



## **ENFORCEMENT AND ACCRUED INTEREST**



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## **Enforcement and accrued interest**

### **-Statement of accrued interest as grounds for enforced collection of entire claim-**

#### **I. Introduction**

Where a debtor fails to pay a debt that has become due, the creditor is entitled to seek to collect that debt in an enforcement action. To bring an enforcement motion, the creditor requires either an enforceable title<sup>i</sup> or an authentic instrument.<sup>ii</sup>

One authentic instrument that can underpin an enforcement motion is the statement of accrued interest, which has sharply divided courts, and is therefore described in detail in this paper. The primary problem that has emerged in practice concerns entitlement to collect an entire claim (that is, both principal and interest) in an enforcement action based on accrued interest.

As such, this paper will first present the key concepts of enforced collection and then go on to deal with the practical problems involved with seeking to collect an entire claim based on accrued interest from the perspective of the legislative framework and inconsistent Serbian case law, as well as the impacts of these issues.

#### **II. Claims**

Claims can be either monetary or non-monetary. Monetary claims are relevant for this issue as outstanding claims accrue statutory penalty interest. For that reason, any reference to ‘claim’ in this paper will mean a monetary claim.

A claim can have two components, the principal amount and any additional claims, including those for statutory penalty interest. An additional claim is ancillary to the principal claim, meaning its resolution depends on that of the principal.

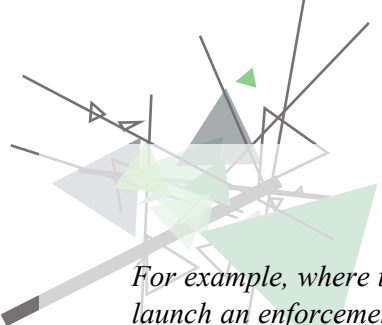
Where a debtor fails to pay a debt in full when it becomes due (this is the principal claim), the law allows the creditor to also claim statutory penalty interest<sup>iii</sup> (SPI). SPI in effect represents damages due to the creditor<sup>iv</sup> for not having received payment in due time. SPI accrues to the principal from the date of default to the date the principal claim is paid.

*For example, a bank’s client overdraws its account by 1,000 dinars and is required to repay this sum by 31 January 2020. If the debt is not repaid by that date, on the following day (1 February 2020) SPI will begin to accrue on the 1,000 dinars, and the bank (the creditor) will be entitled to seek both the 1,000 dinars (principal claim) and SPI (ancillary claim) from its client (the debtor).*

#### **III. Enforced collection of claims**

A claim can either be paid voluntarily or collected in an enforcement action. Voluntary payment means the debtor pays what they owe either on the due date or subsequently. If the debtor fails to pay voluntarily, the creditor is able to collect the debt in an enforcement action.

In this case, the creditor initiates enforcement by filing an enforcement motion based on an enforceable title or an authentic instrument, and a statement of accrued interest is deemed to be an authentic instrument. Both the principal amount and any ancillary claims can be collected in an enforcement action.



*For example, where the bank's client has failed to repay the overdraft by 31 January 2020, the bank can launch an enforcement action to collect the 1,000-dinar principal and SPI accruing on that amount from 1 February 2022 to the date of payment.*

#### **IV. Statement of accrued interest**

As explained above, the creditor can seek to collect their claim in an enforcement action where the debtor has failed to pay voluntarily. To be able to initiate an enforcement action, the creditor must be in possession of an enforceable title or an authentic instrument.

Statement of accrued interest is deemed to be an authentic instrument on which a creditor can base their enforcement motion. A statement of accrued interest is in effect a record of the principal amount and SPI accruing on that amount from the date of default to the date of the statement of accrued interest. At any rate, SPI continues to accrue until final payment, so a statement of accrued interest actually shows the state of principal and interest as of a particular date.<sup>v</sup>

*For instance, the bank issues a statement of accrued interest showing a principal amounting to 1,000 dinars and SPI accruing from the date of default (1 February 2020) to the date of the statement (say, 1 June 2020), but interest will continue accruing after the date of the statement if the debtor fails to pay.*

#### **V. Practical illustration**

Even though case law is not formally a source of law in Serbia, courts are nevertheless required to act uniformly in identical cases. This ensures legal predictability and provides equal legal safeguards for all.<sup>vi</sup>

This means that, if a court allows a creditor to collect the entirety of their claim (both principal and interest) in an enforcement action initiated by an enforcement motion based on a statement of accrued interest, then any other creditor that seeks to enforce based on a statement of accrued interest will also have to be allowed to collect the entirety of their claim.<sup>vii</sup> This, however, is not the case in practice.

Most courts will allow creditors to collect their entire claims if their enforcement motions are based on statements of accrued interest.

