

Presented:

Mastering the Art of Collecting Debts and Judgments

September 2-3, 2010
Austin, Texas

**Formation of the Judgment
and
Calculation of Interest**

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I. Introduction

You are the winning party in a lawsuit, and the judge asks you to prepare a proposed judgment. You turn to the rules. Judgments are generally governed by Rules 300 – 316 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 300-16. You soon discover the rules aren't much help, as only a handful address judgment formation. For example, Rule 300 provides that findings of fact should be separately stated from the judgment. TEX. R. CIV. P. 300. Rule 301 tells you that the judgment "should conform to the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity." TEX. R. CIV. P. 301. And Rule 306 says that the entry of the judgment shall contain the "full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered." *Id.* 306. (You might have guessed that). Beyond those rules, you are left to common law requirements and custom in figuring out how to draft your judgment.

This paper addresses each of the items that are customarily included in a judgment, including (1) the opening recitals, (2) the decretal portions addressing the merits of the award, and (3) pre-judgment interest, (4) post-judgment interest, (5) attorney's fees, (6) costs, (7) language of finality, and (8) signature lines. This paper generally assumes that your judgment is a final, appealable judgment, although interlocutory judgments¹ are addressed briefly in section VIII.

II. The Opening Recitals

A. Description of the Proceedings

Although the Texas rules do not mandate any particular form of judgment, it is customary to open with the appropriate recitals. Give the date and state whether the case was tried to a jury or to the bench, or whether summary judgment was granted. For example:

- Jury trial: *"On [date], this cause came to be heard and Plaintiffs [name as stated in pleadings] and Defendants [name as stated in pleadings] appeared in person and by attorney of record and announced ready for trial and, a jury having been previously demanded, a jury consisting of twelve qualified jurors was duly empanelled and the case proceeded to trial."*
- Bench trial: *"Trial in this action began on [date] before the Court and concluded with closing arguments on [date] The issues having been duly tried, the Court issued Findings of Fact and Conclusions of Law on [date] which are incorporated in the Final Judgment for all purposes and by reference."*
- Summary judgment: *"On [date], the Court entered its order granting summary judgment on behalf of [party named as stated in pleadings], and therefore enters the following judgment."*

¹ An interlocutory order is an order that is not final. Some types of interlocutory orders are reviewable by statute. *See, e.g.* TEX. CIV. PRAC. & REM. CODE § 51.014 (permitting interlocutory review of orders on class certification, special appearances, and temporary injunction, to name a few).

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.

B. Description of the 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).

III. The Decretal Language Determining the Rights of All Parties

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). This is the meat-and-potatoes of your judgment. It should clearly state the award being granted so that there is no doubt as to its meaning.

A. 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.

B. 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

When a plaintiff seeks to recover under alternative theories, the judgment cannot award duplicative relief on all the theories in violation of the one satisfaction rule. *Tony Gullo Motors, Inc. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006). If the trier of fact finds in favor of a party on two or more alternative 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). The prevailing party is entitled to make its election after it knows the amount it will recover under its alternative theories, which often happens on appeal.

Tony Gullo Motors, 212 S.W.3d at 314 n.86. 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); *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 613 (Tex. App.—Fort Worth 2006, pet. denied). 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.

7. Settlement credits

Chapter 33 of the Texas Civil Practice and Remedies Code provides the rules for apportioning liability among responsible parties, allowing for a settlement credit based on a plaintiff's settlement with one of the defendants. While this paper will not attempt to examine all of the intricacies of the Texas proportionate responsibility statute or the application of settlement credits, counsel should consult these rules to determine whether the defendant is entitled to a credit or other reduction in net liability. *See* TEX. CIV. PRAC. & REM. CODE §§ 33.012(b), (c).

8. Damages caps

One important statute to take into account in calculating the amount of damages to be awarded in the judgment is the cap on exemplary damages in Chapter 41 of the Remedies Code. TEX. CIV. PRAC. & REM. CODE § 41.008. In addition to placing a ceiling on the amount of punitives that can be awarded, the statute provides that in multi-defendant cases, any award of exemplary damages must be specific as to each defendant. *Id.* § 41.006. Generally, each defendant is liable only for the amount of the award made against the defendant.

