

FORMATION OF THE JUDGMENT

Anne M. Johnson
Haynes and Boone, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
johnsona@haynesboone.com
(214) 651-5376

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APPENDIX A

I. Prejudgment Interest

A. Overview

Prejudgment interest law in Texas has long been “bewildering” and has had “a checkered history.” *Lubrizol Corp. v. Cardinal Const. Co.*, 868 F.2d 767, 772 (5th Cir. 1989); *Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc.*, 835 F.2d 541, 548 (5th Cir. 1987). In his dissenting opinion in *Battaglia v. Alexander*, No. 02-0701 (Tex. May 27, 2005), Justice Brister noted that “our cases on interest are all over the map; there has never been a single rule for calculating prejudgment interest.” (Op. 3.) This section of the paper is intended to clarify the general rules of prejudgment interest and to describe those areas in which the authorities conflict and issues remain unresolved.¹

1. Purpose of Prejudgment Interest

The Texas Legislature has defined “interest” as “compensation for the use, forbearance, or detention of money.” TEX. FIN. CODE § 301.002(a)(4). The Texas Supreme Court has defined prejudgment interest as “compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.” *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962

¹ Take note that certain causes of action are not covered by the rules discussed herein. These include:

- Disputes between a payor and a payee over oil and gas titles. *Concord Oil Co. v. Pennzoil Exploration and Production Co.*, 966 S.W.2d 451 (Tex. 1998) (an equitable award of prejudgment interest not recoverable when such an award is directly at odds with another statute, here the Texas Natural Resources Code).
- Workers’ compensation cases. *Jones v. Liberty Mut. Ins. Co.*, 745 S.W.2d 901, 903 (Tex. 1988).
- Consumer credit cases. *Alaniz v. Yates Ford, Inc.*, 790 S.W. 2d 38, 39 (Tex. App.--San Antonio 1990, no writ).
- Hospital Lien cases. *Hermann Hospital v. Vardeman*, 775 S.W.2d 866, 867 (Tex. App.--Houston [1st Dist.] 1989, no writ).
- F.E.L.A. cases. *Carmouche v. Southern Pacific Transp. Co.*, 734 S.W.2d 46 (Tex. App.--Houston [1st Dist.] 1987, writ ref’d n.r.e.).
- See also TEX. FIN. CODE §§ 304.201, 304.301 and 304.302 (providing the prejudgment interest rules for condemnation cases, delinquent taxes and delinquent child support).

S.W.2d 507, 528 (Tex. 1998) (quoting *Cavnar Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985)). The purpose of prejudgment interest is twofold: (1) to encourage settlements, and (2) to expedite both settlements and trials by removing incentives for defendants to delay without creating such incentives for plaintiffs. *Johnson & Higgins*, 962 S.W.2d at 528; *Cavnar*, 696 S.W.2d at 554; *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930 (Tex. 1988).

2. Pleading Prejudgment Interest

As a general rule, a plaintiff must plead for prejudgment interest sought at common law as an element of damages. *Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987). However, postverdict trial amendments can cure pleading defects with respect to prejudgment interest. *Id.* at 25-26. Statutory or contractual interest may also be predicated on a prayer for general relief. *Id.* at 25; see also *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437 (Tex. App. — Houston [1st Dist.] 2000, no pet.) (holding that even if a personal injury plaintiff does not plead prejudgment interest, if the plaintiff’s claim falls within the scope of a statute authorizing prejudgment interest, then the plaintiff is entitled to prejudgment interest based on a claim for general relief alone.)

Practice Pointer: Always include a request in your prayer for all prejudgment and postjudgment interest allowed by law.

3. Law Governing Prejudgment Interest

Prejudgment interest is determined according to the substantive law of the case. *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 231 (5th Cir. 1972) (Texas law considers interest damages a substantive matter controlled by the law of the state governing the claim giving rise to damages); *Wood v. Armco, Inc.*, 814 F.2d 211, 213 n.2 (5th Cir. 1987) (same).

4. Historical Perspective

Over the past twenty years, prejudgment interest law in Texas has undergone dramatic changes. This section is included to place the following discussion in its proper historical perspective.

Until recent history, prejudgment interest was not available in most tort cases. This changed in 1985 with the Texas Supreme Court’s opinion in *Cavnar v. Quality Control Parking, Inc.* 696 S.W.2d 549

(1985). *Cavnar* allowed recovery of equitable prejudgment interest at the rate of ten percent, compounded daily, starting six months after the date of the incident giving rise to the cause of action. *Id.* at 554-55. *Cavnar* was the key authority on equitable prejudgment interest from 1985 to 1998.

Two years after *Cavnar*, the Texas legislature codified its own prejudgment interest rule in article 5069-1.05, section 6(a) of the Revised Civil Statutes, providing that "[j]udgments in wrongful death, personal injury, and property damage cases must include prejudgment interest." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 3, § 1, 1987 Tex. Gen. Laws 51, 51 repealed by Act of May 24, 1997, 75th Leg., R.S., Ch. 1008 § 6(a), 1997 Tex. Gen. Laws 3091, 3602 (current version at TEX. FIN. CODE § 304.102). This new statute provided for ten percent *simple* interest beginning on the 180th day after written notice of the claim or the date suit was filed, whichever occurred first. TEX. REV. CIV. STAT. ANN. ART. 5069-1.05, §6(a) (Vernon Supp. 1987).

In 1997, the Texas legislature recodified the Vernon's interest statutes in the new Finance Code. As with all recodifications, the stated purpose was to make the statutes "more accessible and understandable" and to avoid "substantive change." TEX. FIN. CODE ANN. § 1.001 (Vernon 1998).

In 1998, in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, the supreme court modified *Cavnar* and adopted in its place the statutory ten percent simple interest formula. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531-32 (Tex. 1998). Thus, *Kenneco* extended the statutory provisions, at least in part, to other claims not otherwise covered by contract or statute.

During the regular 2003 legislative session, the Texas legislature passed House Bills 4 and 2415, both of which contained nearly identical amendments to the Texas Finance Code. The most significant of these amendments changed the method by which postjudgment interest is calculated and effectively reduced the statutory prejudgment and postjudgment interest rate from a floor of ten percent to a floor of five percent. The 2003 amendments also (1) prohibited prejudgment interest on future damages, and (2) repealed Finance Code Section 304.108 which gave the trial court discretion to toll prejudgment interest during periods of trial delay. These amendments apply "in any case in which a final judgment is signed or subject to appeal on or after the effective date of this Act."

B. The Sources of Prejudgment Interest

Texas law recognizes three grounds for an award of prejudgment interest: (1) the contract, if it provides for interest, (2) TEX. FIN. CODE §§ 304.103 and 304.104, which currently provides for 6%² simple interest accruing 180 days after written notice of a claim, or on the date the lawsuit is filed, whichever is first,³ and (3) equity.

Historically, Texas law also recognized an additional statutory basis for interest: Article 5069-1.03 (and its successor, the pre-1999 version of TEX. FIN. CODE § 302.002). Before its amendment in 1999, section 302.002 governed accounts and contracts "ascertaining the amount payable," and provided for 6% simple interest accruing thirty days after the date the amount is due and payable. In 1999, the legislature amended section 302.002. It appears that the 1999 version of that statute no longer authorizes or regulates any award of prejudgment interest. *See, infra*, at Section I.B.4.

Appendix A sets forth the pertinent sections of the Texas Finance Code.

1. Prejudgment Interest by Contract

Parties are free to agree by contract to any nonusurious rate of prejudgment interest on their contractual obligations. *Triton Oil & Gas Corp. v. E.W. Moran Drilling Co.*, 509 S.W.2d 678, 687-88 (Tex. Civ. App. — Fort Worth 1974, writ ref'd n.r.e.). Where they do, the contractual rate and terms govern instead of the statutory rate and terms otherwise applicable. *E.g., Pineda v. PMI Mortgage Ins. Co.*, 843 S.W.2d 660, 670-71 (Tex. App. — Corpus Christi 1992), writ denied per curiam, 851 S.W.2d 191 (Tex. 1993). Parties may also agree, by contractual clauses limiting damages, to forego prejudgment interest altogether. *Computer-Link Corp. v. Recognition Equipment, Inc.*, 670 F.Supp. 455, 455-56 (D. Mass. 1987) (applying Texas law), *aff'd mem.*, 860 F.2d 1072 (1st Cir. 1988).

² The rate for judgments rendered in June 2005 is 6%. For further discussion of rate, *see* Section I.B.2.a herein.

³ Subchapter 304 of the Texas Finance Code recodified former TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6. The statute is also recodified in the Texas Credit Title.

2. TEX. FIN. CODE §§ 304.101 - 304.108

The 2003 version of TEX. FIN. CODE § 304.103 provides that the rate will be prime rate, with a floor of 5% and a ceiling of 15%, which is to be computed as simple interest. Prior to the 2003 amendments, the rate under this statute was effectively 10%, as discussed below. Under Section 304.104, interest accrues 180 days after the date the defendant receives written notice of the claim or the day the suit is filed, whichever occurs first, and ends on the day preceding the date judgment is rendered.

a. Rate

Under Texas Finance Code section 304.103, prejudgment interest is awarded at the same rate as postjudgment interest. As a result, when the 78th legislature amended the postjudgment interest rate in 2003, it also changed how prejudgment interest is calculated. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 676, § 1, 2003 Tex. Gen. Laws 2096, 2097 (effective June 20, 2003) (codified at TEX. FIN. CODE Ann. § 304.003(c) (Vernon Supp. 2004–2005)) [hereinafter “H.B. 2415”]; Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 6.01, 2003 Tex. Gen. Laws 847, 862 (effective Sept. 1, 2003) (codified at TEX. FIN. CODE Ann. § 304.003(c) (Vernon Supp. 2004–2005)) [hereinafter “H.B. 4”].

