like any other damages proximately caused.[12] A

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who, in an article published in March 2000 listed four states in the no interest recovery view and fourteen states allowing interest recovery. Most of the authorities cited for the fourteen majority view states predated *Leendertsen*, which was decided in 1996. *See infra* Part III, in which I present a current tally of states following each of the three views.

10. This portion of the article is primarily adapted from *Tax Malpractice Damages*, *supra* note 1, 723-31.

11. Part III of this article will focus on how many states follow each approach.

12. *See, e.g.*, Jobe v. Int'l Ins. Co., 933 F. Supp. 844, 860 (D. Ariz. 1995) *order withdrawn pursuant to settlement*, 1 F. Supp. 2d 1403 (D. Ariz. 1997); Jones v. Childers, No. 88-85-CIV-T-22C, 1992 WL 300845, at *12 (M.D. Fla. June 26, 1992), *aff'd and rev'd on other grounds*,18 F.3d 899 (11th Cir. 1994); Wynn v. Estate of Holmes, 1991 OK CIV APP 78, ¶ 34, 815 P.2d 1231, 1236, *overruled on another issue by* Stroud v. Arthur Anderson & Co., 2001 OK 76, 37 P.3d 783; Jerry Clark Equip., Inc. v. Hibbits, 612 N.E.2d 858, 861-63, 865 (Ill. App. Ct. 1993); Dail v. Adamson, 570 N.E.2d 1167, 1169 (Ill. App. Ct. 1991); Sorenson v. Fio Rito, 413 N.E.2d 47, 51, 53, 55 (Ill. App. Ct. 1980); Cameron v. Montgomery, 225 N.W.2d 154, 155-56 (Iowa 1975); Slaughter v. Roddie, 249 So. 2d 584, 586 (La. Ct. App. 1971); Warmbrodt v. Blanchard, 692 P.2d 1282, 1284 n.2 (Nev. 1984); Hall v. Gill, 670 N.E.2d 503, 506 (Ohio Ct. App. 1995); Wyatt v. Smith, Nos. 92 CA 104, 91 CV 400, 1993 WL 518630 at *1, *5 (Ohio Ct. App. Dec. 15, 1993); Harrell v. Crystal, 611 N.E.2d 908, 913-14 (Ohio Ct. App. 1992); King v. Neal, 2001 OK CIV APP 11, ¶¶ 1-13, 19 P.3d 899, 900-02; Merriam v. Cont'l Cas. Co., No. 98-2522-FT, 597 N.W.2d 774, 1999 WL 326183

second view, that is the minority view, is diametrically opposite to the first view and absolutely prohibits the recovery of such interest.[13] This view developed from approximately 1986 to 1996.[14] A third view, a middle view followed in a number of states, permits the recovery of such interest, but only to the extent it exceeds the interest actually earned by the plaintiff on the underpaid taxes.[15] This last view initially started in 1999 and seems to be the preferred view of most recent cases.[16]

The starting point in this inquiry is the traditional view that since the defendant's negligence caused the plaintiff to incur the interest expense, the interest is recoverable under the normal theory of damages for negligence, which is to make the plaintiff whole.[17] Thus, many cases simply include the interest as an element of recoverable damages.[18]

The basic reason for the opposite view denying recovery of the interest is that to permit a recovery would result in a windfall for the plaintiff.[19] The plaintiff would have both the use of the tax money as well as a recovery of the interest paid for the use of that money.[20] According to this view, the interest charged for a tax underpayment is not a penalty imposed upon the taxpayer.[21] Rather, it is merely a charge for the use of money that really belonged to the government rather than the plaintiff.[22] To put it differently, allowing the plaintiff both use of the tax money and a recovery of the interest from the defendant results in an interest-free loan to the plaintiff "for the period during which the tax[es] were unpaid."[23] This view follows the approach of federal securities law

at *4-5 (Wis. Ct. App. May 25, 1999) (table opinion); Adel v. Parkhurst, 681 P.2d 886, 890 (Wyo. 1984). *See also* McCulloch v. Price Waterhouse LLP, 971 P.2d 414, 415 (Or. Ct. App. 1998).

13. *See, e.g.*, Eckert Cold Storage, Inc. v. Behl, 943 F. Supp. 1230, 1235 (E.D. Calif. 1996); Orsini v. Bratten, 713 P.2d 791, 794 (Alaska 1996); Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990); *Leendertsen*, 916 P.2d at 451.

14. *See supra* note 13.

15. *See, e.g.*, Streber v. Hunter, 221 F.3d 701, 734-35 (5th Cir. 2000); Frank v. Lockwood, 749 N.W.2d 443 (Neb. 2008); Ronson v. Talesnick, 33 F. Supp. 2d 347, 353-54 (D.N.J. 1999); O'Bryan v. Ashland, 2006 SD 56, ¶ 20, 717 N.W.2d 632, 638-39; Amato v. KPMG LLP, No. 06cv39, 2006 U.S. Dist. LEXIS 57091 (M.D. Pa. Aug. 14, 2006).

16. *See infra* Part III.

17. *See, e.g.*, *Jobe*, 933 F. Supp. at 860; *Jerry Clark Equip., Inc.*, 612 N.E.2d at 863, 865; *Dail*, 570 N.E.2d at 1169; *Harrell*, 611 N.E.2d at 913-14; *King*, 2001 OK CIV APP 11, ¶ 13, 19 P.3d at 902; *Merriam*, 597 N.W.2d 774, 1999 WL 326183, at *2.

18. *See supra* note 17.

19. *See* cases cited *supra* note 13.

20. *See* cases cited *supra* note 13.

21. *See, e.g.*, *O'Bryan*, 2006 SD 56, ¶¶ 13-15, 717 N.W.2d 632, 636-37.

22. *Id.*

23. Caroline Rule, *What and When Can a Taxpayer Recover from a Negligent Tax Advisor?*, 92 J. Tax'n 176, 177 (2000) (citing the reasoning used by jurisdictions in Alaska, California, New York, and Washington).

for securities fraud claims under Rule 10b-5, under which such interest also is not recoverable.[24]

Leendertsen v. Price Waterhouse, which adopted the no-interest-recovery view in Washington State, suggested two additional justifications for this result.[25] First, a defendant may not be held responsible for such damages because there is no proximate causation; the rate of return earned by a plaintiff on such funds is due to the plaintiff's exercise of independent "judgment as to where to invest the money."[26] The court seemed to be concerned that "damages from poor investing are too speculative to blame [on] defendants."[27] Also, the court was concerned with the "difficulty of proving where the money was invested."[28]

In *McCulloch v. Price Waterhouse LLP.*, the Court of Appeals of Oregon gave short shrift to these concerns.[29] Here too, the court, as a matter of first impression, was faced with the decision of whether interest paid on a tax underpayment is recoverable as damages.[30] In deciding, contrary to *Leendertsen*, that such interest is recoverable, the court simply held that similar issues were dealt with satisfactorily under Oregon law either by the jury where enough evidence to get to a jury was introduced by the plaintiff or by the court directing a verdict in cases where there was inadequate evidence to get to a jury.[31] In other words, such issues were properly to be determined by the trier of fact.[32]

The third view is a modern, intermediate view between the previous two extremes that was developed in *Ronson v. Talesnick*[33] and *Streber v. Hunter*.[34] It seems to be a reaction primarily to the harsh results that may occur from a rigid application of the no-interest-recovery view. The logic of the no-interest-recovery view initially seems compelling because when a plaintiff obtains and keeps money she or he is not

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24. *See, e.g.*, Streber v. Hunter, 221 F.3d 701, 734 (5th Cir. 2000) (citing DCD Programs, Ltd. v. Leighton, 90 F.3d 1442, 1449 (9th Cir. 1996)); Stone v. Kirk, 8 F.3d 1079, 1092-93 (6th Cir. 1993); Freschi v. Grand Coal Venture, 767 F.2d 1041, 1051 (2d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986). *Alpert v. Shea Gould Climenko & Casey*, relied on *Freschi* in denying recovery of such interest. 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990).
25. 916 P.2d 449, 451-52 (Wash. Ct. App. 1996).
26. *Id.* at 451.
27. *Id.* at 452.
28. *Id.*
29. 971 P.2d 414, 419 (Or. Ct. App. 1998).
30. *Id.* at 417.
31. *Id.* at 419.
32. *Id.*
33. 33 F. Supp. 2d 347, 353-54 (D. N.J. 1999).
34. 221 F.3d 701, 734-35 (5th Cir. 2000).

entitled to, it seems appropriate to impose an interest charge for the use of this money when the money is repaid. If this interest charge were recoverable from the defendant, logic further suggests the plaintiff would enjoy a windfall of having enjoyed the interest-free use of the money.[35] However, simply denying any recovery of such interest is based on the tacit assumption that the theoretical value of the use of the money is always exactly equal to the interest paid to the Internal Revenue Service ("IRS") or a state and that these amounts always net out, leaving no net recoverable damages. However, there are several practical problems with this theoretical scenario. As an initial matter, it assumes the plaintiff taxpayer has available money to invest equal to the tax underpayment, the earnings on which offset the interest charged for the underpayment. Frequently, however, a plaintiff will not have any available funds to invest so there are no earnings to offset the interest payable to the IRS.[36] Additionally, the theoretical scenario assumes the taxpayer can earn a rate of return on his or her investable funds equal to the interest charged by the IRS, which often may not be true. Finally, the no-interest-recovery approach does not take into account the hardship to a plaintiff who has to make an unexpected payment, which may not have been budgeted.[37]

In *Ronson*, the plaintiff taxpayer invested in tax shelter partnerships from 1980 through 1983 and claimed losses from the partnerships on his tax returns.[38] Subsequently, the IRS began questioning the deductibility of these losses.[39] In mid-1986, the taxpayer sought advice from the defendant accountant on how to stop the accrual of interest on the amount that would be owed if these losses were ultimately disallowed.[40] The accountant advised the taxpayer to send the IRS a cash bond for $91,300, which the taxpayer did in June 1986.[41] In 1996, the IRS audited the taxpayer and determined the cash bond was too low and that

35. Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (N.Y. App. Div. 1990).

36. *See, e.g.*, Wynn v. Estate of Holmes, 1991 OK CIV APP 78, ¶ 29, 815 P.2d 1231, 1235 *overruled on another issue by* Stroud v. Arthur Anderson, 2001 OK 76, 37 P.3d 783. As a theoretical matter, even if the plaintiff does not have financial liquidity and does not have available an amount of funds to invest, the financial benefit of having had the government's funds still has occurred. In the absence of the tax underpayment, the plaintiff may have had to either do without certain expenditures or borrow a similar amount to meet his or her needs, thereby benefiting by the amount of interest not incurred.

37. *See* Rule, *supra* note 23, at 177.

38. 33 F. Supp. at 349-50.

39. *Id.*

40. *Id.* at 350.