IV. 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*, 177 S.W.3d 893 (Tex. 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.” 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.²

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 S.W.2d 507, 528 (Tex. 1998) (quoting *Cavnar Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985)). The Court further clarified that compensation for other than the lost use of money is not “interest.” *Battaglia v. Alexander*, 177 S.W.3d 893, 907 (Tex. 2005) (“[O]ne could call such compensation a windfall (from the claimant’s perspective) or a penalty or fine (from the defendant’s perspective), but it is not interest.”)

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); *see also Shook v. Walden*, 304 S.W.3d 910, 927-28 (Tex. App. – Austin 2010, n.p.h.).

2. Pleading Prejudgment Interest

If a plaintiff’s recovery is predicated on a statutory or contractual right, he is not required to plead a claim for prejudgment interest. *See Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987); *Bufkin v. Bufkin*, 259 S.W.3d 343, 357 (Tex. App.—Dallas 2008, pet. denied); *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

² 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).

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); *Pegasus Energy Group v. Cheyenne Pet. Co.*, 3 S.W.3d 112, 123-24 (Tex. App.—Corpus Christi 1999, pet. denied).

However, where prejudgment interest is sought at common law as an element of damages, a plaintiff must plead for it. *Benavides*, 726 S.W.2d at 25; *Bufkin*, 259 S.W.3d at 357. A prayer for general relief does not suffice. *Id.* Post-verdict trial amendments can cure pleading defects with respect to prejudgment interest. *Id.* at 25-26; *Firefighters' & Police Officers' Civil Serv. Comm'n v. Herrera*, 981 S.W.2d 728, 734-35 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

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-five 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 1985, prejudgment interest was not available in most tort cases. This changed 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 a statutory floor of 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 Texas 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 interest formula set forth in the Texas Finance Code. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531-32 (Tex. 1998). In doing so, *Johnson & Higgins* harmonized the common law prejudgment interest accrual scheme with the Finance Code, and 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.³ 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.”⁴

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 5%⁵ simple interest accruing 180 days after written notice of a claim, or on the date the lawsuit is filed, whichever is first;⁶ and (3) equity.

Historically, Texas law also recognized an additional statutory basis for interest in contract cases: 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. Following that amendment, several intermediate appellate courts have held that the current version of section

³ 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)) [“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)) [“H.B. 4”].

⁴ The effective date of H.B. 2415 is June 20, 2003. The effective date of H.B. 4 is September 1, 2003. The passage of these bills sparked widespread debate regarding the meaning of the phrase “subject to appeal.” The Texas Supreme Court resolved this debate in *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 255-57 (Tex. 2008). In *Hogue*, the supreme court held that phrase “subject to appeal” meant “capable of being appealed” rather than “on appeal.” *Id.* at 256. Because the appeal of the judgment in *Hogue* could not have been initiated after the effective date of the amendments, House Bills 2415 and 4 did not apply. *Id.* at 256-57.

⁵ The rate for judgments rendered in August 2010 is 5%. For further discussion of rate, see Section IV herein.

⁶ 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.

302.002 no longer authorizes or regulates any award of prejudgment interest. *See Bufkin v. Bufkin*, 259 S.W.3d 343, 357 (Tex. App.—Dallas 2008, pet. denied); *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); *but 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).

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).

Prejudgment interest in a contract case where the contract provides for interest or time price differential is the lesser of the interest rate specified in the contract or eighteen percent a year. TEX. FIN. CODE ANN § 304.002. If the contract does not provide for interest, then the statutory rate and accrual provisions apply. *Johnson & Higgins*, 962 S.W.2d at 532; *see also Meridien Hotels, Inc. v. LHO Fin. Partnership I, LP*, 255 S.W.3d 807, 823 (Tex. App.—Dallas 2008, no pet.) (applying section 304.003 for prejudgment interest rate in contract case); *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 319 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (same).