Prior to H.B. 2415 and H.B. 4, judgment interest was computed, under Section 304.003 of the Finance Code, by the consumer credit commissioner based upon the auction rate quoted on a discount basis for 52-week treasury bills, except that the minimum rate allowed was ten percent and the maximum rate was twenty percent. However, the last auction of 52-week treasury bills was held on February 27, 2001, and the last auction rate published by the Federal Reserve Board was apparently in June 2000. As a result, the post-judgment interest rate was frozen at ten percent, despite falling interest rates in the market.⁴

As codified, H.B. 2415 reads in its entirety:

§ 304.003. Judgment Interest Rate: Interest Rate or Time Price Differential Not in Contract

(a) A money judgment of a court of this state to which Section 304.002 does not apply,

including court costs awarded in the judgment and prejudgment interest, if any, earns postjudgment interest at the rate determined under this section.

(b) On the 15th day of each month, the consumer credit commissioner shall determine the postjudgment interest rate to be applied to a money judgment rendered during the succeeding calendar month.

(c) The postjudgment interest rate is:

(1) the prime rate as published by the Federal Reserve Bank of New York on the date of computation;

(2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is less than five percent; or

(3) 15 percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is more than 15 percent. TEX. FIN. CODE ANN. § 304.003 (Vernon Supp. 2004).

The new Section 304.003 creates a floor of five percent and a ceiling of fifteen percent for prejudgment and postjudgment interest rates. *See* TEX. FIN. CODE § 304.103 (providing that the prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment). In other words, if prime rate is less than five percent on the date of computation, then the judgment interest rate will be five percent. If the prime rate is more than fifteen percent on the date of computation, then the judgment interest rate will be fifteen percent. Under *Kenneco*, these statutory rate provisions apply to all claims not otherwise covered by contract or statute. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514, 530 (Tex. 1998) (holding that the statutory framework, at least as to rate and accrual, should be applied to all cases, not just those involving “wrongful death, personal injury, and property damage”).

Some courts have interpreted the 2003 rate amendment as simply a reduction of the postjudgment and prejudgment interest rate from ten percent to five percent. *See, e.g., In re Kajima Int’l, Inc.*, 139 S.W.3d 107 (Tex. App.—Corpus Christi 2004, no pet.) (2003 amendments “had the effect of reducing the rate of postjudgment interest accruing on the judgment from

⁴ For additional analysis and discussion of the reasons for the 2003 Amendments, see Jennifer Tillison, Subject to Appeal, APP. ADVOC., Winter 2004, at 6–12.

ten percent to five percent per annum”); *Warrantech Corp. v. Computer Adapters Servs., Inc.*, 134 S.W.3d 516 (Tex. App.—Fort Worth 2004, no pet. hist.) (holding inapplicable Finance Code section that reduces postjudgment interest rate from ten percent per year to five percent per year). While their view might have been appropriate at the time, it is important to examine the rate at the time of the judgment as prime rate fluctuates. In mid-December 2004, the prime rate exceeded five percent for the first time in over four years. As a result, the Office of the Consumer Credit Commissioner determined that the postjudgment interest rate for judgments rendered in January and February 2005 is 5.25%. The rate for judgments rendered in March and April 2005 is 5.5%. The rate for judgments rendered in May 2005 is 5.75%. The rate for judgments rendered in June 2005 is 6.00%.

Practice Pointer:

*Given the current trend of rising interest rates, the easiest and most reliable way to determine the current judgment interest rate is to go to the website of the Office of the Consumer Credit Commissioner at <http://www.occc.state.tx.us>. The current judgment interest rate is posted each month on this site in the OCCC’s weekly publication, *The Texas Credit Letter*.*

b. Application of the 2003 Amendments

Both H.B. 4 and H.B. 2415 state that the amendments apply “in any case in which a final judgment is signed or subject to appeal on or after the effective date of this Act.” The effective date of H.B. 2415 is June 20, 2003. The effective date of H.B. 4 is September 1, 2003. The bill analyses of H.B. 2415 and H.B. 4 explain that these amendments are to apply prospectively.⁵ Nevertheless, the passage of these bills sparked widespread debate regarding the meaning of the phrase “subject to appeal.” One view is that “subject to appeal” is equivalent to “appealable” or “capable of being appealed,” and therefore the amendments apply only to judgments signed or capable of being appealed on or after the

effective date of the Act. The other view is that the phrase “subject to appeal” means “on appeal” or “pending on appeal” and therefore the amendments apply to all cases in the appellate system as of the effective date of the Act.

The first appellate court to address the meaning of the phrase “subject to appeal” was the Fort Worth Court of Appeals in *Columbia Medical Center v. Bush*, 122 S.W.3d 835, 864–66 (Tex. App.—Fort Worth 2003, pet. denied). Based on an examination of the legislative history, the court concluded that the plain meaning of the phrase “subject to appeal,” when used to describe a judgment, means that it is capable of being appealed. Accordingly, the court interpreted section 2(a) of the amendment as providing that the amendment applied to (1) judgments signed on or after September 1, 2003,⁶ and (2) judgments signed before September 1, 2003 but which did not become subject to appeal until on or after September 1, 2003, such as a default judgment in a multi-defendant case where the default judgment, although signed before September 1, 2003, was not appealable until the plaintiff’s claims against the remaining defendants were disposed of after September 1, 2003. *Columbia Med. Ctr.*, 122 S.W.3d at 865-66.

Since *Columbia Medical Center*, several appellate courts have agreed with the Fort Worth Court of Appeals, holding that the plain meaning of the phrase “subject to appeal,” when used to describe a judgment, means that it is capable of being appealed. *See, e.g., Mission Resources, Inc. v. Garza Energy Trust*, 2005 WL 1039648 (Tex. App.—Corpus Christi 2005 n.p.h.); *Sunbridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 255 (Tex. App.—Texarkana 2005

⁶ *Columbia Medical Center* did not address H.B. 2415, effective June 20, 2003, which makes the interest amendments applicable to judgments that were signed after June 20, 2003. Other courts and commentators have concluded that June 20, 2003 is the effective date of the 2003 Amendments. *See, e.g., Tillison, supra* note 5, at 6, 6–12.

Judgments that were signed after June 20, 2003 (or perhaps after August 1, 2003 according to the Office of Consumer Credit Commissioner), or judgments that were capable of being appealed after the effective date are subject to the new postjudgment interest rate calculation. The amendment should not be applied to modify the postjudgment interest rate in cases that already were pending on appeal when the new rate went into effect.

Id. at 12.

⁵ See SENATE COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2415, § 2(a), 78th Leg., R.S. (2003) (stating that the “signed or subject to appeal” section “[m]akes application of this Act prospective”); SENATE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 4, § 6.04, 78th Leg., R.S. (2003) (stating that the “signed or subject to appeal” section “[m]akes application of the changes in law made by this article prospective”).

n.p.h.); *City of Dallas v. Redbird Dev. Corp.*, 143 S.W.3d 375, 388–89 (Tex. App.—Dallas 2004, no pet.); *In re Kajima Int'l*, 139 S.W.3d 107, 117 (Tex. App.—Corpus Christi 2004, orig. proceeding); *Sibley v. RMA Partners, L.P.*, 138 S.W.3d 455, 459–60 (Tex. App.—Beaumont 2004, no pet.); *Bennett v. Cochran*, No. 14-00-01160-CV, 2004 WL 852298, at *7–8 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Burke v. Union Pac. Res. Co.*, 138 S.W.3d 46, 74 (Tex. App.—Texarkana 2004, pet. filed); *Tesfa v. Stewart*, 135 S.W.3d 272, 279 (Tex. App.—Fort Worth 2004, pet. denied); *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671, 688 (Tex. App.—Dallas 2004, pet. granted); *Utts v. Short*, No. 03-03-00512-CV, 2004 WL 635342, at *5–6 (Tex. App.—Austin April 1, 2004, pet. denied); *Cigna Healthcare of Tex., Inc. v. Pybas*, 127 S.W.3d 400, 420–21 (Tex. App.—Dallas 2004), *judgm't vacated w.r.m.*, 2004 WL 585008 (Tex. App.—Dallas 2004). These cases hold that, giving the statutory language its plain meaning, the amendments to section 304.003(c) of the Texas Finance Code apply to cases in which a judgment is signed on or after June 20, 2003.

Nevertheless, practitioners continue to argue in pending appeals across the state that judgments that are pending on appeal remain “subject to appeal” and should qualify for the reduced interest rates under the 2003 Amendments. They assert that, in the past, when the Texas Supreme Court has changed the law regarding interest calculations, it has applied the changes to all cases “in the judicial process.” See *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 533 (Tex. 1998); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 556 (Tex. 1985). They also argue that the legislative history of House Bills 2415 and 4 support their interpretation that these amendment apply to all cases, including those pending on appeal.⁷

Fortunately, although the Texas Supreme Court denied review in *Columbia Medical Center v. Bush*, it has granted review in *Columbia Medical Center of*

⁷ For example, Michael Graham testified regarding the addition of the “subject to appeal” language, Senate Floor Amendment No. 8 to H.B. 4, as follows: “The purpose of these amendments are to create, or to fix an existing inequity. We believe that it should be fixed as quickly as possible, and therefore, should apply to all suits within the judicial process currently, and not to causes of action accruing in the future . . .” The Medical Malpractice & Tort Reform Act of 2003: Hearings on Tex. H.B. 4 Before the Senate Comm. on State Affairs, 78th Leg., R.S. 1836 (Feb. 26, 2003) (testimony of Michael Graham, representing the Texas Civil Justice League).

Las Colinas, Inc. v. Hogue, another case presenting the issue of the meaning of “subject to appeal.” 132 S.W.3d 671 (Tex. App.—Fort Worth 2004, pet. granted). The Texas Supreme Court heard oral argument in *Hogue* on April 12, 2005.

c. Causes of Action Covered

The statutory prejudgment interest provisions only apply, per the statute, to the three types of cases listed in Section 304.102: “wrongful death, personal injury, and property damage cases.” *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 530 (Tex. 1998); *Spangler*, 861 S.W.2d at 398 (if Legislature had intended to codify the award of prejudgment interest in all cases, section 6(a) would read “all judgments,” as section 2 does); *Associated Telephone Directory*, 849 S.W.2d at 900 (same); *Enterprise-Laredo Assoc. v. Hachar's, Inc.*, 839 S.W.2d 822, 839 (Tex. App. — San Antonio 1992), *writ denied per curiam*, 843 S.W.2d 476 (Tex. 1992).