41. *Id.*

interest of approximately $235,000 was still due.[42] The taxpayer then filed suit, seeking recovery from the accountant of the additional interest owed by the taxpayer.[43]

The only damages sought by the plaintiff in *Ronson* was the interest owed the IRS.[44] The defendant moved for summary judgment on the ground that interest is never recoverable as damages and that the suit therefore must be dismissed since an essential element of the cause of action (i.e., damages) was absent.[45] The federal district court determined that New Jersey law applied and that New Jersey had no law on point.[46] Therefore, the court had to determine how the New Jersey Supreme Court would rule on this issue.[47]

In deciding the issue, the court in *Ronson* initially recognized the split between the no-interest-recovery and the interest-recovery views.[48] Based on New Jersey's public policy that a tortfeasor should not benefit from the ingenuity of a harmed plaintiff, the court decided that New Jersey would permit the recovery of interest.[49] According to the court, prohibiting the recovery of interest from a negligent accountant permits the tortfeasor to benefit from the presumption that a harmed taxpayer has been or should have been ingenious enough to (1) maintain a sum of money that he would have otherwise had to pay over to the IRS and (2) invest that money in a manner in which he earned interest in an amount comparable to the interest rate charged by the IRS.[50]

Ronson, however, did not hold that New Jersey simply would adopt the view allowing recovery of the interest.[51] *Ronson* held that New Jersey law is more circumscribed.[52] It found that New Jersey follows a benefits rule that "'where a wrong creates a benefit that would not have existed but for the wrong, the damages flowing from the wrong are offset to the extent of the benefit received.'"[53]

Under this rule, a defendant could introduce "evidence of [a] benefit from the malpractice that could . . . reduce a plaintiff's

42. *Id.*
43. *Id.* at 351.
44. *Id.*
45. *Id.*
46. *Id.* at 351-52.
47. *Id.* at 352.
48. *Id.*
49. *Id.* at 355 (surmising that this was the New Jersey public policy underlying its collateral source rule).
50. *Id.*
51. *Id.* at 354.
52. *Id.*
53. *Id*. (quoting Garcia v. Meiselman, 531 A.2d 1373, 1377 (N.J. Super. Ct. Law Div. 1987).

recovery."[54] Thus, where a plaintiff earned some interest on the tax underpayment, but less than the amount paid to the IRS, the interest recovery would be limited to the difference.[55]

In *Streber,* the Fifth Circuit affirmed a damage award of exactly the same amount, which the court referred to as the "interest differential," that is, the difference between the interest earned by the plaintiff while she had the tax underpayment and the interest charged by the IRS.[56] *Streber* involved a combination of bad advice by the defendant attorney about how to report a transaction for tax purposes as well as subsequent bad advice not to settle the controversy on favorable terms.[57] At the jury trial below, the most significant element of damages awarded was for the interest differential.[58] On appeal, the defendants argued that such interest was not recoverable.[59]

At the commencement of its analysis, the Fifth Circuit noted that the issue was one of first impression in that court as well as in any other court.[60] The court recognized the split between the no-interest-recovery and the interest-recovery views[61] and also recognized that no interest recovery was permitted for federal securities fraud claims under Rule 10b-5.[62] The Fifth Circuit then held that the interest differential was recoverable because by awarding only the interest differential there was no double recovery as would occur if a plaintiff could recover all the interest paid to the IRS.[63] Additionally, an award of the interest

54. *Id.* at 355.

55. *Id.*

56. 221 F.3d 701, 734 (5th Cir. 2000).

57. *Id.* at 713-16.

58. *Id.* at 717.

59. *Id*. at 734.

60. *Id.* Strangely, the court cited the *Ronson* case at the end of the very paragraph in which it made this statement, apparently without realizing that *Ronson* had addressed the same issue. *Id*. *See also Ronson*, 33 F. Supp. 2d at 351, 354-55. The Fifth Circuit simply cited *Ronson* as one of the accountant malpractice cases allowing the recovery of interest. Perhaps the Fifth Circuit intended its observation to be directed at attorney tax malpractice rather than accountant tax malpractice. However, *Alpert v. Shea Gould Climenko & Casey* which was cited by the court as one of the accountant malpractice cases involved attorneys as defendants. *See* 559 N.Y.S.2d 312, 313 (N.Y. App. Div. 1990). *Jobe v. International Insurance Co.* similarly involved tax malpractice by an attorney though the case was brought by an insured law firm against its malpractice insurer. *See* 933 F. Supp. 844, 849 (D. Ariz. 1995), *order withdrawn pursuant to settlement*, 1 F. Supp. 2d 1403 (D. Ariz. 1997).

61. *Streber*, 221 F.3d at 734. The Fifth Circuit referred to this split as involving accounting malpractice claims, though two of the five cases cited by the court involved attorneys (*Alpert and Jobe*). *Jobe* involved a suit between an insured law firm and its malpractice insurer. 933 F. Supp. at 849; *see also Alpert*, 559 N.Y.S.2d at 313.

62. *Streber*, 221 F.3d at 734.

63. *Id.* at 734-35.

differential would prevent a plaintiff from being penalized for conservative investing.[64] The Fifth Circuit held that the result was correct under the applicable Texas law, which required damages adequate to make a plaintiff whole.[65] Likewise, the Texas law's requirements that consequential damages be "foreseeable" and proven with "reasonable certainty" were complied with because the evidence established that the defendant knew the plaintiffs intended to invest conservatively.[66] In addition, there was abundant evidence establishing exactly how much the plaintiffs earned from the tax underpayment and how much interest the IRS charged.[67]

While *Streber* seemed to uphold an award of exactly the same amount as contemplated in *Ronson*,[68] there is a very important procedural difference between the two approaches. In *Ronson*, the court awarded the plaintiff the full interest paid to the IRS, subject to the defendant being able to prove the existence of a benefit (i.e., earnings) received by the plaintiff that should reduce the plaintiff's recovery.[69] In *Streber*, on the other hand, the plaintiffs had the burden of proving the interest differential with "reasonable certainty."[70]

In *O'Bryan v. Ashland*, the Supreme Court of South Dakota was called upon to decide the issue of whether interest on a tax underpayment was recoverable.[71] Here, the case involved an error by the defendant accountant concerning the incorporation of plaintiff's business and the change from the cash method of accounting to the accrual method of accounting.[72] The accountant's error resulted in a substantial underpayment of tax that the IRS later discovered and for which the IRS imposed an interest charge on the plaintiff.[73] At trial, the defendant accountant conceded his negligence and the only issue was the amount of damages recoverable.[74] Both parties argued extensively before the jury as to whether interest was recoverable, and the jury ultimately awarded the plaintiff the interest charged by the IRS, which

64. *Id.*
65. *Id.* at 735.
66. *Id.*
67. *Id.*
68. *Id.* at 740; Ronson v. Talesnick, 33 F. Supp. 2d 347, 355 (D. N.J. 1999).
69. 33 F. Supp. 2d at 355.
70. 221 F.3d at 735.
71. 2006 SD 56, ¶ 12, 717 N.W.2d 632, 636.
72. *Id.* ¶ 1, 717 N.W.2d at 633-34. For a very brief overview of tax accounting methods, see JOHN E. DAVIDIAN & JACOB L. TODRES, REDUCING PERSONAL INCOME TAXES: A GUIDE TO DEDUCTIONS AND CREDITS § 1.06 (Law Journal Seminars Press 1998).
73. 2006 SD 56, ¶ 4, 717 N.W.2d at 634.
74. *Id.* ¶ 6, 717 N.W.2d at 635.

was calculated to be around $39,000.[75] On appeal, the issue was whether such interest may be recovered as damages under South Dakota law.[76]

After recognizing the existing split between the no-interest-recovery and interest-recovery views and examining each view, the South Dakota Supreme Court placed itself firmly with those states that refuse to adopt a blanket no-interest-recovery rule.[77] The court did this in conformity with its own precedent requiring the injured party be made whole.[78] After concluding that such interest may be recoverable, the court affirmed the jury award of interest as being supported by the evidence.[79] The court then went on to seemingly endorse the approach taken by *Ronson* to allow a defendant to come forward with evidence of a benefit received by the plaintiff from the malpractice that would reduce the plaintiff's recovery.[80] According to the court, such an approach would "cut a pragmatic course between two rigid theories."[81] However, the court stopped short of adopting the *Ronson* approach and left that for a future case.[82]

What is notably absent from *O'Bryan's* analysis is any discussion of, or even reference to, the *Streber* case, which essentially follows *Ronson* and, together with *Ronson*, seems to anchor the intermediate view on this issue.

In *Amato v. KPMG LLP.*, the federal district court in Pennsylvania followed *O'Bryan*, after agreeing that it "provides an excellent template for surveying the legal debate about recovery of interest paid to the IRS."[83] In *Amato,* the federal district court was applying Pennsylvania

75. *Id.* ¶ 9, 717 N.W.2d at 636.

76. *Id.* ¶ 10, 717 N.W.2d at 636.

77. *Id.* ¶ 21, 717 N.W.2d at 639.

78. *Id.*, 717 N.W.2d at 639 (quoting Hulstein v. Meilman Food Indus., Inc., 293 N.W.2d 889, 891 (S.D. 1980)).

79. *Id.* at ¶ 23, 717 N.W.2d at 639-40.

80. *Id.* at ¶ 24, 717 N.W.2d at 639-40.

81. *Id.*, 717 N.W.2d at 640.

82. *Id.*, 717 N.W.2d at 640.

83. Amato v. KPMG LLP, No. 06cv39, 2006 U.S. Dist. LEXIS 57091, at *5 (M.D. Pa. Aug. 14, 2006). The procedural posture of *Amato* is fascinating. At the heart of the case is a claim by the plaintiffs that the defendants put them in an ineffective tax shelter prevalent in the late 1990s to early 2000s. The complaint was filed in Pennsylvania court on October 28, 2005. It was removed to the federal district court on January 6, 2006. On June 13, 2006, the court issued an order addressing a number of different motions made by the parties. Without really focusing on the issues surrounding the recoverability of interest, the court granted one of the defendant's motions which resulted in precluding the plaintiffs from recovering any interest paid to the IRS. *Id*. at *1. The *O'Bryan* case was issued on June 21, 2006. *Id*. at *4-5. The present motion for reconsideration of the preclusion of any interest recovery was filed on June 27, 2006. *Id*. at *1.

law. After noting that Pennsylvania had no law on point and after analyzing the split in authority, the court held

> The better practice is to reject a blanket rule forbidding interest recovery in professional malpractice actions. Instead, we align ourselves with those jurisdictions that leave the issue as to whether a taxpayer has been damaged to the trier of fact, with the burden of proof upon the taxpayer. Therefore, we conclude that interest paid to the IRS may be a recoverable element of damages, depending upon the facts of the case. [84]

Frank v. Lockwood[85] is the most recent case to focus on the recoverability of interest on a tax underpayment. While firmly placing itself within the newer, third view, the case contains extensive analysis of the relevant issues.[86] This is probably due to the fact that the procedural difference noted above between the *Ronson* approach and *Streber's* interest differential approach[87] is exactly the bone of contention between the majority and the dissent.