Conversely, some courts have taken the view that enforcement actions relying solely on statements on accrued interest can seek collection only of SPI and have rejected motions where creditors have sought to collect principal as well.

*The extent of the threat this poses to equality of legal safeguards is illustrated by the example of a creditor looking to enforce their claim against one debtor in Užice and another one in Belgrade. The Basic Court of Užice would deny the motion to collect the principal and admit only the accrued interest, whilst in Belgrade the creditor would be able to collect the entire claim (both principal and interest).*

The courts that denied these motions justified this view by claiming that the legal term used for the authentic instrument, 'statement of accrued interest', meant it could not be used to seek collection of the principal.<sup>viii</sup>

A multitude of factors must be taken into consideration to assess whether this view is justified.

Firstly, neither the Enforcement and Security Law (ESL) nor any other piece of legislation prevents the principal from being collected in an enforcement action based on a statement of accrued interest. In accordance with the rule that anything not expressly prohibited is permitted, the above view has no basis in law.



Secondly, as outlined above, the statement of accrued interest is in effect a document showing the state of both principal (to which the interest accrues) and SPI as of a particular date. Hence, even though the instrument is named the 'statement of accrued interest', the fact cannot be overlooked that it does present both the principal and the interest, and as such it remains unclear why a narrow reading of the name was preferred over an understanding of the content of this instrument.

In addition, SPI is a claim ancillary to the principal and its legal resolution depends on that of the principal. Obviously, any creditor wishes to collect the principal (if a creditor has lent, say, 1,000 euros to a creditor, it is only logical that the creditor's primary interest is to recover this amount first, and only then seek to recover any SPI, which many creditors in fact waive). Another consideration to bear in mind here is that any interpretation must be meaningful. Here the question becomes whether this position is justified: in other words, in the absence of any statutory limitations, why would a court rule that only interest can be recovered in an action based on a statement of accrued interest, since doing so renders this instrument entirely pointless and unjustifiably prevents creditors from collecting their principal claims.

What does matter, however, is that, being an ancillary claim, SPI cannot be sought separately in an enforcement action. Only after the principal is recovered can SPI become a claim in its own right, allowing the creditor to launch an action aimed solely at collecting this interest.

*For instance, a debtor owes a 1,000-euro loan to a creditor, the principal claim, and 100 euros in SPI. As long as the 1,000-euro principal remains outstanding, the creditor cannot file a separate enforcement motion to recover the 100-euro SPI.<sup>ix</sup> But, if the debtor has paid the 1,000 euros but refuses to pay the 100 euros of interest, the creditor will be able to initiate an enforcement action to recover the interest.*

The considerations outlined above clearly suggest the position taken by some courts whereby they have prevented recovery of principal based on statements of accrued interest is erroneous as it does not properly account for the legal nature of the interest claim. As such, even though SPI is an ancillary claim and cannot be sought from the debtor in an enforcement action separately so long as the principal claim remains outstanding, the practice of allowing enforced collection only of interest even though the principal claim has not been recovered unjustifiably ignores the nature of SPI as an accessory claim.

In view of the above, the position whereby statements of accrued interest can only be used to seek collection of SPI are untenable, especially as the flawed argument hinges on the legal name of the document. By contrast, regulations, rules, interpretations, and the content of these statements, as well as elementary logic, suggest that interest statements can in fact underpin collection of principal as well, as is the usual case law.

## **VI. Impact**

Even though only a few courts have to date embraced this view, the issue of allowing the enforced collection of an entire claim based on a statement of accrued interest deserves particular attention due to its extensive impact.

This is a practice that originated with the Basic Court of Novi Sad,<sup>x</sup> from where it spread to several other courts and may yet extend to more judicial bodies.

This position has made itself felt in a variety of ways. A creditor wishing to recover a claim in its entirety through an enforcement action cannot do so before a court that has espoused this view if its enforcement motion is based only on a statement of accrued interest. This creditor would first have to bring a civil case<sup>xi</sup> and, if they won, could then initiate an enforcement action. Of course, this in the interest neither of the creditors nor of the debtors, and neither does it benefit the courts. Having to engage in two actions,

both a civil and an enforcement case, increases procedural costs<sup>xiii</sup> and extends the time to collection, whilst placing an even greater burden on already overworked courts.

It follows that inconsistent actions by courts in factually identical situations threatens legal certainty and equal legal safeguards.

## VII. Conclusion

The arguments set out above suggest that the practice whereby some courts deny creditors the ability to seek enforced collection of the entirety of a claim based on statements of accrued interest has no legal basis and is at odds with the ancillary nature of SPI, which cannot be recovered separately for as long as the principal remains outstanding. Doing so threatens legal certainty and is not in the interest of any party. Concerted effort is required to eliminate such practices.