However, in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, the Supreme Court held that the statutory formulation should be extended to the common law setting and that equitable prejudgment interest should be computed in accordance with the statute. For further discussion of equitable prejudgment interest, see Section I.B.3.

d. Accrual

Under *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, regardless of whether prejudgment interest is awarded pursuant to the Texas Finance Code or common law, it does not accrue until the earlier of 1) 180 days after the date a defendant receives written notice of a claim against it, or 2) the date the suit was filed.⁸

Some courts have held, however, that an exception to the statutory accrual rule exists with respect to a defendant added after suit was filed. At least two courts have concluded that the purpose of encouraging settlements would not be served if prejudgment interest began to run from the date suit was filed as to a defendant who had no claims against

⁸ Exceptions to this general accrual rule exist. For example, in condemnation cases, prejudgment interest begins accruing on the date of the constitutional taking. See *State v. Sledge*, 36 S.W.3d 152, 156–57 (Tex. App. — Houston [1st Dist.] 2000, pet. denied); *City of Austin v. Foster*, 623 S.W.2d 672, 674–75 (Tex. Civ. App. — Austin 1981, writ ref'd n.r.e.).

him until a later amended petition. *See Citizens Nat. Bank and Lender Asset Recovery, Inc. v. Allen Rae Investments, Inc.*, 142 SW.3d 459, 486-87 (Tex. App. — Fort Worth 2004, no pet.); *Qwest Communications Int'l, Inc. v. AT & T Corp.*, 114 S.W.3d 15, 39-40 (Tex. App. — Austin 2003, pet. filed); *see also Thrift v. Hubbard*, 44 F.3d 348, 362 (5th Cir. 1995) (holding that prejudgment interest accrued on emotional distress claim from time complaint was amended to assert it). Other courts have followed the strict language of the statute regardless of when claims and/or defendants were added to the suit. *See Brownsville Pediatric Ass'n v. Reyes*, 68 S.W.3d 184 (Tex. App. — Corpus Christi 2002, no pet.) (holding that prejudgment interest against defendant added after suit was filed should be computed from the date the original suit was filed).

Courts have also considered various writings in determining what constitutes written notice of a claim. The following have been found to constitute sufficient “written notice of a claim”:

- ☛ a standstill agreement stating “Kenneco asserts that, to the extent underwriters are found not to be liable [in the federal action]..., J & H is liable to Kenneco for the amounts which Kenneco has claimed under the Policy.” *See Johnson & Higgins*, 962 S.W.2d at 531.
- ☛ a letter in which the plaintiff requested that the insurance carrier pay certain medical bills and inquired as to when the next lost wages check was due. *Robinson v. Brice*, 894 S.W.2d 525, 528 (Tex. App. — Austin 1995, writ denied).
- ☛ a signed medical authorization form, coupled with a letter asking the company to “properly consider [plaintiff’s] injury claim.” *Beyers v. Soule*, 909 S.W.2d 599, 603-04 (Tex. App. — Fort Worth 1995, no writ).

e. Meaning of “Property Damage”

The courts interpret “property damage” under Section 304.101 to mean damage to tangible property, not economic loss. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d at 530; *Manufacturers Auto Leasing, Inc. v. Autoflex Leasing, Inc.*, 2004 WL 966306 (Tex. App. — Fort Worth 2004, pet. denied); *Associated Telephone Directory Publishers, Inc. v. Five D’s Pub. Co., Inc.*, 849 S.W.2d 894, 900 (Tex. App. — Austin 1993, no writ). An example of property damage is loss of crops. *Ciba-Geigy Corp. v. Stephens*, 871 S.W.2d 317, 321-

322 (Tex. App. — Eastland 1994, writ denied). Economic loss claims not governed by Section 304.101 include breach of contract, breach of fiduciary duty, conversion and unfair competition, and tortious interference with a prospective contract. *Kenneco*, 962 S.W.2d at 530; *see also Spangler*, 861 S.W.2d at 398; *Associated Telephone Directory*, 849 S.W.2d at 900; *Ralston Purina Co. v. McKendrich*, 850 S.W.2d 629, 637 (Tex. App. — San Antonio 1993, writ denied).

3. Equitable Prejudgment Interest

In *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, the Supreme Court held that the statutory formulation should be extended to the common law setting and that equitable prejudgment interest should be computed in accordance with the statute. Specifically, the Court applied the rate and accrual date provisions from the statute to a common law breach of contract claim. The prejudgment interest was calculated as 10% simple interest, from the 180th day after notice of the written claim. (The written claim in this case was a tolling agreement which reserved all claims, including claims for prejudgment interest.)

The Court held that its prejudgment interest holding “applies to all cases in which judgment is rendered on or after December 11, 1997 [the date of the first *Kenneco* opinion], and to all other cases currently in the judicial process in which the issue has been preserved.” *Id.* at 930.

After *Kenneco*, two areas of dispute arose regarding the extent to which the statutory scheme supplants the common law analysis: (1) the question of whether equitable prejudgment interest applies to future damages (*see* discussion at Section I.C.1., *infra*); and (2) the question of whether there is a threshold equity analysis. For authorities holding that an award of equitable prejudgment interest is still discretionary with the trial court, *see Citizens Nat. Bank and Lender Asset Recovery, Inc. v. Allen Rae Investments, Inc.*, 142 S.W.3d 459 (Tex. App.—Fort Worth 2004, no pet.); *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248 (Tex. App.—Austin 2002, no pet.); *Miga v. Jensen*, 25 S.W.3d 370, 381 (Tex. App.—Fort Worth 2000), *rev'd on other grounds*, 96 S.W.3d 207 (Tex. 2003); *Wylar Industrial Works, Inc. v. Garcia*, 999 S.W.2d 494, 510 (Tex. App.—El Paso 1999, no writ); *Lege v. Jones*, 919 S.W.2d 870, 875-76 (Tex. App.—Houston [14th Dist.] 1996, no writ); and *City of Port Isabel v. Shiba*, 976 S.W.2d 856, 861 (Tex. App.—Corpus Christi 1998, writ denied). For authorities

holding that there is no threshold equity determination, *see Birmingham Fire Ins. Co. v. American Nat'l Fire Ins. Co.*, 947 S.W.2d 592, 606-07 (Tex. App.—Texarkana 1997, writ denied) (citing *Graco Robotics, Inc. v. Oaklawn Bank*, 914 S.W.2d 633, 646 (Tex. App.—Texarkana 1995, writ dismissed) (“[T]he trial court has no discretion about the decision to award prejudgment interest . . .”); *Smith v. Herco, Inc.*, 900 S.W.2d 852, 861-62 (Tex. App.—Corpus Christi 1995, writ denied) (holding that “[i]f a judgment provides only the amount of damages sustained at the time of the incident, plaintiffs are not fully compensated” and that “[a] plaintiff is entitled to recover prejudgment interest as a matter of law on damages that have accrued by the time of judgment”).

4. TEX. FIN. CODE § 302.002 and the Six Percent Rule

Until 1997, article 5069-1.03 of the Texas Revised Civil Statutes governed interest in cases sounding in contract where there was no contractual interest provision, providing for prejudgment interest at a rate of six percent per year on a breach-of-contract claim involving a contract in which the amount payable could be ascertained with reasonable certainty. (*See* Section I.B.4.a. for a detailed discussion of this statute.) In 1997, article 5069-1.03 was recodified in Chapter 302, Interest Rates, Subchapter A, Usurious Interest, of the Texas Finance Code. No substantive change in law was intended by the codification. TEX. FIN. CODE § 1.001(a). The 1997 version of Section 302.002 was identical to article 5069-1.03 and provided:

When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable.

TEX. FIN. CODE ANN. § 302.002 (Vernon 1998) (the “1997 version of 302.002”). However, in 1999, the legislature amended Section 302.002 to read as follows:

If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year on the principal amount of the credit extended beginning on the 30th day after the date on which the amount is due.

TEX. FIN. CODE ANN. § 302.002 (Vernon Supp. 2003) (the “1999 version of 302.002”).

It has been argued that the 1999 version of Section 302.002, the current version of the statute, does not authorize or regulate any award of prejudgment interest.⁹ This version (1) does not limit its application to contracts or accounts “ascertaining a sum payable” and it is not required that the obligation—the “credit extended”—be embodied in a written contract; (2) provides for interest on “credit extended”; and (3) excludes “judgment interest”—interest on a money judgment, whether the interest accrues before, on, or after the date the judgment is rendered. Further, “prejudgment interest” is not mentioned anywhere in the statute.

As a result of the 1999 amendments, several courts have held that section 302.002 no longer authorizes prejudgment interest awards. The first to do so was the Waco Court of Appeals in *De la Morena v. De Guadalupe*, 56 S.W.3d 652 (Tex. App. — Waco, 2001, no pet.). The court pointed out that TEX. FIN. CODE § 302.002 is now included in the subchapter of the Finance Code entitled “Usurious Interest” rather than under the judgment interest chapter and held that section 302.002 therefore did not apply to appellees’ claim for damages incurred when appellants did not perform under the contract. Instead, the court applied the rules established in *Kenneco* and TEX. FIN. CODE § 304.103. To date, at least five Texas appellate courts have followed *De la Morena* in holding that section 302.002 does not apply to an award of prejudgment interest. *See Lucke v. Kimball*, 2004 WL 102830 (Tex. App. — Corpus Christi 2004, pet. denied); *El Paso Natural Gas Co. v. Lea Partners, L.P.*, 2003 WL 21940729 (Tex. App. — El Paso 2003, pet. denied); *Cumberland Cas. & Sur. Co. v. Nkwazi, L.L.C.*, 2003 WL 21354608 (Tex. App. — Austin 2003, no pet.); *Walden v. Affiliated Computer Servs., Inc.*, 97 S.W.3d 303, 330 (Tex. App. — Houston [14th Dist.] 2003, pet. denied); *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 413-14 (Tex. App. — Amarillo 2003, pet. denied).