In *Frank*, the ultimate issue before the Supreme Court of Nebraska was the recoverability of federal and Nebraska interest and penalties incurred by the plaintiffs, Mr. and Mrs. Frank, on the late payment of their taxes and the late filing of their tax returns for 2001.[88] There was evidence that their accountant, defendant Fred Lockwood, failed to advise them to pay estimated taxes for 2001 when, on April 15, 2002, he advised them to file for an extension of time to file their 2001 federal and Nebraska income tax returns.[89] After trial, the jury awarded the plaintiffs the full amount of interest and penalties paid to the IRS and Nebraska.[90] The trial judge denied several motions by the defendant for a directed verdict and for judgment notwithstanding the verdict.[91] On appeal, the issue before the Supreme Court of Nebraska was whether the defendant suffered recoverable damages.[92]

With respect to the recoverability of interest incurred by the plaintiffs on the late payment of their taxes, the Supreme Court of Nebraska stated several times that it rejected a blanket rule that

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84. *Id*. at *6.
85. 749 N.W.2d 443 (Neb. 2008).
86. *Id.* at 451-53.
87. *See supra* text accompanying notes 69-70.
88. 749 N.W.2d at 451.
89. *Id*. at 448.
90. *Id*. at 448-49.
91. *Id.*
92. *Id.* at 451.

precluded the recoverability of interest on taxes as an item of damages.[93] It also stated the converse proposition several times, that it was adopting a rule that such interest is available as an item of damages.[94] However, the court made it very clear that the burden of proof was on a plaintiff to specifically establish the existence of such damages.[95] Because the plaintiffs in *Frank* did not satisfy this burden of proof, interest was not recoverable.[96]

The burden of proof placed upon plaintiffs by the court seems to be a very heavy one. The court, though ultimately not adopting the minority, no-interest-recovery view, seemed in basic agreement with this view's approach:

> As noted above, we generally agree with the reasoning of other courts that interest paid to the IRS represents a payment for use of money and that therefore, a person who has use of the money is not generally damaged by the payment of interest. We recognize that there may be circumstances under which a plaintiff actually is damaged, but the burden remains on the plaintiff to prove that such circumstances exist. . . . "[T]o the extent that the I.R.S. charges the market rate, interest is not a proper element of damages" . . . . To the extent that interest charged by the IRS is above the market rate or does not reflect the value of the use of the money, we think it is the plaintiff's duty to so prove . . . .[97]

Previously, the court indicated that a plaintiff might incur damages from the payment of such interest if he or she could show either that he or she could have borrowed money at the relevant time at a rate below that imposed by the taxing authorities, or if he or she had enough money to pay the taxes but the value of the use of such money during the relevant period was less than the interest rate charged by the taxing authorities.[98] Though the court never explained the second situation, presumably, it would exist where a plaintiff could not earn as high a rate of return on his funds as the interest charged by the taxing authorities.[99]

The approach of the majority in *Frank* was to create a presumption that normally the payment of interest does not represent damages and

93. *Id*. at 451-53.
94. *Id*.
95. *Id*.
96. *Id.* at 453-54, 456.
97. *Id.* at 453 (internal citation omitted).
98. *Id.* at 452.
99. See the court's discussion of the interest differential approach where it seems to acknowledge that an interest differential, if proven, might be recoverable. *Id.* at 453-54.

that a plaintiff has the burden of proving the contrary.[100] The dissent, which disagreed only with the majority's approach to the recovery of interest issue, disagreed with this presumption.[101] The dissent's approach is the diametrical opposite of the majority's. In the dissent's view, the plaintiffs would not have incurred any interest payment but for the defendant's negligence.[102] As such, the dissent's position is that the recovery of the interest payment does not place the plaintiffs in a better position.[103] The dissent then concedes that the harm caused by the defendant's negligence might be offset by the benefit of plaintiffs' having had use of the money, but that the burden of proving this "special benefit" belongs on the defendant.[104]

The disagreement between the majority and the dissent seems to be the same as the disagreement between the *Ronson* and the *Streber* approaches to the new, third view.[105] All agree that the previous approaches of either always permitting the recovery of all interest incurred on a tax underpayment, or never permitting the recovery of any such interest are incorrect. The issue ultimately seems to devolve into a burden of proof question; one, which in actuality seems to depend on one's starting point. If the starting point is that the payment of interest to a taxing authority is not really damages (i.e., per the no-interest-recovery view), then the burden of proving an exception to the rule belongs on the plaintiff—as the majority in *Frank* and the *Streber* interest differential approach hold. If the starting presumption is that the payment of interest to a taxing authority does constitute damages (i.e., per the traditional, recovery-of-interest view), then the burden of proving a "special benefit" to the plaintiff belongs on the defendant—as the dissent in *Frank would hold* and as *Ronson did* hold.

The dissent in *Frank* specifically adopts the *Ronson* approach,[106] and the majority in *Frank* specifically rejects the Ronson approach.[107] Interestingly, however, the majority in *Frank,* instead of adopting *Streber's* interest differential approach, explicitly refuses to do so.[108] It does go out of its way, however, not to reject this approach, but to leave this for another day:

100. *Id.* at 453.
101. *Id.* at 456-57.
102. *Id.* at 457.
103. *Id.*
104. *Id.*
105. *See supra* text accompanying notes 69-70.
106. 749 N.W.2d at 458-59.
107. *Id.* at 453-54.
108. *Id.* at 454.

> We do not reject the interest differential approach as a possible measure of damages, and we think that it could be one of the circumstances referred to above in which a plaintiff could prove damages from the payment of interest to the IRS . . . . Because the Franks' evidence regarding interest differential was inadequate, we need not decide in this case whether we would adopt the interest differential approach.[109]

With respect to the difference between the *Ronson* and *Streber* approaches, it should be noted that in *O'Bryan*[110] the Supreme Court of South Dakota, while stopping short of adopting the *Ronson* approach, seemed to be inclined toward that approach.[111] In fact, it never even mentioned *Streber*.[112] Contrariwise, in *Amato*[113] the federal district court in Pennsylvania followed the *Streber* approach and placed the burden of proof on the plaintiff to show damages.[114] Similarly, Massachusetts also seems to follow the *Streber* approach.[115]

In connection with the third view, *McCulloch*[116] merits brief discussion. *McCulloch* was decided about seven weeks before *Ronson*,[117] and probably follows the traditional view that interest may be recovered as damages.[118] However, in refusing to follow the no-interest-recovery view, the opinion contains some language reminiscent of *Ronson's* approach.[119] In *McCulloch*, in response to an argument based on *Leendertsen* that interest damages on tax underpayments are speculative and therefore ought not be recoverable, the Oregon Court of Appeals stated that a plaintiff retains the burden of proof of the causation and the amount of each claim for damages and that, "to the extent that defendants choose to contend that the plaintiffs have failed to mitigate damages, discovery is available to augment such an allegation."[120] If the reference to mitigation of damages could be deemed to allow a

109. *Id.*
110. 2006 SD 56, 717 N.W.2d 632.
111. *Id.* ¶ 24, 717 N.W.2d at 639-40.
112. *Id.*, 717 N.W.2d at 639-40.
113. No. 06cv39, 2006 U.S. Dist. LEXIS 57091 at *5 (M.D. Pa., Aug. 14, 2006).
114. *See supra* text accompanying note 84.
115. *See* Miller v. Volk, 825 N.E.2d 579 (Mass. App. Ct. 2005). The court's entire discussion of the recoverability of interest consists of the following: "no proof was offered that the interest paid to the IRS on the deficiency exceeded the value to the plaintiffs of having use of the money in the meantime. There was, in other words, no proof of actionable damages." *Id*. at 582.
116. McCulloch v. Price Waterhouse LLP, 971 P.2d 414 (Or. Ct. App. 1998).
117. *Id.* at 414; Ronson v. Talesnick, 33 F. Supp. 2d 347 (D. N.J. 1999).
118. *McCulloch*, 971 P.2d at 419.
119. *Id.*
120. *Id*.

defendant to reduce recoverable damages by the earnings received by the plaintiff on the tax underpayment, this would be almost identical with the recovery permitted in *Ronson.*[121] The only difference would be one of nomenclature. *Ronson* refers to the reduction of recoverable damages as coming under New Jersey's benefit rule,[122] while *McCulloch* refers to the reduction instead as being by reason of mitigation.[123] Alternatively, this might simply be a reference to the universally recognized obligation imposed upon plaintiffs to mitigate avoidable damages and nothing more.[124]

It should be noted that in *King v. Deutsche Bank AG*,[125] the federal district court for the district of Oregon adopted the *Streber* interest differential approach.[126] However, there is no indication in the opinion that the court was declaring Oregon law. Indeed, in this small segment of the opinion in which only five cases are cited, none are from Oregon.[127] If the court were declaring Oregon law, its failure to discuss or even cite *McCulloch* would be inexplicable.

III. THE DEVELOPMENT AND STATUS OF THE THREE VIEWS

In this portion of the article, I will briefly explore the development of each of the views on the recoverability of interest on a tax underpayment. The goal is to then present a tally of the jurisdictions following each view. The tally is intended as a rough guide, not as being final or even very definitive. As an initial matter it should be emphasized that while I have done research to discover recent cases that have addressed the issue, I have not attempted to systematically research the law in each of the fifty states. Instead, my tally is based in part on an earlier tally presented in a 2000 article,[128] supplemented by the cases I have encountered in writing in this area[129] and by current research.

121. *See Ronson*, 33 F. Supp. 2d at 354-55.
122. *Id.*
123. *McCulloch*, 971 P.2d at 419.
124. *See generally* 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 21:10 (2009 ed.). Concomitantly, the mitigation costs become an element of recoverable damages.
125. No. CV04-1029HU, 2005 U.S. Dist. LEXIS 11317 (D. Or. May 9, 2005).
126. *Id.* at *110.
127. *Id.* at *108-10.
128. Rule, *supra* note 23, at 177-78.
129. *See, e.g.*, Jacob L. Todres, *Malpractice and the Tax Practitioner: An Analysis of the Areas in Which Malpractice Occurs*, 48 Emory L. J. 547 (1999); Jacob L. Todres, *Malpractice: Areas in Which It Occurs and the Measure of Damages—An Update*, 78 St. John's L. Rev. 1011 (2004); *Tax Malpractice Damages*, *supra* note 1.

There is always the possibility, or even the likelihood, that some cases will have eluded me.

The second caveat in attempting to prepare a tally is that tallies are inherently imprecise and there is often much room for differing interpretations of the underlying cases. It is not always clear what the view of any state is, nor, sometimes, even how to interpret any given case. For instance, Alaska is usually cited as a state following the no-interest-recovery view,[130] based on the 1986 case of *Orsini v. Bratten.*[131] Nevertheless, a 1991 Illinois case listed Alaska as permitting the recovery of such interest[132] based on the later Alaska case of *Thomas v. Cleary.*[133]

A second example of the difficulty of characterizing even what any given case stands for is illustrated by *O'Bryan v. Ashland*.[134] In *O'Bryan*, the South Dakota Supreme Court directly faced the issue of whether interest paid on a tax underpayment may be recoverable as damages from a negligent tax advisor.[135] At the beginning of the opinion, the court indicated that this issue was "never before decided in South Dakota."[136] Nevertheless, in *Ronson v. Talesnick*,[137] the New Jersey federal district court[138] listed South Dakota among the jurisdictions permitting the recovery of interest based on the earlier case of *Lien v. McGladrey & Pullen*.[139] While acknowledging what *Ronson* had done, and agreeing with the principle of law *Ronson* had gleaned from *Lien*, the South Dakota Supreme Court nevertheless emphatically stated that *Lien* never decided the issue, but that the court was doing so only in *O'Bryan*.[140]

Before proceeding to review the development of each view and my tally of states following the views, I wish to emphasize that when I refer to the view permitting the recovery of interest, I intend to refer to the situation where interest on the tax underpayment is recoverable as damages without qualification.[141] Similarly, when referring to the no-

130. *See, e.g.*, *Frank,* 749 N.W.2d 443, 451 (Neb. 2008).
131. 713 P.2d 791 (Alaska 1986).
132. Dail v. Adamson, 570 N.E.2d 1167, 1169 (Ill. App. 1991).
133. 768 P.2d 1090, 1094 n.10 (Alaska 1989).
134. 2006 SD 56, 717 N.W.2d 632, (S.D. 2006).
135. *Id.* ¶ 1, 717 N.W.2d at 633.
136. *Id.*, 717 N.W.2d at 633.
137. 33 F. Supp. 2d 347 (D. N.J. 1999).
138. *Id.* at 352.
139. 509 N.W.2d 421, 426 (S.D. 1994).
140. *O'Bryan*, 2006 SD 56, ¶ 15 n.9, 717 N.W.2d at 638 n.9.
141. The general duty of a plaintiff to mitigate damages is ignored because it pertains to all damages and not particularly to interest incurred on a tax underpayment.

interest-recovery view, I contemplate a view that absolutely refuses to permit the recovery of such interest, with no exceptions. The third or intermediate view refers to all views that are not absolute, but which sometimes permit the recovery of interest depending upon the facts and circumstances. For the tally, it is irrelevant whether the burden is initially placed upon the plaintiff to prove some interest differential or if the defendant is given the burden of proving some special benefit to the plaintiff. So long as there is not an absolute rule either permitting or denying the recovery of such interest, such position is placed in the third, intermediate view.