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<sup>i</sup> Art. 41 of the Enforcement and Security Law (*Official Gazette of the Republic of Serbia* Nos. 106/2015, 106/2016 – Authentic Interpretation, 113/2017 – Authentic Interpretation, and 54/2019) (ESL).

<sup>ii</sup> Art. 52 of the ESL.

<sup>iii</sup> Art. 277 of the Law of Contracts and Torts (*Official Gazette of the Socialist Federal Republic of Yugoslavia* Nos. 29/78, 39/85, 45/89 – Constitutional Court of Yugoslavia Ruling, and 57/89; *Official Gazette of the Federal Republic of Yugoslavia* No. 31/93; *Official Gazette of Serbia and Montenegro* No. 1/2003 – Constitutional Charter; and *Official Gazette of the Republic of Serbia* No. 18/2020) (LCT).

<sup>iv</sup> It is open to discussion whether SPI constitutes damages. An interpretation of Art. 278 of the LCT suggests SPI is not primarily intended to serve as compensation, since a creditor is entitled to it even if it has not suffered any damage. Conversely, if the creditor has suffered damage, SPI does in fact constitute compensation since, according to the LCT, any damage is deemed to be compensated in the amount of SPI, so that only any remaining damages can be sought.

<sup>v</sup> Author's definition.

<sup>vi</sup> Art. 36 of the Constitution of the Republic of Serbia (*Official Gazette of the Republic of Serbia* Nos. 98/2006 and 115/2021) (Constitution of Serbia); Art. 2 of the Civil Procedure Law (*Official Gazette of the Republic of Serbia* Nos. 72/2011, 49/2013 – Constitutional Court Ruling, 74/2013 – Constitutional Court Ruling, 55/2014, 87/2018, and 18/2020) (CPL).

<sup>vii</sup> Obviously, on condition that all other procedural requirements to adopt an enforcement ruling have been met.

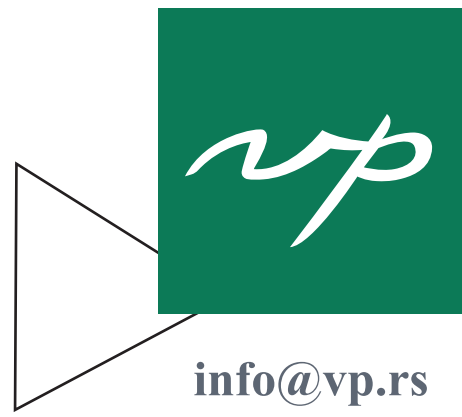
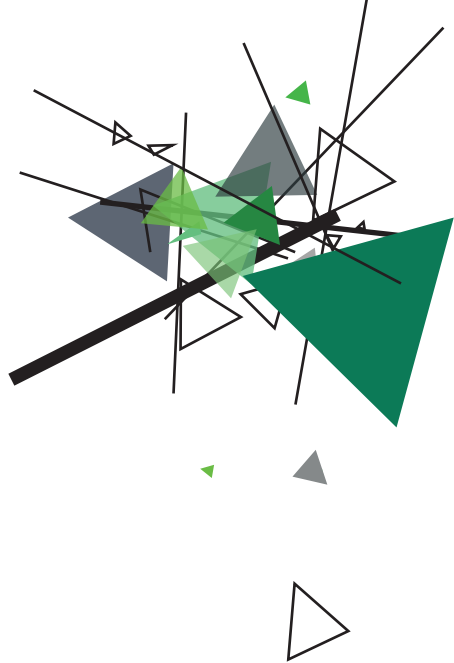
<sup>viii</sup> See Ruling of the Higher Court of Novi Sad No. Gž 4237/2017 of 3 October 2017 upholding Ruling of the Basic Court of Novi Sad No. Ipv Iv 492/17 of 5 September 2017, available at [bilten.osns.rs/presuda/sentenca?url=obracun-kamate-kao-verodostojna-isprava](https://bilten.osns.rs/presuda/sentenca?url=obracun-kamate-kao-verodostojna-isprava)

<sup>ix</sup> See judgment of the Appellate Court of Niš No. Gž 2440/2021 of 9 December 2021.

<sup>x</sup> Interestingly, the Basic Court of Novi Sad has reversed its course and now allows enforcement actions to seek recovery of claims in their entirety based on statements of accrued interest.

<sup>xi</sup> Litigation here includes actions aimed at securing court-issued payment orders, provided the appropriate requirements have been met.

<sup>xiii</sup> For more information, see [Costs of civil litigation](#) and [Costs of the Enforcement Proceedings](#)



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