⁹ The Houston Court of Appeals has held that, as of September 1, 1997, section 302.002 no longer authorized prejudgment interest at a rate of 6% on contract cases because it was effectively repealed and superseded in 1997 by TEX. REV. CIV. STAT. ANN. art. 5069-1C.002 (Vernon Supp. 1998), a Credit Title provision that is essentially the same as the 1999 version of Section 302.002. *Walden v. ACS*, 97 S.W.3d 303, 330 (Tex. App. — Houston [14th Dist.] 2003, pet. denied).

In addition, the Fifth Circuit has held that “Texas common law allows prejudgment interest to accrue at the same rate as postjudgment interest on damages awarded for breach of contract.” *International Turbine Services, Inc. v. VASP Brazilian Airlines*, 278 F.3d 494 (5th Cir. 2002). Noting that §302.002 was “repealed” in 1999, the court awarded 10% prejudgment interest in this breach of contract suit.

However, many other published opinions have applied the statute and held that the prejudgment interest rate in contract cases is still six percent. *See Mobil Prod. Texas & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916, 920 (Tex. App. — Corpus Christi 2002, no pet.) (analyzing 2000 judgment and agreeing that 6% prejudgment interest rate applies to judgments based on contract); *Wallace v. Ramon*, 82 S.W.3d 501, 505-06 (Tex. App. — San Antonio 2002, no pet.) (applying 6% prejudgment interest rate to 2001 judgment); *Roach v. Dickenson*, 50 S.W.3d 709, 714 & n.2 (Tex. App. — Eastland 2001, no pet.) (applying 6% prejudgment interest rate to 2000 judgment); *Aquila Southwest Pipeline, Inc. v. Harmony Exploration, Inc.*, 48 S.W.3d 225, 242 (Tex. App. — San Antonio 2001, pet. denied) (applying 6% interest rate to November 1999 judgment); *Adams v. H & H Meat Prod., Inc.*, 41 S.W.3d 762, 780 (Tex. App. — Corpus Christi 2001, no pet.) (analyzing October 1997 judgment and agreeing that 6% prejudgment interest rate governs contract interest); *Jackson v. Knight*, 2002 WL 1470359, *2 (Tex. App. — Dallas July 10, 2002, no pet.) (not designated for publication) (applying 6% prejudgment interest rate to 2001 judgment); *Inglis v. Machen*, 2001 WL 832356, *7 (Tex. App. — Houston [1st Dist.] July 19, 2001, no pet.) (not designated for publication) (applying 6% prejudgment interest rate to 1998 judgment); *Dora v. Mullick*, 2000 WL 33322942, *8 (Tex. App. — Texarkana May 31, 2001, no pet.) (not designated for publication) (applying 6% prejudgment interest rate to 1999 judgment); *Computed Imaging Service, Inc. v. Fayette Memorial Hosp.*, 2001 WL 23188, *7 (Tex. App. — Austin Jan. 11, 2001, no pet.) (not designated for publication) (applying 6% prejudgment interest rate to 2000 judgment); *State Farm Lloyds v. Fitzgerald*, 2000 WL 1125217, * 8 (Tex. App. — Austin Aug. 10, 2000, no pet.) (not designated for publication) (analyzing 1999 judgment and recognizing that 1997 version of § 302.002 provides for 6% prejudgment interest rate for cases sounding in contract).

The Texas Supreme Court has not yet squarely addressed this issue. In *Miga v. Jensen*, 96 S.W.3d

207 (Tex. 2002), the court awarded 10% prejudgment interest in a contract case involving stock options, however the prejudgment issue was not briefed by the parties in that case or analyzed by the Court. *Id.* at 217. As a result, uncertainty as to the applicability of the 6% statute remains.

a. Article 5069-1.03 (now repealed)

To understand the significance of the differences between Article 5069-1.03 and the 1999 version of Section 302.002, it is helpful to study the prior version of the statute and the cases interpreting its language. Appendix C contains the language of both statutes, and Article 5069-1.03 is discussed below.

(i) Rate on Contracts Ascertaining a Sum Payable

Article 5069-1.03 provided that on all accounts and contracts “ascertaining the amount payable,” which did not provide for an agreeable rate of interest, interest was allowed at the rate of 6% per annum.

(ii) Simple Interest

It was generally recognized that the interest awarded under Article 5069-1.03 was simple interest. *See Mo.-Kan.-Tex. R.R. Co. v. Fiberglass Insulators*, 707 S.W.2d 943, 951 (Tex. App. — Houston [1st Dist.] 1986, writ ref’d n.r.e.); *Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257, 267 (Tex. App. — Houston [14th Dist.] 1992, no writ); *William C. Dear & Assocs., Inc. v. Plastronics, Inc.*, 913 S.W.2d 251, 254 (Tex. App. — Amarillo 1996, writ denied) (construing legislature’s omission of reference to compounding in article 5069-1.03 to disallow compounding when parties have not otherwise agreed); *but see Allen v. Allen*, 751 S.W.2d 567, 576-77 (Tex. App. — Houston [14th Dist.] 1988, writ denied) (awarding 6% interest, compounded daily). The supreme court has not ruled on this point, however.¹⁰

(iii) Accrual Date

¹⁰ The supreme court has, however, held that the term “per annum” in article 5069-1.03 does not provide any basis for determining whether interest is compounded. *Ex Parte Glover*, 701 S.W.2d 639, 640 (Tex. 1985) (“per annum can mean compound interest as easily as simple interest”). “Per annum” refers to the term over which interest is calculated, by multiplying the principal times the interest rate. “Per annum” simply means that the term is one year.

Interest under Article 5069-1.03 began to run thirty days after the date the sum was due under the contract. The end date for accrual of interest was the date of judgment. *Mo.-Kan.Tex. R.R. Co.*, 707 S.W.2d at 951.

(iv) What kind of contracts ascertain a sum payable

The most significant case on this point is *Great American Ins. Co. v. North Austin Municipal Utility Dist. No. 1*, 950 SW.2d 371 (Tex. 1997). In *Great American*, the Supreme Court held that Article 5069-1.03 was to be given a liberal interpretation and rejected the contention that the 6% rate should not apply simply because extrinsic evidence was needed to quantify damages. The court held: “article 5069-1.03 [the predecessor to Section 302.002] applies when calculating prejudgment interest even if extrinsic evidence is needed to quantify contract damages so long as the contract fixes a measure by which the sum payable can be ascertained with reasonable certainty in light of the attending circumstances. We disapprove of those court of appeals opinions holding that 5069-1.03 cannot be applied when resort to extrinsic evidence to determine damages is necessary.” *Id.* at 373.

Great American stated the operative standard as follows: “A contract is one ‘ascertaining the sum payable’ when it (1) ‘provides the conditions upon which liability depends,’ and (2) ‘fixes a measure by which the sum payable can be ascertained with reasonable certainty, in the light of the attending circumstances.” *Id.* at 372-73.

(v) When is a sum payable not ascertainable

There were two reasons given as to why the sum payable was not ascertainable from the contract.

First, a sum payable was not ascertainable if the amount due under the contract was not sufficiently specified by the contract. *Perry Roofing*, 744 S.W.2d at 930-31 (contract provided no measure to determine damages resulting from failure to install roof properly); *Rio Grande Land & Cattle v. Light*, 758 S.W.2d 747 (Tex. 1988) (the contract did not contain provisions to determine damages from overcharging for costs expended); *Axelson, Inc. v. McEvoy-Willis*, 7 F.3d 1230, 1234 (5th Cir. 1993) (court had to use general principles of law to determine amount owed under contract); *Law Offices of Moore & Assocs. v. Aetna Ins. Co.*, 902 F.2d 418, 421-22 (5th Cir. 1990) (term “reasonable fee” did not establish amount owed to attorney).

Second, some courts held that a sum payable was not ascertainable if the parties disputed the sum payable apart from the issue of liability. *Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1499-1500 (5th Cir. 1992) (“thoroughly disputed” insurance contract did not unambiguously establish the amount owed); *Campbell, Athey & Zukowski*, 863 F.2d at 401-02 (although amount sought in contract claim was established with relative certainty, article 5069-1.03 did not apply because defendants contested both liability and the amounts owed for which they acknowledged liability).

In *Enserch*, the Fifth Circuit held that article 5069-1.03 applied only when a court, having already found liability, concludes that the contract unambiguously establishes the amount owed. *Id.* at 1499. The *Enserch* insurers disputed liability and argued that the amount owed was not certain. *Id.* The court held that “thoroughly disputed” contracts do not establish the amount owed. *Id.* Because article 5069-1.03 did not apply, prejudgment interest at the rate of 10% was awarded according to the equitable principles of *Cavnar*. *Id.* at 1499 & n.28.

C. Amounts Not Subject to Prejudgment Interest

1. Future Damages

The 2003 Amendments added Section 304.1045 to the Finance Code which provides that prejudgment interest may not be assessed or recovered on an award of future damages in cases involving wrongful death, personal injury, or property damage. *See id.* § 304.1045, § 304.101.

Prior to the 2003 Amendments, it was unclear whether interest was available for future damages. A brief discussion of the law prior to the 2003 amendments follows. For the applicability of the 2003 Amendments, see Section I.B.2.b. *infra*.

Cavnar did not allow interest on future damages, holding that, unless statutorily or contractually provided, prejudgment interest was only available on actual damages that have accrued by the time of judgment. *See Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 555–56 (Tex. 1985). Thus, to recover prejudgment interest on accrued damages under *Cavnar*, the plaintiff had to segregate accrued damages from future damages. *Id.* at 556; *see also Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 24–25 (Tex. 1987) (although jury awarded lump sum combining past and future damages, stipulation on

past medical expenses and separate finding on property damage sufficiently segregated past and future damages to allow prejudgment interest on past damages); *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 636 (Tex. 1986) (plaintiffs were not entitled to prejudgment interest on wrongful death claims because they failed to segregate past damages from future, unaccrued damages such as loss of inheritance); *Loyd Elec. Co., Inc. v. Millett*, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, no writ) (court correctly calculated prejudgment interest on damages accruing before trial).