A. Traditional View—Permitting Interest Recovery

Under traditional tort damages doctrine, all damages directly flowing from a defendant's negligence are recoverable.[142] Accordingly, interest incurred on a tax underpayment is recoverable according to this view because it was caused by the tax advisor's negligence.[143] Today, the following thirteen states seem to follow this view: Alabama,[144] Arizona,[145] Florida,[146] Illinois,[147] Iowa,[148] Louisiana,[149] Maryland,[150] Nevada,[151] North Carolina,[152] Ohio,[153] Oklahoma,[154] Wisconsin,[155] and

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142. BERNARD WOLFMAN, ET. AL., STANDARDS OF TAX PRACTICE § 605.1.1 (6th ed. 2004); 3 MALLEN & SMITH, *supra* note 128, at § 21:1, § 21:4.

143. *Id. See also Tax Malpractice Damages*, *supra* note 1, at 724-25.

144. Jamison, Money, Farmer & Co. v. Standeffer, 678 So.2d 1061, 1066-67 (Ala. 1996).

145. Jobe v. Int'l Ins. Co., 933 F. Supp. 844, 860 (D. Ariz. 1995), *order withdrawn pursuant to settlement*, 1 F. Supp. 2d 1403 (D. Ariz. 1997).

146. Jones v. Childers, No. 88-85-CIV-T-22C, 1992 WL 300845, at *12 (M.D. Fla. June 26, 1992), *aff'd and rev'd on other grounds*, 18 F.3d 899 (11th Cir. 1994).

147. Jerry Clark Equip. Inc. v. Hibbits, 612 N.E.2d 858, 861-63, 865 (Ill. App. Ct. 1993); Dail v. Adamson, 570 N.E.2d 1167, 1169 (Ill. App. Ct. 1991); Sorenson v. Fio Rito, 413 N.E.2d 47, 51, 53, 55 (Ill. App. Ct. 1980).

148. Cameron v. Montgomery, 225 N.W.2d 154, 155-56 (Iowa 1975).

149. Slaughter v. Roddie, 249 So. 2d 584, 586 (La. Ct. App. 1971).

150. Shofer v. Stuart Hack Co., 723 A.2d 481 (Md. Ct. Spec. App. 1999), *cert. denied*, 731 A.2d 440 (Md. 1999).

151. Warmbrodt v. Blanchard, 692 P.2d 1282, 1284 n.2 (Nev. 1984).

152. Estate of Smith v. Underwood, 487 S.E.2d 807, 817 (N.C. Ct. App. 1997).

153. Hall v. Gill, 670 N.E.2d 503, 506 (Ohio Ct. App. 1995); Wyatt v. Smith, Nos. 92 CA 104, 91 CV 400, 1993 WL 518630, at *1, *5 (Ohio Ct. App. Dec. 15, 1993); Harrell v. crystal, 611 N.E.2d 908, 913-14 (Ohio Ct. App. 1992).

154. King v. Neal, 2001 OK Civ. App. 11, ¶ 1-13, 19 P.3d 899, 900-02; Wynn v. Estate of Holmes, 815 P.2d 1231, 1236 (Okla. Civ. App. 1991), *overruled on another issue* by Stroud v. Arthur Anderson & Co., 2001 OK 76, 37 P.3d 783 (Okla. 2001).

155. Merriam v. Cont'l Cas. Co., No. 98-2522-FT, 597 N.W.2d 774, 1999 WL 326183, at *4-6 (Wis. Ct. App. 1999) (table opinion).

Wyoming.[156] In a number of these states the courts simply awarded interest without discussing the issue.[157] In two of the states the law was declared by a federal court rather than a state court.[158]

Oregon probably also belongs with these thirteen states,[159] though there may be some uncertainty about this. I included it in this group in my recent *Tax Malpractice Damages* article,[160] as did another author in an earlier article.[161] Also, Oregon's *McCulloch* case was cited several times as standing for this proposition.[162] There is, however, reason to possibly place Oregon in the third view.

Oregon's position was declared in *McCulloch v. Price Waterhouse LLP*,[163] which involved a suit against an accountant and his firm for a deficient estate tax return.[164] At trial, the plaintiff recovered damages that included interest paid to the IRS.[165] One of the issues on appeal was the trial judge's refusal to rule that the recovery of damages for such interest is precluded as a matter of law.[166] In addressing this issue the court noted that the issue was one of first impression in Oregon.[167] The court extensively analyzed the no-interest-recovery view,[168] very clearly declined to adopt it, and held the plaintiff could recover such interest as damages.[169] What is not very clear is whether the court was simply adopting the traditional view which absolutely permits the recovery of interest or if it was really more circumscribed and was adopting a position that today would be characterized as fitting within the middle, third view. *McCulloch* itself must have assumed it was adopting the traditional view, since there was then no third view.[170]

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156. Adel v. Parkhurst, 681 P.2d 886, 889 (Wyo. 1984).

157. *See, e.g.*, Alabama, Arizona, Florida, Illinois, Maryland, Nevada, North Carolina, Ohio, Wisconsin, and Wyoming, s*upra* notes 142-47 and 150-56, respectively.

158. Arizona and Florida, s*upra* notes 145-46.

159. *See* McCulloch v. Price Waterhouse LLP, 971 P.2d 414 (Or. Ct. App 1998).

160. *Tax Malpractice Damages*, *supra* note 1, at 724 n.110.

161. Rule, *supra* note 23, at 178.

162. *See, e.g.*, *Frank*, 749 N.W.2d 443, 457 n.1 (Neb. 2008) (dissent); King v. Neal, 2001 OK Civ. App. 11, ¶ 13, 19 P.3d at 902. *But see* O'Bryan v. Ashland, 2006 SD 56, ¶ 17, 717 N.W.2d 632, 637.

163. 971 P.2d 414 (Or. Ct. App. 1998). *See also supra* text accompanying notes 29-32 and 116-25.

164. 971 P.2d at 415.

165. *Id.*

166. *Id.*

167. *Id.* at 417.

168. *Id.* at 417-19.

169. *Id.* at 419.

170. *McCulloch* was decided about seven weeks before *Ronson*. Also, none of the subsequent cases treat *McCulloch* as belonging to the third view.

If it was intending to establish a novel, new view, it would have needed to do so much more explicitly than the ambiguous, circumscribed language it used.[171]

In refusing to accept the defendant's argument, based on *Leendertsen*, that interest damages are too speculative to be recoverable *McCulloch* stated,

> We note that plaintiffs retain the burden of proof of the causation and amount of each claim of damage by a preponderance of the evidence and that, to the extent that defendants choose to contend that plaintiffs have failed to mitigate their damage, discovery is available . . . to augment their allegations. Accordingly, we decline to adopt the rule that defendants propose. We hold that, under the circumstances of this case, plaintiff is not barred as a matter of law from seeking damages based on the interest obligation that he owes to the IRS.[172]

If the court is simply referring to the generally recognized obligation imposed on all plaintiffs to prove their damages and also to mitigate damages, *McCulloch* is simply following the traditional view allowing the recovery of interest.[173] Its use of the qualifying clause, "under the circumstances of this case" in the last sentence in the above quote would simply be the general caution of careful jurists to decide a case as narrowly as possible.[174] Alternatively, if the reference to mitigation of damages could be deemed to allow a defendant to reduce recoverable interest damages by any earnings received by the plaintiff on the tax underpayment, then this is very similar to the type of recovery obtained in *Ronson*[175] or by *Streber's*[176] interest differential approach.[177] Since there was no third view extant yet, this second alternative seems

171. *See McCulloch*, 971 P. 2d at 419.
172. *Id.* at 419 (footnote omitted).
173. *See id.*
174. *Id.*
175. *See* 33 F. Supp. 2d. 347, 354-55 (D. N.J. 1999).
176. *See* 221 F.3d 701, 734-45.
177. In *O'Bryan*, the Supreme Court of South Dakota's discussion of *McCulloch* is ambiguous, and could almost be read to mean that *McCulloch* belongs in the newer third view. 717 N.W.2d 632, 637-38. However, the court in one string cite includes with *McCulloch* a reference to *Ronson*, clearly belonging in the third, intermediate view, but also references to Jobe v. International Ins. Co., 933 F. Supp. 844 (D. Ariz. 1995), *order withdrawn pursuant to settlement*, 1 F. Supp. 2d 1403 (D. Ariz. 1997), Dail v. Adamson, 570 N.E.2d 1167 (Ill. Ct. App. 1991), and Wynn v. Estate of Holmes, 1991 OK Civ. App. 78, 815 P. 2d 1231 (Okla. Ct. App. 1991), *overruled on another issue*, Stroud v. Arthur Anderson & Co., 2001 OK 76, 37 P.3d 783 the latter three belonging to the traditional view allowing interest. 2006 SD 56, ¶17, 717 N.W.2d at 637. Amato v. KPMG LLP, No. 06cv39, 2006 U.S. Dist. LEXIS 57091 at *16-17 (M.D. Pa. 2006), cites this discussion in *O'Bryan* with seeming approval.

remote. So, I assume, ultimately, *McCulloch* probably is simply another case following the traditional view, though, perhaps, a precursor of the third view to come. However, because of the possibility that *McCulloch* is not simply adopting the traditional view, I have not directly added Oregon to the list of majority view jurisdictions.

Just to confuse things a bit further, in *King v. Deutsche Bank AG*,[178] the federal district court for the district of Oregon simply adopted the *Streber* interest differential approach, the third view.[179] There is no indication in the case, however, that the court was declaring Oregon law. *McCulloch* is not even cited in the opinion and none of the five cases cited by the court in this small portion of the opinion is from Oregon.[180] I, therefore, believe the court in *King* adopted the *Streber* approach as its rule of law and was not addressing Oregon's position.

Before leaving the traditional view discussion, a brief caveat about Florida and North Carolina. Both of these were included among the states following the traditional view based on the cases cited above.[181] There is some language in *Loftin v. KPMG LLP* which might suggest the court viewed these states as belonging in the no-interest view.[182] This conclusion seems remote, though, and would be inconsistent with the cases noted above. I, therefore, believe it is appropriate to include Florida and North Carolina among the states following the traditional view.