Article 5069-1.05, (the predecessor to sections 304.101–108 of the Texas Finance Code), enacted in 1987, modified *Cavnar* in “wrongful death, personal injury, and property damage” cases. In *C&H Nationwide, Inc. v. Thompson*, the Texas Supreme Court held that this statute allowed recovery of prejudgment interest in such cases not only on past damages, but also on future damages included in the judgment. *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 324–25 (Tex. 1994). *But see Columbia Hosp. Corp. v. Moore*, 92 S.W.3d 470, 474–75 (Tex. 2002) (prohibiting the award of prejudgment interest on future damages in health care liability claims). The court reasoned that the phrase “amount of the judgment” in article 5069-1.05, section 6(a) made no distinction between past and future damages and thus entitled the plaintiffs to prejudgment interest on the entire judgment. *C & H Nationwide*, 903 S.W.2d at 325. Based on *C&H Nationwide*, several appellate courts upheld awards of prejudgment interest on future damages. *See, e.g., C&D Robotics, Inc., v. Mann*, 47 S.W.3d 194, 202 (Tex. App.—Texarkana 2001, no pet.); *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 347 (Tex. App.—Austin 2000, pet. denied); *Weidner v. Sanchez*, 14 S.W.3d 353, 372 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Jamar v. Patterson*, 910 S.W.2d 118, 124 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

Nevertheless, it remained unclear whether prejudgment interest was recoverable on future damages in cases to which the statute did not apply. On the reasoning that the Supreme Court extended the statutory approach to all claims for equitable prejudgment interest in *Kenneco*, it could be argued that prejudgment interest on future damages was recoverable even in non-statutory cases. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514, 530 (Tex. 1998) (holding that the statutory framework should be applied to all cases, not just those involving “wrongful death, personal injury, and property damage”). However, several courts

maintained that *Cavnar* still controlled in non-personal injury cases. *See, e.g., Casteel v. Crown Life Ins. Co.*, 3 S.W.3d 582, 596 (Tex. App.—Austin 1997) (reaffirming viability of *Cavnar* in non-personal injury cases), *rev’d in part on other grounds*, 22 S.W.3d 378 (Tex. 2000); *KMG Kanal-Muller-Gruppe Deutschland GmbH & Co. KG v. Davis*, No. 01-02-00344-CV, 2005 WL 568056, at *12 (Tex. App.—Houston [1st Dist.] March 10, 2005, no pet.) (“holding that *Cavnar* still controls when “damages are awarded for economic injury, not for personal injury”).

Under the 2003 Amendments, it is clear that prejudgment interest on future damages is no longer permitted in wrongful death, personal injury or property damage cases. This has important implications for the court’s charge. As under *Cavnar*, a plaintiff now has the burden to request a damage question that segregates between past and future damages. If the plaintiff does not segregate past losses from future losses, he is not entitled to recover prejudgment interest on those non-segregated elements of damages. *Cavnar*, 696 S.W.2d at 554-56; *Domingues v. City of San Antonio*, 985 S.W.2d 505, 511 (Tex. App. —San Antonio 1998, pet. denied); *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 223 (Tex. App. — 2003, no pet.); *but see Columbia/HCA Healthcare Corp. v. Cottey*, 72 S.W.3d 735, 747 (Tex. App. -- Waco 2002, no pet.) (determining that, because there was no objection to charge which did not segregate between past and future damages, defendants could not complain on appeal that jury awarded damages which would not otherwise be recoverable for fraudulent inducement).

Practice Pointer: *In order to recover prejudgment interest on past damages, the jury charge must segregate past and future damages.*

2. Attorneys’ Fees

Texas cases have almost entirely denied claims for prejudgment interest on attorneys’ fees, whether interest is awarded pursuant to statute or equity. *Hervey v. Passero*, 658 S.W.2d 148, 149 (Tex. 1983) (award of attorneys’ fees was not a contract “ascertaining a sum payable” under article 5069-1.03); *C&H Nationwide*, 903 S.W.2d at 325 (attorneys’ fees are not part of “the amount of the judgment” as it is commonly understood and thus not subject to interest); *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 797 n.13 (Tex. 1994) (same); *Enserch*, 952 F.2d at 1500 & n.32 (no prejudgment interest on

attorneys' fees awarded pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 38.001); *Graco*, 914 S.W.2d at 647-67 (pecuniary and non-pecuniary damages subject to equitable interest under *Cavnar* and article 5069-1.05, § 2 do not include attorneys' fees); *Berry Property Management*, 850 S.W.2d at 670 (prejudgment interest not available on DTPA award of attorneys' fees); *McCann v. Brown*, 725 S.W.2d 822, 826 (Tex. App. — Fort Worth 1987, no writ) (same).

At least one court has allowed equitable prejudgment interest on attorneys' fees. *A.V.I., Inc. v. Heathington*, 842 S.W.2d 712, 717 (Tex. App. — Amarillo 1992, writ denied). In a DTPA action where equitable prejudgment interest applied, the Amarillo court reasoned that interest on attorneys' fees that had accrued by time of judgment was consistent with the language and spirit of *Cavnar*.

3. Punitive Damages

Prejudgment interest is not available on punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.007 (Vernon 1997); *Cavnar*, 696 S.W.2d at 555-56; *Keever*, 888 S.W.2d at 798. A plaintiff can be made whole without prejudgment interest on punitive damages, which are intended to punish the defendant. *Cavnar*, 696 S.W.2d at 555-56. Further, these damages are "by their very nature, unaccrued." *Id.*

4. Additional Damages

Because additional damages awarded pursuant to the Texas Insurance Code and the DTPA are essentially punitive damages, a trial court may not award prejudgment interest on top of such damages. *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 137 (Tex. 1988). In *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co., Inc.*, 974 S.W.2d 51, 54 (Tex. 1998), the Supreme Court further clarified that prejudgment interest should only be awarded on the actual damages and should not be trebled. This clarified an earlier split in the case law on whether prejudgment interest on actual damages could be trebled.

Prior to *St. Paul*, one line of cases had held that the trial court should calculate the prejudgment interest upon the actual damages and then treble that amount. *E.g.*, *Crum & Forster*, 887 S.W.2d at 154; *Beaston v. State Farm Life Ins. Co.*, 861 S.W.2d 268, 278-79 (Tex. App. — Austin 1993), *rev'd on other grounds*, 907 S.W.2d 430 (Tex. 1995); *Celtic Life Ins. Co. v. Coats*, 831 S.W.2d 592, 598-99 (Tex. App. — Austin 1992), *aff'd as modified*, 885 S.W.2d 96 (Tex. 1994).

These decisions classified prejudgment interest as an element of actual damages and thus allowed the trebling of prejudgment interest as part of the actual damages. *See* Phillip K. Maxwell & Tim Labadie, *Insurance Law*, 47 S.M.U. L. REV. 1227, 1264-67 (1994) (arguing that prejudgment interest is an element of actual damages under the common law, and trebling prejudgment interest furthers the deterrence policy of article 21.21, § 16 of the Insurance Code). However, the majority of cases had held that the trial court should not treble the amount of prejudgment interest. *E.g.*, *Southern Life & Health Ins. Co. v. Alfaro*, 875 S.W.2d 740, 748 (Tex. App. — San Antonio 1994, no writ); *Precision Homes, Inc. v. Cooper*, 671 S.W.2d 924, 931 (Tex. App. — Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Roberts v. Grande*, 868 S.W.2d 956, 960 (Tex. App. — Houston [14th Dist.] 1994, no writ.)

5. Insurance Code Article 21.55 Damages

The purpose underlying article 21.55 of the Texas Insurance Code is to ensure prompt payment of insurance claims by penalizing the insurer when the insurer fails to follow the steps required by the article. TEX. INS. CODE ANN. ART. 21.55, § 8. Because the award is akin to exemplary damages, several appellate courts have held that a party is not entitled to prejudgment interest on Article 21.55 damages. *See, e.g.*, *J.C. Penney Life v. Heinrich*, 32 S.W.3d 280, 289 (Tex. App. — San Antonio 2000, pet. denied); *Texas Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 398 (Tex. App. — Dallas 2000, pet. denied); *Dunn v. Southern Farm Bureau Cas. Ins. Co.*, 991 S.W.2d 467, 478-79 (Tex. App. — Tyler 1999, pet. denied); *see also Teate v. The Mutual Life Ins. Co. of New York*, 965 F.Supp. 891, 894-95 (E.D.Tex. 1997); *Marineau v. General American Life Ins. Co.*, 898 S.W.2d 397, 405 (Tex. App. — Fort Worth 1995, writ denied).

6. Verdict before deduction of settlement credits

The Texas Supreme Court recently decided in *Battaglia v. Alexander*, No. 02-0701 (Tex. May 27, 2005) that prejudgment interest under section 16.02 of former article 4590i should be calculated only on amounts awarded in the judgment *after* any offsets for settlement credits. The Court reasoned that, because "interest" is "damages for lost use of the money due as damages," the timing of settlement payments must be taken into account. (Op. 22-23.) To award interest before deduction of settlement credits would lead to "incongruous results" such as the following example cited by the Court:

For example, if a plaintiff were injured in 1992, one defendant settled the following month for \$1,000,000, and at trial in 2000, a jury awarded \$1,000,000, the non-settling defendant would owe no actual damages but would be required to pay interest on \$1,000,000 for eight years, even though the plaintiff had use of the money that entire time.

(Op. 6.)