Loftin involved a plaintiff who was put into two ineffective tax shelters.[183] His return for the earlier year was audited and the primary defendant, KPMG, encouraged him to settle.[184] While pursuing a settlement agreement with the IRS, the plaintiff sued the defendants for damages based on various causes of action including fraud and malpractice.[185] In this case, the court granted the defendants' motions to dismiss because there were no damages yet, and the case was therefore premature.[186] The state law claims involved were governed by either Florida or North Carolina law.[187] The court did not decide which law

178. No. CV 04-1029-HU, 2005 U.S. Dist. LEXIS 11317 (D. Or. Mar. 8, 2005).
179. *Id.* at *110.
180. *Id.* at *108-10.
181. *See supra* notes 161-81.
182. No. 02-81166-CIV-RYSKAMP/VITUNAC, 2002 U.S. Dist. LEXIS 26909, *24, 29 (S.D. Fla. Sept. 10, 2003).
183. *Id.* at *5-6.
184. *Id.* at *8.
185. *Id.* at *3-9.
186. *Id.* at *29.
187. *See id.* at *22 n.4.

governed because it held both laws were the same with respect to the issues involved.[188] After holding the plaintiffs' claims for fraud and negligent misrepresentation were premature, the court added "[i]ndeed if Loftin's settlement payments amount to nothing more than payment for . . . interest, he will not have suffered an injury."[189] Later, with regard to one of the plaintiff's malpractice claims, the court held it was premature "for the same reasons the rest of his state law claims are premature."[190] If this latter quote can be deemed to also incorporate by reference the court's earlier observation that simply paying interest is not damages to the plaintiff, the court is putting Florida and North Carolina in the no-interest view. However, this would seem to be reading too much into a general reference that the malpractice claim is also premature. Accordingly, I have ignored this possibility, and counted both states among traditional states allowing the recovery of interest.

B. No-Interest View

The no interest view developed between 1986 and 1996 in four states—Alaska,[191] California,[192] New York,[193] and Washington.[194] In California the law was declared by a federal district court.[195] While it briefly appeared this view may have picked up two[196] new adherents, Massachusetts and Nebraska,[197] this turned out not to be the case.[198]

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188. *Id.*

189. *Id.* at *24.

190. *Id.* at *29.

191. Orsini v. Bratten, 713 P.2d 791, 794 (Alaska 1986).

192. Eckert Cold Storage, Inc. v. Behl, 943 F. Supp. 1230, 1235 (E.D. Cal. 1996).

193. Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990).

194. Leendertsen v. Price Waterhouse, 916 P.2d 449, 451 (Wash Ct. App. 1996).

195. *Eckert*, 943 F. Supp. 1230.

196. As was noted in the text, *supra* text accompanying notes 182-90, Loftin v. KPMG LLP, No. 02-81166-CIV-RYSKAMP/VITUNAC, 2002 U.S. Dist. LEXIS 26909 (S. D. Fla. Sept. 10, 2003) might possibly be read to state that Florida and North Carolina also follow this view. However, this is ignored herein because such an interpretation seems quite strained and there are cases in each state putting them in the traditional view allowing the recovery of interest. *See, e.g.*, Jones v. Childers, No. 88-85-CIV-T-22C, 1992 WL 300845, at *12 (M.D. Fla. June 26, 1992), *aff'd and rev'd on other grounds*,18 F.3d 899 (11th Cir. 1994); Estate of Smith v. Underwood, 487 S.E.2d 807, 817 (N.C. Ct. App. 1997).

197. *See* Sorenson v. H&R Block, Inc. No. 99-10268-DPW, 2002 U.S. Dist LEXIS 18689, at *45-46 (D. Mass Aug. 27, 2002), *aff'd*, 107 F. App'x 227 (1st Cir. 2004); J.D. Warehouse v. Lutz & Co., 639 N.W.2d 88, 92, 93-94 (Neb. 2002).

198. *See infra* text accompany notes 252-70.

Currently, these four states, and the original cases in which they adopted the no-interest view, are still cited as the only followers of this view.[199]

Except for New York, there have not been any notable developments in the other three states following this view. In Alaska, the no-interest view was promulgated by the Alaska Supreme Court in 1986 in *Orsini v. Bratten.*[200] There was some language in *Thomas v. Cleary*,[201] a 1989 decision of the Alaska Supreme Court, which was read by some out-of-state courts as being consistent with the traditional view allowing the recovery of interest.[202] However, several years later, in a case involving a breach of fiduciary claim against an estate's personal representative,[203] the Alaska Supreme Court held interest was not recoverable, based on *Orsini.*[204] *Thomas* was never even cited in the court's brief focus on this issue.[205]

In both California and Washington, recent cases reaffirmed adherence to the no-interest view based on *stare decisis*, and without any reexamination of the issues or reference to the recent emergence of the intermediate, third view.[206] Both *Fallon*[207] and *Malone*[208] were decided in federal district courts, not in state courts. In Washington, *Malone* simply followed *Leendertsen*, even to the point of repeating its erroneous statement that the no-interest view is the majority view.[209]

New York adopted the no-interest view in *Alpert v. Shea Gould Climenko & Casey.*[210] *Alpert* is still recognized as the New York position both inside[211] and outside[212] of New York. The reasoning of

199. *See, e.g.*, Frank v. Lockwood, 749 N.W.2d 443, 451 (Neb. 2008); Amato v. KPMG LLP, No. 06cv36, 2006 U.S. Dist. LEXIS 57091, at *15-16 (M.D. Pa. Aug. 14, 2006); O'Bryan v. Ashland, 2006 SD 56, ¶13-16, 717 N.W.2d 632, 636-37.

200. 713 P. 2d 791, 794 (Alaska 1996).

201. 768 P.2d 1090, 1091-92 n.5 (Alaska 1989).

202. *See, e.g.*, Dail v. Adamson, 570 N.E.2d 1167, 1169 (Ill. App. Ct. 1991). *Cf.* Jobe v. Int'l Ins. Co., 933 F. Supp. 844, 860 (D. Ariz. 1995), *order withdrawn pursuant to settlement*, 1 F. Supp. 2d 1403 (D. Ariz. 1997); *O'Bryan*, 2006 SD 56, ¶ 20, 717 N.W.2d at 638-39.

203. Gudschinsky v. Hartil, 815 P.2d 851, 852 (Alaska 1991).

204. *Id.* at 856.

205. *Id.*

206. *See* Fallon v. Locke, Liddell & Sapp, LLP, No. C-04-03210 RMW, 2008 U.S. Dist. LEXIS 67708, at *10 (N.D. Cal. Sept. 1, 2008); Malone v. Nuber, No. CO7-2046RSL, 2008 U.S. Dist. LEXIS 48461, at *50 (W.D. Wash. June 23, 2008).

207. 2008 U.S. Dist. LEXIS 67708.

208. 2008 U.S. Dist. LEXIS 48461.

209. *Id.* at *50.

210. 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990).

211. *See, e.g.*, Shalam v. KPMG LLP, 843 N.Y.S.2d 17, 19 (N.Y. App. Div. 2007); Gertler v. Sol Masch & Co., 835 N.Y.S.2d 178, 179 (N.Y. App. Div. 2007); Penner v. Hoffberg Oberfest Burger & Berger, 755 N.Y.S.2d 835 (N.Y. App. Div. 2003); Blumberg v. Altman, 841 N.Y.S.2d

Alpert is that the payment of interest is not damages but simply a payment for the use of money during a period of time the plaintiff was not entitled to it, and further, if interest were awarded as damages the plaintiff would have a windfall of having both the use of the money and recovering the interest thereon.[213] Approximately twelve years after *Alpert*, another panel of the same First Department that decided *Alpert* decided *Jamie Towers Housing Co. v. Lucas*,[214] which seems fundamentally inconsistent with *Alpert*.

In *Jamie Towers* the plaintiff, a residential housing cooperative, incurred over $470,000 in interest when its managing agent failed to timely pay real estate taxes for the 1991/1992 tax year.[215] In this suit the plaintiff was seeking to recover the interest from its former managing agent and its former accountant.[216] The lower court dismissed the complaint on defendant's summary judgment motion based upon *Alpert*.[217] The First Department reversed, holding *Alpert* inapposite.[218] The First Department's analysis in its entirety follows:

> Here, however, plaintiff, allegedly through no fault of its own, was unnecessarily caused to pay $472,043 in interest to the City due to its managing agent's failure to timely pay certain real estate taxes for the 1991/1992 tax year. As such, the recovery of such interest as an element of its damages would not constitute an impermissible windfall or put plaintiff in a "better position" than it was in prior to its managing agent's alleged misfeasance and it should be entitled to prove such damages, if any. Those would ordinarily be measured not by the difference in interest rates charged by the City and the IRS, but by the actual amount of interest and late charges paid to the City due to the alleged misfeasance, subject to any offset of the actual income derived from the funds in question during the relevant period of time.[219]

818, 836 (N.Y. Sup. Ct. 2007); and Thies v. Bryan Cave, 831 N.Y.S.2d 350, 2006 WL 2883815, at *11-12 (N.Y. Sup. Ct. 2006) (table), *aff'd*, 826 N.Y.S.2d 54 (N.Y. App. Div. 2006).

212. *See, e.g.*, Frank v. Lockwood, 749 N.W.2d 443, 451 (Neb. 2008); and Amato v. KPMG LLP, No. 06cv39, 2006 U.S. Dist. LEXIS 57091, at * 13-14 (M.D. Pa. Aug. 14, 2006); O'Bryan v. Ashland, 2006 SD 56, ¶13, 15, 717 N.W.2d at 636-37. *See also* Seippel v. Jenkens & Gilchrist, 341 F. Supp. 2d 363, 383-84 (S.D.N.Y.), *amended on reconsideration*, 03 CIV. 6942 (SAS), 2004 U.S. Dist. LEXIS 21589 (S.D.N.Y. 2004).

213. 559 N.Y.S.2d at 315.

214. 745 N.Y.S.2d 532 (N.Y. App. Div. 2002).

215. *Id.* at 533.

216. *Id.*

217. *Id*.

218. *Id.* at 533-34.

219. *Id*. (citation omitted).

It is very difficult to understand why *Alpert* is distinguishable. In both situations the plaintiff ended up retaining possession of money he, or it, was not entitled to.[220] In *Jamie Towers* it was due to the error of the managing agent in not paying real estate taxes.[221] In *Alpert* it was due to the error of the tax advisor in advising the plaintiff that he had legitimate tax reductions.[222] In both situations the plaintiff had use of the money until the error was discovered and the money repaid. Yet in *Jamie Towers* the First Department held the recovery of interest was not an *impermissible* windfall,[223] while in *Alpert* it held it would be.[224] The cases may differ because in *Alpert* the plaintiff intentionally sought the tax shelter, intentionally utilized it, and paid less taxes than otherwise would have been payable,[225] while in *Jamie Towers* the underpayment arose inadvertently due to an error.[226] Also, *Alpert* involved underpayment of income taxes[227] while *Jamie Towers* involved underpayment of city real estate taxes.[228] However, these seem to be distinctions without differences; in both instances the end result is the same: the plaintiff had use of a sum of money to which he or it was not entitled.

Despite the fact that *Jamie Towers* seems to be fundamentally inconsistent with *Alpert*, many later cases simply cite *Alpert* for the no-recovery-of interest proposition and never even bother to cite *Jamie Towers*.[229] While some cases do address the existence of *Jamie Towers*,[230] and attempt to distinguish it, their reasons for distinguishing

220. *See* Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (N.Y. App. Div. 1990)*;* Jamie Towers v. William B. Lucas, Inc., 745 N.Y.S.2d 532 (N.Y. App. Div. 2002).

221. *Jamie Towers*, 745 N.Y.S.2d at 533.

222. *Alpert*, 559 N.Y.S.2d at 313-314.

223. In *Jamie Towers* the measure of damages adopted by the court was that of the intermediate, third view, (i.e., the difference between the interest paid reduced by the actual income derived from the money during the relevant time). 745 N.Y.S.2d at 534.

224. *Alpert*, 449 N.Y.S.2d at 315.

225. 449 N.Y.S.2d at 313-14.

226. *Jamie Towers*, 745 N.Y.S.2d at 533.

227. *Alpert*, 449 N.Y.S.2d at 313-14.

228. *Jamie Towers*, 745 N.Y.S.2d at 533.

229. *See, e.g.*, Gertler v. Sol Masch & Co., 835 N.Y.S.2d 178, 179 (N.Y. App. Div. 2007); Penner v. Hoffberg Oberfest Burger & Berger, 755 N.Y.S.2d 835, 836 (N.Y. App. Div. 2003); Blumberg v.Altman, 841 N.Y.S.2d 818 (N.Y. Sup. Ct. 2007); Rosenbach v. Diversified Group, Inc., 819 N.Y.S.2d. 851, *available at* 2006 WL 1310656, at *6 (N.Y. Sup. Ct. 2006); Williams v. Sidley Austin Brown & Wood, 816 N.Y.S.2d 702, 2006 WL 684599, at *7 (N.Y. Sup. Ct. 2006) (table), *on reconsideration*, 824 N.Y.S.2d 759 (N.Y. Sup. Ct. 2006), *aff'd*, 832 N.Y.S.2d 9 (N.Y. App. Div. 2007)..

230. *See, e.g.*, Shalam v. KPMG LLP, 843 N.Y.S.2d 17, 19 (N.Y. App. Div. 2007); Thies v. Bryan Cave, 831 N.Y.S.2d 350, *available at* 2006 WL 2883815, at *5 (N.Y. Sup. Ct. 2006) *aff'd*, 826 N.Y.S.2d 54 (N.Y. App. Div. 2006).

it do not seem compelling. For instance, in *Thies v. Bryan Cave LLP*,[231] a case involving a suit against two law firms that gave opinions with respect to investments in an ineffective tax shelter, the court distinguished *Jamie Towers* because the plaintiff in *Thies* intentionally decided not to pay the taxes in question.[232] I fail to comprehend any difference in final result if the retained funds were obtained due to an oversight—forgetting to pay real estate taxes—or to intentionally and in good faith relying on an attorney's advice that a tax reduction was valid.

Similarly, in *Shalam v. KPMG LLP*, which also involved a suit against a tax advisor for advice to invest in a bad tax shelter, the First Department held interest was not recoverable per *Alpert.*[233] The court held that *Jamie Towers* (and also *Ronson*) were distinguishable because they involved "negligence by an accountant or other agent resulting in exposure to liability that would not have been incurred, 'but for their accountant's negligence."[234] Again, if paying interest for the use of funds that one is not entitled to does not constitute damages, why does the circumstance of how the funds were obtained matter? Also, the lower court in *Shalam* seems to have decided that *Alpert* governed, rather than *Jamie Towers*, because the facts of *Shalam* and *Alpert* were more analogous in that each involved a bad tax shelter.[235]

In *Apple Bank for Savings v. PricewaterhouseCoopers, LLP*,[236] a trial court within the First Department followed *Jamie Towers* and had a very original and novel interpretation of what *Alpert* stood for. In *Apple Bank* the issue before the court involved whether the defendant accounting firm gave the plaintiff bank incorrect advice concerning the tax consequences of how the bank redeemed stock from the estate of its sole shareholder.[237] The case arose on the defendant's motion for summary judgment dismissing the complaint.[238] One of the grounds asserted for dismissal was that under *Alpert* any interest incurred by the bank was not recoverable.[239] The court, however, denied the motion for summary judgment and read *Alpert* very narrowly to prevent the

231. 831 N.Y.S.2d 350, *available at* 2006 WL 2883815, at *5.

232. *Id*. at *5.

233. *Shalam*, 843 N.Y.S.2d at 18-19.

234. *Id*. at 19.

235. Shalam v. KPMG LLP, 112732/05, 2006 N.Y. Misc. LEXIS 2380, at *38-41 (N.Y. Sup. Ct. 2006).

236. 603492/06, 2009 N.Y. Misc. LEXIS 1176, at *2 (Sup. Ct. N.Y. Co. 2009), rev'd, 73 A.D.3d 438, 895 N.Y.S.2d 361 (1st Dep't. 2010).

237. *Id.* at *2-5.

238. *Id.* at *1-3.

239. *Id.* at *6.

recovery of interest only where the plaintiff inevitably would have incurred the tax liability even if the plaintiff had not relied on the faulty tax advice.[240] "However, if the tax liability would have been avoided but for the erroneous advice, it appears that . . . interest would be recoverable in order to make the plaintiff whole."[241] As authority for this proposition the court cited *Jamie Towers* and *Penner v. Hoffberg Oberfest Burger & Berger*.[242] *Penner*, however, is a very short opinion in which the court's entire focus on the recovery of interest (and back taxes) was to uphold the lower court's dismissal of plaintiff's cause of action, "since plaintiff's tax liability was not attributable, to an act or omission on defendants' part."[243] This hardly seems an adequate basis for such a dramatic narrowing of *Alpert* from simply holding there is never any recovery of interest in such situations.

While *Apple Bank* is the most recent exposition of *Alpert*, (a) it is a lower court holding, and one that is not officially reported, [244] (b) it was reversed on appeal, but solely on unrelated statute of limitations grounds,[245] (c) *Penner* seems to be very weak, if any, authority,[246] and (d) in light of the history of invisibility of *Jamie Towers*, it is unclear how strong the *Jamie Towers* precedent is. Accordingly, it is impossible to assess the strength of *Apple Bank*. Only time will tell if *Apple Bank* has successfully narrowed the scope of *Alpert*.

At some point in time, it appeared as if both Nebraska and Massachusetts might have adopted the minority view, but in both instances this was, at best, transient. In *J.D. Warehouse v. Lutz & Co.*,[247] the Nebraska Supreme Court indicated that the district court below had expressly held that interest paid to the IRS was not a proper element of damages for reasons that paralleled those of the minority view.[248] The Nebraska Supreme Court, however, never focused on this part of the

240. *Id.* at *6, 9.

241. *Id.* at *6. The court's holding also applied to the recoverability of additional taxes caused by the defendant's negligent advice.

242. *Id.* at *6-7. The court actually cited *Penner* first, but as a parenthetical.

243. Penner v. Hoffberg Oberfest Burger & Berger, 755 N.Y.S.2d 835, 836 (N.Y. App. Div. 2003).

244. *Apple Bank*, 2009 N.Y. Misc. LEXIS 1176.

245. As a threshold matter the trial court held the statute of limitations was tolled under the continuous representation doctrine. It therefore proceeded to the substantive issues. On appeal, the court held the statute of limitations was not tolled and dismissed the complaint as time-barred without addressing the substance.

246. *See supra* note 243.

247. 639 N.W.2d 88 (Neb. 2002).

248. *Id.* at 92.

lower court's opinion.[249] What, if anything, could have been made of this is now moot because in *Frank v. Lockwood*[250] the Nebraska Supreme Court placed Nebraska squarely in the intermediate, third view.[251]

The situation in Massachusetts is somewhat analogous to that of Nebraska, though the court that seemingly adopted the minority view was the local federal district court rather than a state court.[252] Also, the portion of the opinion addressing this issue is so internally inconsistent and erroneous that its validity is questionable.[253] *Sorenson v. H&R Block, Inc.*[254] involved an accusation by plaintiff that one of the defendant's employees reported his suspicions to the IRS that the plaintiff planned to file fraudulent 1993 income tax returns before the returns were actually filed.[255] Virtually all of plaintiff's claims for damages were dismissed except for a limited breach of contract claim that H&R Block did not keep his tax information confidential and a rather technical violation of the Massachusetts False and Deceptive Trade Practices Act.[256] Total damages of only $630 were awarded.[257] Any statements by the court concerning tort damages recoverable were probably, therefore, dicta, at best.

In *Sorenson*, the federal district court combined its discussion of the possibility of recovering additional taxes, interest, and penalties.[258] As to interest and penalties, the court stated that the Massachusetts courts had not addressed the issue, and that the weight of authority followed the no-interest recovery rule of *Alpert*.[259] The court then stated that *Eckert Cold Storage, Inc. v. Behl* reached the opposite conclusion based on California law, but *Eckert* nevertheless acknowledged that *Alpert* represented the majority view.[260] While *Eckert* and *Alpert* reached different results as to the recovery of additional taxes caused by the

249. *Id.*
250. 749 N.W.2d 443 (2008).
251. *See supra* text accompanying notes 85-110.
252. *See* Sorenson v. H&R Block, CIV.A.99-10268-DPW, 2002 U.S. Dist LEXIS 18689 (D. Mass. Aug. 27, 2002), *aff'd*, 107 F. App'x 227 (1st Cir. 2004).
253. *See id.* at *45-46.
254. 2002 U.S. Dist. LEXIS 18689.
255. *Id.* at *2-3.
256. *Id.* at *62.
257. *See* Sorenson v. H&R. Block, Inc., No. 03-2268, 2004 U.S. App. LEXIS 17723, at *3 (1st Cir. 2004).
258. *Sorenson*, 2002 U.S. Dist. LEXIS 18689, at *45-46.
259. *Id.* at *45.
260. *Id.* at *46.

negligence of a tax advisor, both follow the no-interest view[261] and the court was simply wrong when it stated they differed with respect to the recoverability of interest. Also, the recovery of penalties caused by a negligent tax advisor is very different from the treatment of interest on a tax underpayment. With regard to penalties, there is no issue of plaintiff having had use of the money or any windfall type of concern. Any penalties incurred are out-of-pocket damages and are clearly recoverable.[262]

Without belaboring any further the authoritativeness of *Sorenson* on this issue, it should be noted that in *Miller v. Volk*[263] the Massachusetts Appeals Court adopted the intermediate, third view,[264] thus removing Massachusetts from the no interest camp, even assuming *Sorenson* placed Massachusetts there to begin with.

C. Intermediate Third View

Most of the cases following the intermediate, third view have been discussed previously in Part II of this article. Thus, New Jersey, Texas, South Dakota, Pennsylvania, and Nebraska adhere to this view, as pronounced in *Ronson*, *Streber*, *O'Bryan*, *Amato* and *Frank*, respectively.[265] *Ronson*[266]and *Amato* were decided by the local federal district courts.[267] *Streber* was decided by the Fifth Circuit,[268] while *O'Bryan*[269] and *Frank*[270] were decided by the Supreme Courts of South Dakota and Nebraska, respectively. While South Dakota seemed favorably inclined towards *Ronson's* approach of awarding the plaintiff interest and imposing the burden on the defendant to show special benefits to the plaintiff, in *O'Bryan* the South Dakota Supreme Court declined to adopt the *Ronson* approach and left that issue for a later

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261. *See supra* notes 192-93 and 211-14.

262. *See, e.g.*, Frank v. Lockwood, 749 N.W.2d 443, 454-55 (Neb. 2008); Blumberg v. Altman, 841 N.Y.S.2d 818, 818. *See generally Tax Malpractice Damages*, *supra* note 1, at 731.

263. 825 N.E.2d 579 (Mass. App. Ct. 2005).

264. *Id*. at 582.

265. See *supra* text accompanying notes 101-16.

266. *Ronson's* articulation of New Jersey law was followed by Carroll v. LeBouef, Lamb, Greene & MacRae, L.L.P. 392 F. Supp. 2d 621, 629 (S.D. N.Y. 2005).

267. Ronson v. Talesnick, 33 F. Supp. 2d 347 (D. N.J. 1999); Amato v. KPMG LLP, No. 06cv39, 2006 U.S. Dist. LEXIS 57091 (M.D. Pa. Aug. 14, 2006).

268. 21 F.3d 701.