Although *Battaglia* relates specifically to a now-repealed provision of Article 4590i, the reasoning and result comport with the current weight of authority which favors the calculation of pre-judgment interest on the net amount of the verdict after deduction of any credits. See *Ellender*, 968 S.W.2d at 928; *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991) (holding under chapter 32 that non-settling defendant should receive a dollar-for-dollar credit and remanding the case for recalculation of prejudgment interest on the net amount after reduction of the credit); *Bellows v. San Miguel*, 2002 WL 835667, at *16 (Tex. App. — Houston [14th Dist.] 2002, pet. denied); *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914, 923 (Tex. App. — Beaumont 1997, pet. dismissed) (“Prejudgment interest accrues on the judgment rendered by the court, not on the verdict returned by the jury. . . . The trial court thus erred in not applying the settlement credit before calculating prejudgment interest.”); *Owens-Corning Fiberglass Corp. v. Schmidt*, 935 S.W.2d 520, 524 (Tex. App. — Beaumont 1996, writ denied) (holding in chapter 33 case that “the trial court erred in calculating prejudgment interest before crediting settlements”); *Berry Property Mgmt., Inc. v. Bliskey*, 850 S.W.2d 644, 671 (Tex. App. — Corpus Christi 1993, writ dismissed by agmt) (same); *Sisters of Charity of the Incarnate Word v. Dunsmoor*, 832 S.W.2d 112, 117-18 (Tex. App. — Austin 1992, writ denied) (holding in chapter 33 case that “any offsets or credits due the Hospital should be deducted from the total damages awarded in the jury verdict before calculating prejudgment interest on the remaining judgment amount”); see also *C & H Nationwide, Inc. v. Thompson*, 810 S.W.2d 259, 275 (Tex. App. — Houston [1st Dist.] 1991), *aff’d in part and rev’d in part on other grounds*, 903 S.W.2d 315 (Tex. 1994) (prejudgment interest accrues on the judgment rendered by the trial court, not on the verdict returned by the jury). But see *Norris v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 811722, at *1 (Tex. App. — Waco Apr. 14, 2004, no pet. h.) and *Allstate Indem. Co. v. Collier*, 983 S.W.2d 342 (Tex. App. — Waco 1998,

writ dismissed by agmt) (both favoring the calculation of prejudgment interest on total damage award based on language in Texas Insurance Code which state that settlement credit under the statute reduces total judgment rather than damages or verdict).

Courts have applied the credit in this fashion based upon statutory language that the credit is to be applied to the amount of damages while prejudgment interest is calculated on the total judgment (which is the net amount of damages less any settlement credits and reductions for the plaintiff’s negligence). See, e.g., TEX. CIV. PRAC. & REM. CODE. §33.012. Also, applying settlement credits before calculating prejudgment interest may be rooted in the assumption that amounts paid by a defendant as part of a settlement agreement include the principal amount that defendant would have been liable for as well as the pre- and post-judgment interest that would have accrued on that principal. See *Dunsmoor*, 832 S.W.2d at 117-18.

D. Suspension of Interest

Former Section 304.108 of the Texas Finance Code provided as follows:

- (a) In addition to the exceptions provided by Section 304.105, a court may order that prejudgment interest does not accrue during periods of delay in the trial.
- (b) A court shall consider:
 - (1) periods of delay caused by a defendant; and
 - (2) periods of delay caused by a claimant.

TEX. FIN. CODE Ann. § 304.108 (Vernon 1997).

Section 304.108 was repealed in its entirety under H.B. 4 in 2003. For application of the 2003 amendments, see Section I.B.2.b. However, the interest clock is still tolled during periods in which settlement offers may be accepted. Specifically, “[i]f judgment for a claimant is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement offer during the period that the offer may be accepted.” See TEX. FIN. CODE ANN. § 304.105(b) (Vernon Supp. 2004–2005). A settlement offer must be in writing to affect the accrual of prejudgment interest. *Id.* § 304.106.

II. Postjudgment Interest

Like prejudgment interest, postjudgment interest is intended to compensate for a judgment creditor's lost opportunity to invest the money awarded as damages at trial. *Miga v. Jensen*, 96 S.W.3d 207, 212 (Tex. 2002) (“the purpose of post-judgment interest is not to punish a debtor for exercising his right to appeal”).

Several courts have held that post-judgment interest is so fundamental that the interest is recoverable whether or not it is specifically awarded in the judgment. *Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 25 (Tex. App. — Houston [1st Dist.] 1996, writ denied); *El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc.*, 802 S.W.2d 799, 804 (Tex. App. — Corpus Christi 1990, writ denied); *Crenshaw v. Swenson*, 611 S.W.2d 886, 892-93 (Tex. Civ. App.— Austin 1980, writ ref'd n.r.e.). In fact, in reference to the pre-1999 postjudgment interest statute, the Texas Supreme Court stated that interest accrues automatically once a court renders its judgment. *Office of the Attorney Gen. of Tex. v. Lee*, 92 S.W.3d 526, 528 (Tex. 2002).

Practice Pointer: *Don't take a chance — be sure to include an award of postjudgment interest in your judgment*

A. Method of Calculating Postjudgment Interest on Contract Claims With a Specified Rate of Interest

If the judgment is based on a contract that provides a specific rate of interest, the judgment earns postjudgment interest at a rate equal to the lesser of (1) the rate specified in the contract, or (2) 18 percent. TEX. FIN. CODE 304.002 (Vernon Supp. 2004).

B. Method of Calculating Postjudgment Interest On All Other Claims

1. Judgments Signed or “Subject to Appeal” after June 20, 2003

When a contract does not provide a specific rate of interest, the postjudgment interest rate is determined on the 15th day of each month by the consumer credit commissioner. TEX. FIN. CODE 304.003(b) (Vernon Supp. 2004). For judgments signed or subject to appeal after June 20, 2003, the postjudgment interest rate is: (1) the prime rate as published by the Federal

Reserve Bank of New York on the date of computation; (2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is less than five percent; or (3) 15 percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is more than 15 percent. TEX. FIN. CODE §304.003(c). The rate for judgments rendered in June 2005 is 6%. For a detailed discussion of the application of the 2003 Amendments to the postjudgment interest rate, *see* Sections I.B.2.b. and I.B.2.a.

2. Judgments signed or “Subject to Appeal” before June 20, 2003

For judgments signed or subject to appeal prior to June 20, 2003, the postjudgment interest rate is based on the auction rate for 52-week treasury bills, but it may not be lower than 10 percent and not higher than 20 percent. The rate applies to judgments for the next calendar month following the computation date. TEX. FIN. CODE 304.003, 304.004 (Vernon Supp. 2001). In the recent past, the rate calculated under this formula has been 10%.

Postjudgment interest is compounded annually. TEX. FIN. CODE 304.006 (Vernon Supp. 2004).

C. Accrual of Interest

Generally, a judgment accrues interest beginning on the date of its rendition and ending the day the judgment is satisfied. TEX. FIN. CODE 304.005(a) (Vernon Supp. 2001). The only exception to this rule is for the period of time the plaintiff is granted an extension to file an appellate brief during the period of extension interest is tolled. TEX. FIN. CODE 304.005(b) (Vernon Supp. 2004).

1. Accrual of Interest on Appellate Attorneys' Fees

The issue of when postjudgment interest on appellate attorneys' fees begins to accrue is somewhat unsettled in Texas. One court has held that interest cannot begin to accrue on an award of conditional appellate attorneys' fees until the appeals court renders judgment on the case because the award is conditioned on the unsuccessful outcome of the appeal. Thus, the award is not a final award until after the appeal. *See ProTechnics Intern., Inc. v. Tru-Tag Systems, Inc.*, 843 S.W.2d 734, 736 (Tex. App. — Houston [14th Dist.] 1992, no writ). However, the weight of authority from other Texas courts holds that

postjudgment interest on appellate attorneys' fees begins to accrue when an appeal is either perfected or petition for review is filed. *Law Offices of Windle Turley v. French*, ___ S.W.3d. ___ (Tex. App. – Dallas 2005, n.p.h.); *Moore v. Bank Midwest, N.A.*, 39 S.W.3d 395, 404 (Tex. App.—Houston [1st Dist.] 2000, pet. denied.); *O'Farrill Avila v. Gonzalez*, 974 S.W.2d 237, 250 (Tex. App. — San Antonio 1998, pet. denied); *Southwestern Bell Tel. Co. v. Vollmer*, 805 S.W.2d 825, 834 (Tex. App. — Corpus Christi 1991, writ denied); *Republic Nat'l Life Ins. Co. v. Beard*, 400 S.W.2d 853, 859-60 (Tex. Civ. App. — San Antonio 1966, writ ref'd n.r.e.). With respect to an *unconditional* award of appellate attorneys' fees under section 14.082 of the Family Code, one court has held that interest on appellate attorneys' fees begins to accrue when appeal is either perfected or when an application for writ of error is filed, reasoning that, if interest accrues at the time of judgment, a party who decides not to appeal will pay interest on unconditional appellate attorneys' fees it never actually owed. *D.R. v. J.A.R.*, 894 S.W.2d 91, 97 (Tex. App. — Fort Worth 1995, writ denied).

D. Amounts on Which PostJudgment Interest Accrues

In an effort to combat confusion raised by a footnote in *Ellis County State Bank v. Kever*, 888 S.W.2d 790, 797 n.13 in which the Texas Supreme Court stated that prejudgment interest is excluded from the computation of postjudgment interest, the Texas Legislature amended Section 304.003 of the Texas Finance Code. The statute now specifically provides that both court costs awarded in the judgment and prejudgment interest earn postjudgment interest. TEX. FIN. CODE § 304.003(a).

III. Other Items To Be Included In The Judgment

In addition to prejudgment and postjudgment interest, the following items should also be considered in formation of a judgment.

A. Parties

The judgment should contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered. TEX. R. CIV. P. 306; *Schaeffer Homes, Inc. v. Esterak*, 792 S.W.2d 567, 569 (Tex. App. — El Paso 1990, no writ). A judgment must be sufficiently definite and certain to define and protect the rights of all litigants, or it should provide a definite means of ascertaining such

rights. *Stewart v. USA Custom Paint & Body Shop*, 870 S.W.2d 18, 20 (Tex. 1994) (a signed captionless sheet that was labeled as an order but identified no parties or docket number did not constitute a valid judgment dismissing the underlying action).

Judgment may not be granted in favor of or against a party not named in the suit as a plaintiff or a defendant. *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991); *Fuqua v. Taylor*, 683 S.W.2d 735, 738 (Tex. App. — Dallas 1984, writ ref'd n.r.e.).