269. O'Bryan v. Ashland, 2006 SD 56, 717 N.W.2d 632.

270. Frank v. Lockwood, 749 N.W.2d 443 (Neb. 2008).

day.[271] While both *Amato* and the majority in *Frank* placed the burden of proof on the plaintiff to establish any interest damages, neither adopted the *Streber* interest differential approach.[272] *Amato* did this by silence,[273] while *Frank* explicitly left this for another day.[274]

In *Miller v. Volk* the Appeals Court of Massachusetts seemed to have summarily adopted the intermediate view without any express focus on the issues.[275] In holding that no proof of actionable damages existed as a result of claimed negligent tax advice, the court pointed to the fact that "no proof was offered that the interest paid to the IRS on the deficiency exceeded the value to the plaintiffs of having use of the money in the meantime."[276] The court, thus, also appears to place the burden of proof on the plaintiff.

Seippel v. Jenkens & Gilchrist involved a suit by an investor in a bad tax shelter to recover various damages incurred.[277] With respect to interest, the federal district court for the Southern District of New York held that Virginia law governed.[278] The court further held that Virginia courts had not directly addressed this issue.[279] Based on Virginia's approach to the "benefits rule," the court held Virginia would award interest paid by the plaintiff as damages, but permit the defendant to establish that a special benefit has been conferred upon the plaintiff that ought to be considered in mitigation.[280] In short, that Virginia would follow the same approach as New Jersey, as articulated in *Ronson.*

In *King v. Deutsche Bank AG*[281] the Oregon federal district court adopted the *Streber* interest differential approach.[282] While the court did take note of the parties' arguments and cited various cases on point, the court rather summarily adopted the *Streber* approach.[283] This is troubling because the court did not indicate if it was simply adopting this

271. *O'Bryan*, 2006 SD 56, ¶ 24, 717 N.W.2d at 640.

272. *Amato*, 2006 U.S. Dist. LEXIS 57091, at *18; *Frank*, 749 N.W.2d at 454.

273. *Amato*, 2006 U.S. Dist. LEXIS 57091, at *17-18. *Amato* did place the burden of proof on the plaintiff to show damages but it never referred to *Streber. Id.*

274. *Frank*, 749 N.W.2d at 454.

275. 825 N.E.2d at 581 (Mass. App. Ct. 2005).

276. *Id.* at 582.

277. 341 F. Supp. 2d 363 (S.D.N.Y. 2004), *amended on reconsideration*, 03 CIV 6942 (SAS), 2004 U.S. Dist. LEXIS 21589 (S.D. N.Y. Oct. 26, 2004).

278. *Id.* at 384.

279. *Id.*

280. *Id.* at 384-85.

281. No. CV04-1029HU, 2005 U.S. Dist. LEXIS 11317 (D. Ore. Mar. 8, 2005).

282. *Id.* at *110.

283. *Id.* at *108-10.

view for itself, or if this was meant to reflect the law in Oregon.[284] It seems almost impossible to assume this was intended as a statement of Oregon law because (a) the court never indicated it was so intended, and (b) the court never even cited the *McCulloch* opinion of the Oregon Court of Appeals that contained a very thoughtful and careful analysis of the issues.[285] In light of this, it seems that *King* should be read as adopting the *Streber* approach only for the federal district court for Oregon and nothing more.

D. Conclusion and Tally

The following table summarizes the conclusions reached in this part.

STATES FOLLOWING:		
Traditional View Allowing Recovery of Interest	No-Interest Recovery View	Intermediate View-Depends on Facts and Circumstances
Alabama	Alaska	Massachusetts
Arizona	California	Nebraska
Florida	New York	New Jersey
Illinois	Washington	Pennsylvania
Iowa		South Dakota
Louisiana		Texas
Maryland		Virginia
Nevada		
North Carolina		
Ohio		Federal district court for Oregon
Oklahoma		
Wisconsin		
Wyoming		
Totals 13	**4**	**7 (8?)**
(Oregon?)		

This table is intended solely as a current snapshot[286] and only as a very general guide. Cases may lend themselves to different interpretations and changes may always occur. The only thing that

284. *Id.*
285. *See supra* text accompanying notes 126-28 and 179-81.
286. As of late June 2010.

seems reasonably certain is that the traditional view allowing the recovery of interest is, and probably always was, the majority view.[287] The no interest view is clearly a minority view—even if the two transient adherents[288] are taken into account. Any statement in certain cases that this view is, or ever was, the majority view seems incorrect. The intermediate, third view seems to be growing and today has more adherents than the minority, no-interest view.

IV. REFLECTIONS ON THE THREE VIEWS

The development of the law on the recoverability of interest on a tax underpayment as damages is a wonderful case study of how law evolves. First came the traditional, majority view that such interest is recoverable as a simple application of traditional tort damage principles. Since the defendant's negligence caused the plaintiff to incur such interest costs, the costs were recoverable as damages under traditional doctrine. Over time, the injustice, or potential injustice, that such an absolute rule could create, became apparent. The spectre of awarding interest damages to a plaintiff who had use of the unpaid tax money caused the no-interest-recovery view to be born. This view dealt with the problem by adopting the exact opposite of the traditional approach and absolutely prohibited the recovery of such interest. While this certainly remedied the problem of possible unjust enrichment of a plaintiff who had both the use of the tax underpayment and who also recovered the interest paid for the use of such money, it created a different type of injustice, i.e., what about the plaintiff who did not earn as much on the money in his possession as the interest charged by the government? These concerns, in turn, spurred the development of the modern, intermediate, third view that eschewed absolutes and attempted to apply more precise justice by permitting the recovery of interest but only when, and to the extent, appropriate. While this latter view split into two different approaches as to how to cure the perceived problem—either by (1) presuming interest is not generally recoverable, but by permitting a meritorious plaintiff to prove otherwise, or (2) presuming interest is generally recoverable, but permitting the defendant to show a

287. Although there was no intermediate, third view recognized yet and although the list of specific states following the traditional view is a bit different, an authority in 2000 counted fourteen states (actually thirteen if a state counted twice is eliminated), as allowing a recovery of interest and the same four states as not allowing the recovery of interest. Rule, *supra* note 23, at 177-78.

288. See the discussion of Nebraska and Massachusetts, *supra* text accompanying notes 247-64.

special benefit to the plaintiff—both approaches seem to effectively deal with the problems wrought by both predecessor views.

In contemplating the three views, the intermediate, third approach clearly seems best. It eschews both extreme, absolute views and permits awarding damages based on the particular circumstances of the particular litigants before the court. This seems to be widely recognized because, as developed in Parts II and III above, since the *Ronson* case in 2000, no court unconstrained by precedent has adopted either the traditional, majority view or the minority view but, instead, has adopted some form of the intermediate, third view.[289] It, therefore, clearly deserves the appellation of the "modern" view.

While it might be nice if jurisdictions following the traditional and minority views would change and adopt the modern view, I am not certain if this is necessary for the traditional view jurisdictions. The reason for this is that most jurisdictions, perhaps even all, impose upon plaintiffs a duty to mitigate their damages.[290] If these jurisdictions would simply treat any earnings received (or, perhaps, receivable) by a plaintiff on tax underpayments as mitigating any interest damages otherwise recoverable by plaintiff, the result would be virtually the same as under the modern view. There would be no need to change their jurisprudence. As indicated previously, this might be exactly what Oregon did in *McCulloch*.[291]

With respect to the minority, no-interest view, I believe the situation is different. It certainly should not be adopted by any jurisdiction having no law on point. I also would urge that it should be replaced by the modern view in those four jurisdictions that follow it. My reasons for this are twofold. First, I believe this view was totally supplanted by the modern view and simply has run out of steam. It originated in 1986 in Alaska in *Orsini*.[292] New York adopted it in 1990 in *Alpert*,[293] and it was adopted in 1996 in California and Washington.[294] Although it may have gained two temporary adherents,[295] today it is still followed in only these same four states. While recent cases in these

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289. *See supra* text accompanying notes 33-128.

290. *See, e.g.*, 3 MALLEN & SMITH, *supra* note 124, §21:10; BERNARD WOLFMAN, ET AL., STANDARDS OF TAX PRACTICE §605.2.1 (6th ed. 2004).

291. *See supra* text accompanying notes 117-28, and 160-81.

292. Orsini v. Bratten, 713 P.2d 791 (Alaska 1996).

293. Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (N.Y. App. Dive. 1990).

294. Eckert Cold Storage, Inc. v. Behl, 943 F. Supp. 1230 (E.D. Cal. 1996); Leendertsen v. Price Waterhouse, 916 P.2d 449 (Wash. Ct. App. 1996).

295. *See* discussion of Nebraska and Massachusetts, *supra* text accompanying notes 247-64.

jurisdictions continue to follow it based on *stare decisis* principles,[296] it has gathered no new adherents since then. In addition, it may be showing early signs of erosion in New York, based on the recent *Apple Bank* decision that seems to follow *Jamie Towers* and the modern view.[297]

The second reason why I believe the minority view should be replaced is that it is based on a very weak foundation that appears to be flawed. The minority view is based on two legs: a logical argument and some sparse precedent. The basic logical argument of the minority view is that it is unfair to award interest paid on a tax underpayment as damages because the plaintiff had use of the money and, presumably, was able to earn interest on it while holding it.[298] This reason (and no precedent) was articulated first in *Orsini*[299] and was repeated by each of the other cases adopting this view.[300] *Alpert* also added the windfall articulation of this same argument, i.e., that if interest were awarded, a plaintiff would have a windfall of having had both the use of the money and the interest recovery as well.[301] Both of these points have been successfully refuted by the modern view which notes that the underlying tacit assumption of the minority view is that the value of the use of the money to the plaintiff is always exactly equal to the interest charged by the government for the tax underpayment. This is belied, according to the modern view, by the fact that a plaintiff may not have any available funds to invest so there are no earnings to offset the interest payment.[302] Additionally, even if the plaintiff does have funds available, he or she might not be able to earn as high a rate of return as the interest charged by the government. Finally, the minority view also ignores the hardship to a plaintiff who must make an unexpected payment which may not have been budgeted.[303]

As for the two possible additional reasons for the minority view suggested by *Leendertsen*: (1) that "damages from poor investing are too speculative to blame upon defendants" and that since plaintiffs decide where to invest, their exercise of this independent judgment somehow breaks the proximate causation link between the negligence

296. *See supra* text accompanying notes 207, 209, 212.

297. *See supra* text accompanying notes 237-44.

298. *See supra* notes 19-23.

299. Orsini v. Bratten, 713 P.2d 791, 794 (Alaska, 1996).

300. *See, e.g.*, Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990); *Eckert Cold Storage, Inc.*, 943 F. Supp. at 1235; *Leendertsen*, 916 P.2d at 451.

301. *Alpert*, 559 N.Y.S.2d at 315.

302. *See supra* text accompanying notes 33-37 .

303. *See supra* text accompanying notes 33-37.

and the damages; and (2) the difficulty in proving where the money was invested,[304] they have not been adopted by any other court.[305] The reason for this presumably is the same as the reason articulated by the Oregon Court of Appeals in *McCulloch*, when it gave short shrift to these arguments by noting that these were exactly the types of issues normally left to the finder of fact to resolve.[306]

As to the precedent upon which the minority view is based, it is sparse and distinguishable. *Orsini*, the first case to articulate the minority view, did so in only a few lines of text based solely on the use-of-the-money rationale without citing any precedent.[307] *Alpert*, the second case to adopt the minority view cited only two cases,[308] *Freschi v. Grand Coal Venture*[309] and *Cowart v. Lang*.[310] *Freschi* involved a defrauded tax shelter investor seeking recovery under the federal securities law and for common law fraud.[311] *Freschi*, however, based its entire analysis of the issue of the recoverability of interest on the same use-of-the-money rationale as *Orsini* and *Alpert*.[312] It never cited any other precedent.[313] When *Eckert* and *Leendertsen* adopted the minority view, apart from the use-of-the-money rationale, they relied only upon *Orsini*, *Alpert*, and two subsequent cases from Alaska and New York that simply followed *Orsini* and *Alpert*, [314] *Stone v. Kirk*[315] and *In re*

304. *Leendertsen*, 916 P.2d at 451-52.