The failure to name the parties in the body of the judgment may be disregarded if the parties' identity can be established from the caption of the cause, the record, the pleadings, and the process. *Gomez v. Bryant*, 750 S.W.2d 810, 811 (Tex. App. — El Paso 1988, no writ). Similarly, a misnomer does not invalidate a judgment as between parties when the record and the judgment together point out with certainty the persons and the subject matter to be bound. *Schismatic v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 708 (Tex. App. — Dallas 1986, writ ref'd n.r.e.), *cert. denied*, 484 U.S. 823 (1987).

B. Description Of Proceedings.

The judgment should determine the rights of all parties and dispose of all issues in the case. *Felderhoff v. Knauf*, 819 S.W.2d 110, 111 (Tex. 1991). The judgment should also describe the proceedings following the jury verdict including any orders for judgment notwithstanding the verdict and jury findings. However, the validity of a judgment is not controlled by anything other than the portion of the judgment which grants or denies the remedy sought. *Taylor v. Taylor*, 747 S.W.2d 940, 944 (Tex. App. — Amarillo 1988, writ denied).

In a non-jury case, findings of fact should not be recited in the judgment. TEX. R. CIV. P. 299a. Findings of fact should be filed with the clerk of the court as a separate document. If there is a conflict between findings of fact recited in a judgment and findings which were filed with the court separately, the latter findings will control for appellate purposes. TEX. R. CIV. P. 299a

C. Description of Property.

When property is the subject of a judgment, the judgment should describe the property with reasonable certainty. *Dellana v. Walker*, 866 S.W.2d 355, 358 (Tex. App. — Austin 1993, writ denied); *James v. Butler*, 350 S.W.2d 376, 377 (Tex. Civ. App. — Beaumont 1961, writ ref'd n.r.e.) That is, the land

must be described so that an officer executing a writ of possession thereunder could ascertain the boundaries of the land. *Dellana*, 866 S.W.2d at 358.

D. Damages

1. Certainty

An award of money damages must state with certainty the amount recovered or furnish means by which the damages can be determined. *El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc.*, 802 S.W.2d 799, 802 (Tex. App. — Corpus Christi 1990, writ denied). In *El Universal*, the court of appeals held that any error in rendering judgment in pesos in a breach of contract arising out of the failure of a Texas corporation to pay a Mexican newspaper company for advertising services was made harmless by the fact that the court set a conversion rate in the judgment. *Id.* at 802. A decree from which a recovery cannot be ascertained is too vague to constitute a final judgment and will be considered interlocutory. *Disco Machine of Liberal Co. v. Payton*, 900 S.W.2d 71 (Tex. App. — Amarillo 1995, writ denied); *H.E. Butt Grocery Co. v. Bay, Inc.*, 808 S.W.2d 678, 680 (Tex. App. — Corpus Christi 1991, writ denied).

2. Supported by Pleadings.

The relief awarded must be supported by the pleadings. A judgment for damages in excess of the amount pleaded is erroneous, even though a larger amount might be warranted by the evidence. Tex. R. Civ. P. 301; *Borden v. Guerra*, 860 S.W.2d 515, 525 (Tex. App. — Corpus Christi 1993, writ dismissed by agr.); *Employers Ins. of Wausau v. Schaefer*, 662 S.W.2d 414, 419 (Tex. App. — Corpus Christi 1983, no writ). The supreme court has held, however, that a pleading deficiency of this type can be cured by a post-verdict amendment that increases the amount of damages sought in the pleadings to the amount actually awarded by the jury unless the opposing party presents evidence of surprise or prejudice. *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990).

3. Apportionment

Damage awards, including awards of actual and punitive damages and prejudgment interest, should be clearly apportioned among the individual parties. If the awards are several, then several liability must be clearly stated. Conversely, if the awards are joint and

several, then joint and several liability must be clearly stated.

4. Alternative Recoveries

The court may not render judgment on alternative grounds of recovery. *Southern County Mut. Ins. Co. v. First Bank and Trust*, 750 S.W.2d 170, 173-74 (Tex. 1988). If the trier of fact finds in favor of a party on two or more theories, that party is entitled to recover on the theory entitling it to the greatest or most favorable relief. *Boyce Iron Works, Inc. v. Southwestern Bell Telephone Co.*, 747 S.W.2d 785, 787 (Tex. 1988). If the prevailing party fails to make the election, the trial court should render a judgment utilizing the findings affording the greater recovery. *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 367 (Tex. 1987). The judgment can, however, reflect the calculations for the alternative claim. This would allow the appellate court to render on the alternative claim in the event it sets aside the claim upon which the judgment was granted.

5. Alternative Defenses

If the defendant prevails on alternative defenses, he should obtain a judgment that sustains his alternative defenses. By obtaining a judgment that reflects denial of recovery on alternative grounds, the defendant may avoid remand if one of those grounds is subsequently reversed on appeal. *See Oak Park Townhouses v. Brazosport Bank*, 851 S.W.2d 189, 190 (Tex. 1993).

6. Offset by Successful Counterclaims

If the defendant prevails in a counterclaim against the plaintiff in an amount that exceeds any recovery by the plaintiff, the judgment must award the difference to the defendant. TEX. R. CIV. P. 302.

E. Attorneys' Fees

If properly pled and proved, a judgment may include an award of attorneys' fees, assuming such recovery is allowed by law.

Life for judgment calculators became substantially simpler when *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997), was decided. There the Supreme Court held that, under the DTPA, attorneys' fees must be awarded by the jury "in a specific dollar amount, not as a percentage of the judgment." *Id.* at 818. This holding moots any questions regarding whether the base on which percentage attorneys' fees are to be calculated

includes such items as pre-judgment interest, exemplary, additional, or treble damages, and the attorneys' fee award itself. Although *Arthur Andersen* was a DTPA case, it has been held to be applicable to other types of cases as well. See, e.g., *VingCard A.S. v. Merrimac Hospitality Sys.*, 59 S.W.3d 847, 869-70 (Tex. App. -- Fort Worth 2001, pet. denied); *Transcontinental Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 675 (Tex. App. -- Houston [1st Dist.] 2000, pet. denied); *Lubbock County v. Strube*, 953 S.W.2d 847, 858 (Tex. App. -- Austin 1997, review denied).

1. Appellate Attorney's Fees

There are two ways to calculate an award of appellate attorneys' fees. A judgment may state a specific sum for legal work performed through trial, and allow for additional specified amounts in the event of appeal. See *Seureau v. Mudd*, 515 S.W.2d 746, 749 (Tex. Civ. App. — Houston [14th Dist.] 1974, writ ref'd n.r.e.). Alternatively, a judgment may state a total fixed amount for all attorneys' fees in both the trial court and appellate courts which is subject to a remittitur if additional work is not required due to a lack of subsequent appeals. *International Security Life Insurance Co. v. Spray*, 468 S.W.2d 347, 350 (Tex. 1971); *Long v. Fox*, 625 S.W.2d 376, 379 (Tex. App. — San Antonio 1981, writ ref'd n.r.e.). Either type of award is appropriate as long as the total amount of attorneys' fees can be determined with certainty.

2. Conditioned on Unsuccessful Appeal

As a general rule, an award of attorneys' fees on appeal is conditioned upon the appeal being unsuccessful. The rationale is that a successful party on appeal should not be forced to pay the unsuccessful party's attorneys' fees. *Neal v. SMC Corp.*, 99 S.W.3d 813, 818 (Tex. App. — Dallas 2003, no pet.); *Southwestern Bell Tel. Co. v. Vollmer*, 805 S.W.2d 825, 834 (Tex. App. — Corpus Christi 1991, writ denied); *Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex. App. — Houston [1st Dist.] 1983, no writ).

An exception to the general rule exists when the appellate attorneys' fees are held to be part of costs assessed against the losing party, as may occur in the family law context. See, e.g., *D.R. v. J.A.R.*, 894 S.W.2d 91, 96 (Tex. App. -- Fort Worth 1995, writ denied); *Von Behren v. Von Behren*, 800 S.W.2d 919, 924 (Tex. App. — San Antonio 1990, writ denied); *Abrams v. Abrams*, 713 S.W.2d 195, 197-198 (Tex. App. — Corpus Christi 1986, no writ).

F. Costs

The successful party is entitled to recover certain costs that it has incurred. TEX. R. CIV. P. 131; *Furr's Supermarkets v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001); *Martinez v. Pierce*, 759 S.W.2d 114, 114 (Tex. 1988). The judgment can either state the amount of costs, or state generally that costs are awarded against a certain party. See *Thompson v. Beyer*, 91 S.W.3d 902 (Tex. App. — Dallas 2002, no pet.) (holding that the failure of a trial court to assess costs does not affect the finality of a judgment); *but see Straza v. Friedman, Driegert & Hsueh, L.L.C.*, 124 S.W.3d 404, 406 (Tex. App. — Dallas 2003, pet. filed) (petition filed in Texas Supreme Court arguing that a judgment was not final because no costs were assessed in judgment). The advantage to specifying taxable costs in the judgment is that post-judgment interest will clearly run on the costs. Also, any controversies are immediately resolved.

Effective September 1, 2003, a party is also entitled to recover court costs against a party who rejects a settlement offer made under Chapter 42 if the judgment rendered was significantly less favorable than the settlement offer. TEX. CIV. PRAC. REM. CODE §42.004(a).

After the judgment is signed, the clerk will send a cost bill to the party against whom costs were taxed. TEX. R. CIV. P. 129.

1. Costs Awarded Against Prevailing Party

The court may tax costs against the prevailing party, but to do so the court must (1) find good cause, and (2) state the reasons on the record, if not in the judgment itself. TEX. R. CIV. P. 141; *Furr's Supermarkets v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001); *Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003). "Good cause" is determined on a case-by-case basis. In *Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985), the Texas Supreme Court approved the assessment of ad litem costs against the prevailing party because the conduct of that party had unnecessarily prolonged and obstructed the trial. In *Furr's*, however, the court reversed the lower courts' determination that the prevailing party should bear its own costs because the losing party was too emotionally fragile to bear them. 53 S.W.3d at 378. Moreover, in *Roberts*, the court held that grounds of perceived fairness, without more, were insufficient to constitute good cause. 111 S.W.3d at 124.