305. In Malone v. Clark Nuber, P.S., Case No. C07-2046 RSL, 2008 U.S. Dist. LEXIS 48461 (W.D. Wash. June 23, 2008) the court did follow *Leendertsen* as establishing Washington's position on this issue. *Id.* at *50.

306. McCulloch v. Price Waterhouse LLP, 971 P.2d 414, 414-49 (Or. Ct. App. 1998).

307. Orsini v. Bratten, 713 P.2d 791, 794.

308. Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990).

309. 767 F.2d 1041 (2d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986).

310. 298 N.Y.S. 875 (N.Y. App. Div. 1937).

311. 767 F.2d at 1046. There was also a claim for legal malpractice for which the jury awarded damages of $440,000. However, the trial judge granted the defendants judgment notwithstanding the verdict on this claim, *id.*, and this was not an issue on appeal. *See also id.* at 1051.

312. *Id.* at 1051.

313. *Id.*

314. Eckert Cold Storage v. Behl, 943 F. Supp. 1230, 1235 (E.D. Cal. 1996); Leendertsen v. Price Waterhouse, 916 P.2d 449, 451 (Wash. App. 1996). *Eckert* cited to Ackerman v. Price Waterhouse, 591 N.Y.S. 2d 936, 946 (N.Y. Sup. Ct. 1992), *aff'd*, 604 N.Y.S.2d 721 (N.Y. App. Div. 1993), *rev'd on other grounds*, 644 N.E.2d 1009 (N.Y. 1994), which simply cited *Alpert* for the proposition that the payment of interest on a tax underpayment is not damages. *See* 591 N.Y.S.2d. at 946. *Leendertsen* also cited Gudschinsky v. Hartell, 815 P.2d 851 (Alaska 1991), which simply followed *Orsini*. *See* 815 P.2d at 856.

315. 8 F.3d 1079 (6th Cir. 1993).

Securities Group 1980.[316] Both of these latter cases involved securities fraud causes of action, and both recognized that *Freschi* established only that in securities fraud cases and in other fraud cases, interest is not recoverable.[317] The reason being that the only damages recoverable in such situations are either out-of-pocket damages or rescission or rescissory damages, which permit only a recovery of the plaintiff's net actual losses.[318] The following excerpts from *Stone v. Kirk* illustrate both the nature and limitations of damages for securities fraud violations as well as the reversion to the "use of the money rationale" when holding interest on a tax underpayment is not recoverable:

> The correct measure of damages in cases arising under §10(b)/Rule 10b-5 is generally held to be an "out-of-pocket" measure. . . . But in some circumstances, at least, it appears that the plaintiff in a §10(b)/Rule 10b-5 case may elect to obtain rescissory damages in lieu of out-of-pocket damages . . . .
>
> . . . .
>
> Out-of-pocket damages, the alternative to rescissory damages, are not expectancy damages. "The difference between the value of what [the defrauded investor] got and what it was represented he would be getting" is not the measure; out-of-pocket damages are limited to "the excess of what he paid over the value of what he got . . . ." The Stones are not entitled to recover as damages the taxes they had to pay. . . . They did not expect to have to pay such taxes, to be sure, but expectancy damages – damages designed to give the plaintiff the benefit of his bargain – are simply not recoverable under the federal securities laws. Neither are the Stones entitled to recover the interest they had to pay on their back taxes, at least insofar as the IRS charged a market rate of interest. The Stones had the use of the tax money, of course, until the money was belatedly turned over to the IRS.[319]

None of the foregoing federal securities law cases hold interest is not recoverable as damages in a negligence cause of action.[320] Similarly, *Cowart v. Lang* was a fraud case in which the measure of damages was for fraud, not for negligence.[321] Thus, in summary, all of the cases adopting the minority view essentially either directly relied on the use-of-the-money rationale, or did so indirectly by relying on *Freschi* (or

316. 124 B.R. 875 (Bankr. M.D. Fla. 1991), *aff'd in part, vacated in part*, 74 F.3d 1103 (11th Cir. 1996).

317. *Id.* at 902; *Stone*, 8 F.3d at 1093.

318. *In re Securities*, 124 B.R. at 902-03; *Stone*, 8 F.3d at 1092-93.

319. 8 F.3d at 1092-93 (internal citation omitted).

320. *See supra* notes 223-25.

321. 298 N.Y.S. 875 (N.Y. App. Div. 1937).

cases that rely on *Freschi*) or earlier minority view cases which also rely on the same rationale. Also, all of the non-minority view cases cited as precedent involve fraud causes of action in which the measure of damages is very different from the negligence measure of damages. In fraud situations, the measure of damages is designed to only recover the net out-of-pocket loss suffered by the plaintiff while in negligence causes of action expectancy or benefit-of-the-bargain damages are typically available.[322]

V. CONCLUSION

Presently, there are three views concerning the recovery of interest on a tax underpayment caused by a tax advisor's negligence. The traditional view, which is still the majority view, permits the recovery of such interest. A minority view, which absolutely prohibits the recovery of such interest. The modern, intermediate view, which permits the recovery of such interest, but only when the interest paid the government exceeds the earnings the plaintiff was able to realize from the use of the underpaid taxes. There are two approaches utilized by the modern view to achieve its goal. Some adherents of the modern view impose the burden of proof on the plaintiff to show the earnings on the tax underpayment were less than the interest paid the government. Other adherents permit a recovery of the full interest paid the government, subject to reduction if the defendant is able to prove the plaintiff received some special benefit i.e., earnings, on the tax underpayment.

The development of the three views seems to be a good example of how the common law evolves. First came the traditional view that simply applied traditional common law conceptions of damages recoverable on account of negligence to the recovery of such interest damages. Because the interest would not have been incurred but for the defendant's negligence, the interest charges were recoverable according to traditional principles.[323] The minority view sensed the injustice of the traditional view because it overcompensated plaintiffs. Plaintiffs, although incurring the interest cost to the government, did have the use of the money, so, according to the minority view, the interest payment

322. With respect to fraud, see *Stone*, 8 F.3d at 1092-93, discussed in the text accompanying *supra* note 319; Lama Holding Co. v. Smith Barney Inc., 668 N.E.2d 1370, 1373-77 (N.Y. 1996). *See generally* 2 DAN B. DOBBS, LAW OF REMEDIES § 9.2(1) (2d ed. 1993). With respect to negligence, see Flynn v. Judge, 133 N.Y.S. 794, 796-97 (N.Y. App. Div. 1912); 3 MALLEN & SMITH, *supra* note 124, § 21.1 at p.3, § 21.4 at p. 15.

323. *See supra* text accompanying notes 143-44.

did not really represent any loss or damages to plaintiffs.[324] The minority view adopted an approach exactly opposite the traditional view, and absolutely refused to treat such interest as recoverable damages. In response to the traditional and minority views, modern cases analyzed the underlying factual situation more carefully and realized that both extreme views had the potential for injustice—to either overcompensate (i.e., the traditional view) or undercompensate (i.e., the minority view) plaintiffs—so they adopted a much more precise manner of treating such interest payments by awarding or not awarding interest as damages depending on the actual earnings generated by this particular plaintiff with the underpaid tax funds.[325]

Today, the modern view seems most just since it is very precise in awarding damages, thereby avoiding the problems inherent in the other views. While, ideally, each of the other views ought to be changed and the modern view adopted, the traditional view could accomplish this same result without necessarily changing its jurisprudence. This could be accomplished in one of two ways. First, the traditional view could simply refine its definition of such interest damages by looking to net interest damages incurred by a plaintiff, i.e., by reducing the gross interest paid to the government by the earnings realized by the plaintiff on the use of the underpaid taxes, and only awarding the net amount as damages. The second way would be for the traditional view to treat any interest earned[326] by the plaintiff as mitigating the defendant's damages, thus arriving at the same net interest award as actually suffered by each particular plaintiff. This latter approach may in fact be what the *McCulloch* case did right before the birth of the modern view.[327]

Unfortunately, the minority view has no similar means to adapt, and it should be abrogated and replaced by one of the branches of the modern view.[328] Ultimately, the minority view rests its position on the

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324. *See supra* notes 19-23.

325. *See supra* notes 33-35 and 51-67

326. An argument could be made that not only the actual earnings realized by a plaintiff from the tax underpayment should be taken into account, but also potential earnings. For instance, if a plaintiff takes a tax underpayment and places it in a non-interest bearing checking account rather than in an interest bearing account for no apparent reason, perhaps the potential earnings should also reduce or mitigate any recoverable interest. Calculating such potential earnings, however, may present difficult issues.

327. *See supra* text accompanying notes 117-25, and 164-78.

328. The branch of the modern view that seems closest to the minority view is the one that places the burden of proving the existence of an interest differential on the plaintiff. This view seems to start from the proposition that generally interest paid a government is not damages because the plaintiff had use of the funds. If a plaintiff seeks to assert there were damages, the burden of proof is on the plaintiff.

logical argument that such interest paid to a government is not damages because the plaintiff had the offsetting use of the funds.[329] However, the modern view has effectively countered this argument by noting that the minority's argument only works where the interest earned by a plaintiff on the use of the funds exactly equals the interest charged by the government. This precise equality may occur only very rarely. Similarly, the few cases cited by the minority view as authority are either other cases that previously adopted the minority view, cases from minority view states that simply follow the minority view under principles of stare decisis, or federal securities law cases that either directly or indirectly rely upon the same use-of-the-money rationale.[330] Also, almost all cases cited as support for the minority view (other than cases that previously adopted the minority view or simply followed it as stare decisis) are either federal securities fraud cases and one civil fraud case in which, the measure of damages is very different from the traditional negligence measure of damages. The measure of damages in these situations is simply rescission or rescissory damages which seek to make good any out-of-pocket losses suffered by the plaintiff. The measure of damages for negligence is broader and includes compensation for expectancy or benefit of the bargain.[331]

The final evidence that the minority view has outlived its usefulness and ought to be replaced by the modern view is that today it is still followed in only the same four states in which it was initially adopted between 1986 and 1996. Although it may have gained temporary adherents in two other states—Nebraska and Massachusetts—it has not developed any following at all.[332] Contrariwise, the modern view is now followed in seven states and the federal district court in Oregon.[333]

Since the birth of the modern view between 1999 and 2000 in *Ronson* and *Streber* all jurisdictions outside the four minority-view states that have examined the issue have adopted one of the two branches of the modern view.[334] Also, in New York, the jurisdiction

329. The second rationale often given for the minority view—that if interest were awarded as damages a plaintiff would have a windfall of having both the use of the money and recovering the interest thereon—is really the same as the use-of-the-money reason. *See* Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990).

330. *See generally, supra* Part IV.

331. *See generally, supra* Part IV.

332. *See generally, supra* Part III.

333. *See generally, supra* Part III.

334. *See supra* note 289.

with the most relevant cases, it may be that cracks are beginning to appear in its adherence to the minority view.[335]

With due respect to William Shakespeare, it seems that now is the time both to praise the minority view—for changing continued blind adherence to the traditional approach of simply treating such interest as damages—and then to bury it in favor of the modern, more temperate, and more just, view.

335. *See supra* text accompanying notes 211-44.