2. Counterclaims

When a counterclaim is pleaded, the party in whose favor final judgment is rendered should also recover the costs, unless the counterclaim of the defendant was acquired after the commencement of the suit. TEX. R. CIV. P. 303.; *Jackson Law Office v. Chappell*, 37 S.W.3d 15, 28 (Tex. App. — Tyler 2003, pet. denied). In such cases, the plaintiff will still recover costs if he establishes a claim existing at the commencement of the suit.

3. Recoverable Costs

A judge of any court may include in any order or judgment all costs, including the following:

1. Fees of the clerk and service fees due to the county;
2. Fees of the court reporter for the original of stenographic transcripts necessarily obtained for use in the suit;
3. Fees of masters, interpreters, and guardians ad litem appointed pursuant to the Texas Rules of Civil Procedure and state statutes;
4. Other costs and fees as may be permitted by the Texas Rules of Civil Procedure or state statute.¹¹

TEX. CIV. PRAC. & REM. CODE 31.007(b).

G. Execution

The judgment must provide for execution with a sentence such as the following: “All writs and processes for the enforcement and collection of this Judgment or the costs of Court may issue as necessary.” See TEX. R. CIV. P. 308.

H. Language Of Finality

1. Judgments That Do Not Follow Conventional Trials

The Texas Supreme Court in *Lehmann v. Har-Con Corp.*, 39 S.W. 3d 191 (Tex. 2001) rejected the use of Mother Hubbard clauses and established a new

¹¹ For example, expenses of discovery or other taxable court costs may be taxed against a disobedient party for abuse of the discovery process, regardless of the outcome of the case. TEX. R. CIV. P. 215(2)(b)(2).

standard for finality of judgments that do not follow conventional trials (*e.g.*, summary judgments). The case holds:

. . . [A] judgment issued without a conventional trial is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties.

39 S.W.3d at 192-93. Given this holding, the authors suggest that, in drafting a final judgment that does not follow a conventional trial, the following language (or something similar) should be included:

“This judgment finally disposes of all parties and all claims and is appealable.”

39 S.W.3d at 206. The supreme court has also approved:

“The plaintiff takes nothing.”

Ritzell v. Espeche, 87 S.W.3d 536, 538 (Tex. 2002); *Clark v. Pimienta*, 47 S.W.3d 485, 486 (Tex. 2001).

2. Judgments Following Conventional Trials

Under *North E. Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966), if a judgment “not intrinsically interlocutory in character” is signed following a “conventional trial on the merits,” and there is no order for separate trials, then the judgment is presumed to be final and dispose of all parties and issues before the court. Nevertheless, an overly cautious practitioner seeking to ensure finality might consider including the *Lehmann* language. Conversely, if the drafter does not intend the judgment to be final, then explicit language should be included in order to rebut any presumption of finality.

I. Date And Signature Line For The Judge

The judgment should include a line, immediately above the signature line for the judge, which reads: “Signed this ___day of _____, 2004.” The word “signed” should be used (instead of “entered” or any other word) because the appellate timetable runs from the *signing* of a final, appealable judgment. TEX. R. CIV. P. 306a(1); TEX. R. APP. P. 26.1; *Martinez*, 875 S.W.2d at 313. While judges, attorneys, and clerks are directed to use their best efforts to cause all judgments to include the date the judgment was

signed, the absence of a date on the judgment does not invalidate the judgment. TEX. R. CIV. P. 306a(2). If the date of signing is omitted from the judgment, it may be shown in the record by a certificate of the judge. TEX. R. CIV. P. 306a(2).

J. Signature Line For Lawyers

An attorney's signature of approval on a judgment is not a condition precedent to the entry of the judgment by the trial court. *Sigma Systems Corp v. Electronic Data Systems Corp.*, 467 S.W.2d 675, 677 (Tex. Civ. App. — Tyler 1971, no writ). However, unsuccessful counsel who choose to sign their approval of proposed judgments should include the notation "Approved as to Form Only" or "Approved as to Form Only and Not as to Substance" to confirm their reservation of the right to appeal the judgment.

Unless sufficient cautionary words are used, the movant stands the risk of waiving any portion of the judgment that he signs either without notation or "Approved." See, e.g., *First National Bank of Beeville v. Fojtik*, 775 S.W.2d 632 (Tex. 1989); *Bexar County Cr. Dist. Atty. v. Mayo*, 773 S.W.2d 642, 644 (Tex. App. — San Antonio 1989, no writ). In *Fojtik*, the appellant moved for judgment stating that he agreed as to the form of the judgment, but disagreed as to the content and result. The supreme court held that this disclaimer was sufficient to preserve Fojtik's claims on appeal. *Fojtik*, 775 S.W.2d at 633. However, absent such a disclaimer, other courts have held that appellate rights are waived. See *Casu v. Marathon Refining Co.*, 896 S.W.2d 388 (Tex. App. -- Houston [1st Dist.] 1995, writ denied); *D/FW Commercial Roofing Co. v. Mehra*, 854 S.W.2d 182 (Tex. App. -- Dallas 1993, no writ).

APPENDIX A**EXCERPTS FROM TEXAS FINANCE CODE
CHAPTER 304: "2004 JUDGMENT INTEREST"****Post-Judgment Interest****§ 304.001. Interest Rate Required in Judgment**

A money judgment of a court in this state must specify the postjudgment interest rate applicable to that judgment.

§304.002. Judgment Interest Rate: Interest Rate or Time Price Differential in Contract

A money judgment of a court of this state on a contract that provides for interest or time price differential earns postjudgment interest at a rate equal to the lesser of:

- (1) the rate specified in the contract, which may be a variable rate; or
- (2) 18 percent a year.

§ 304.003. Judgment Interest Rate: Interest Rate or Time Price Differential Not in Contract

(a) A money judgment of a court of this state to which Section 304.002 does not apply, including court costs awarded in the judgment and prejudgment interest, if any, earns postjudgment interest at the rate determined under this section.

(b) On the 15th day of each month, the consumer credit commission shall determine the postjudgment interest rate to be applied to a money judgment rendered during the succeeding calendar month.

(c) The postjudgment interest rate is:

- (1) the prime rate as published by the Federal Reserve Bank of New York on the date of computation;
- (2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is less than five percent; or
- (3) 15 percent a year if the prime rate as published by the Federal Reserve Bank of New York described by Subdivision (1) is more than 15 percent.

§ 304.004. Publication of Judgment Interest Rate

The consumer credit commission shall send to the secretary of state the postjudgment interest rate for publication, and the secretary shall publish the rate in the Texas Register.

§ 304.005. Accrual of Judgment Interest

(a) Except as provided by Subsection (b), postjudgment interest on a money judgment of a court in this state accrues during the period beginning on the date the judgment is rendered and ending on the date the judgment is satisfied.

(b) If a case is appealed and a motion for extension of time to file a brief is granted for a party who was a claimant at trial, interest does not accrue for the period of extension.

§ 304.006. Compounding of Judgment Interest

Postjudgment interest on a judgment of a court in this state compounds annually.

§ 304.007. Judicial Notice of Judgment Interest Rate

A court of this state shall take judicial notice of a published postjudgment interest rate

Prejudgment Interest in Wrongful Death, Personal Injury, or Property Damage Case**§ 304.101. Applicability of Subchapter.**

This subchapter applies only to a wrongful death, personal injury, or property damage case of a court of this state.

§ 304.102. Prejudgment Interest Required in Certain Cases

A judgment in a wrongful death, personal injury, or property damage case earns prejudgment interest.

§ 304.103. Prejudgment Interest Rate for Wrongful Death, Personal Injury, or Property Damage Case.

The prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment.

§ 304.104. Accrual of Prejudgment Interest.

Except as provided by Section 304.105 or 304.108, prejudgment interest accrues on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered. Prejudgment interest is computed as simple interest and does not compound.

§ 304.1045. Future Damages.

Prejudgment interest may not be assessed or recovered on an award of future damages.

§ 304.105. Effect of Settlement Offer on Accrual of Prejudgment Interest.

(a) If judgment for a claimant is equal to or less than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the judgment during the period that the offer may be accepted.

(b) If judgment for a claimant is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement offer during the period that the offer may be accepted..

§ 304.106. Settlement Offer Requirements to Prevent Prejudgment Interest Accrual.

To prevent the accrual of prejudgment interest under this subchapter, a settlement offer must be in writing and delivered to the claimant or the claimant's attorney or representative.

§304.107. Value of Settlement Offer for Computing Prejudgment Interest.

If a settlement offer does not provide for cash payment at the time of settlement, the amount of the settlement offer for the purpose of computing prejudgment interest is the cost or fair market value of the settlement offer at the time it is made.

Other Prejudgment Interest Provision**§304.201. Prejudgment Interest Rate for Condemnation Case.**

The prejudgment interest rate in a condemnation case is equal to the postjudgment interest rate applicable at the time of judgment and is computed as simple interest.

**EXCERPT FROM TEXAS FINANCE CODE
CHAPTER 302: "INTEREST RATES"****SUBCHAPTER A: "USURIOUS INTEREST"****§302.002. Accrual of Interest When No Rate Specified.**

If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year on the principal amount of the credit extended beginning on the 30th day after the date on which the amount is due. If an obligor has agreed to pay to a creditor any compensation that constitutes interest, the obligor is considered to have agreed on the rate produced by the amount of that interest, regardless of whether that rate is stated in the agreement. Amended by Acts 1999, 76th Leg., ch. 62 § 7.18(a), eff. Sept. 1, 1999.

Compare to old Article 5069-1.03 (which is similar to the first version [pre-September 1, 1999 version] of section 302.002):

When no specified rate of interest is agreed upon by the parties, interest at the rate of six percent per annum shall be allowed on all accounts and contracts ascertaining the sum payable, commencing on the thirtieth (30th) day from and after the time when the sum is due and payable.