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. TEX. FIN. CODE §§ 304.101 - 304.108

TEX. FIN. CODE § 304.003 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. (The current rate is 5%.) 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. 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);

Texas courts have interpreted “property damage” under Section 304.101 to mean damage to tangible property, not economic loss. *Johnson & Higgins*, 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).

Note, however, that despite the limits of the statute, 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 also be computed in accordance with the statute. *See infra* at Section IV.B.3.

b. Rate

Under Texas Finance Code section 304.103, prejudgment interest is awarded at the same rate as postjudgment interest. As a result, when the legislature amends the postjudgment interest rate, it also changes how prejudgment interest is calculated.

Section 304.003 currently reads in its entirety:⁷

§ 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

⁷ 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.

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 Board of Governors of the Federal Reserve System on the date of computation;

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

(3) 15 percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is more than 15 percent.

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”).

It is important to examine the rate at the time of the judgment as prime rate fluctuates. Currently, the rate for judgments rendered in August 2010 is 5%.

Practice Pointer:

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.

c. 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

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

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 him until a later amended petition. See *Citizens Nat. Bank and Lender Asset Recovery, Inc. v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 486-87 (Tex. App. — Fort Worth 2004, no pet.); *Qwest Commc'ns Inc. v. AT&T Corp.*, 114 S.W.3d 15, 38-40 (Tex. App. - Austin 2003), *rev'd on other grounds*, 167 S.W.3d 324 (Tex. 2005); 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.” *Bevens v. Soule*, 909 S.W.2d 599, 603-04 (Tex. App. — Fort Worth 1995, no writ).

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.)

[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.).

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 (this question was resolved by the 2003 amendments – see *infra* at section IV.C.1); 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”).

C. Amounts Not Subject to Prejudgment Interest

1. Future Damages

Section 304.1045 (added to the Finance Code in 2003) 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, § 304.101.⁹

This has important implications for the court’s charge. A plaintiff 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 may not be 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.

⁹ Prior to the 2003 Amendments, it was unclear whether interest was available for future damages. *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). But in *C&H Nationwide, Inc. v. Thompson*, the Texas Supreme Court held that the prejudgment interest statute allowed recovery of prejudgment interest 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).

denied); *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 223 (Tex. App. — Amarillo 2003, no pet.); *KMG Kanal-Muller-Gruppe Deutschland v. Davis*, 175 S.W.3d 379, 396-97 (Tex. App. — Houston [1st Dist.] 2005, no pet.); *Natural Gas Pipeline Co. of America v. Justiss*, 2010 WL 1730148 (Tex. App.—Texarkana 2010, no pet. h.); *but see Natural Gas Pipeline Co. of Am. v. Justiss*, No. 06-09-00047-CV, 2010 Tex. App. LEXIS 3219, 32-35 (Tex. App.—Texarkana Apr. 30, 2010, no pet.) (concluding that plaintiff's failure to segregate between past and future damages did not bar recovery of prejudgment interest because diminution in value, as damages for a permanent nuisance, does not include future damages for the purposes of prejudgment interest); *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).

The burden to segregate between past and future damages may be more relaxed in a non-jury-trial setting. In *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 629 (Tex. App.—Fort Worth 2006, pet. denied), the trial court entered findings of fact and conclusions of law, erroneously awarding plaintiffs prejudgment interest on past repair costs and future repair costs. On appeal, the parties disputed the remedy for the error. The defendants argued that the court of appeals was required to reverse the entire award of prejudgment interest and render a take-nothing judgment on the plaintiffs' request for prejudgment interest because the plaintiffs did not segregate their past and future damages. *See id.* (citing *Cresthaven*, 134 S.W.3d at 223). The Fort Worth Court rejected the Defendants' argument, reasoning that “the instant case was a bench trial, . . . the [plaintiffs] did segregate their past and future costs of repair, . . . [t]hus, penalizing the [plaintiffs] by deleting the entire award of prejudgment interest would not comport with the reasoning of *Cavnar* or *Cresthaven*.” Therefore, the court simply modified the judgment to exclude the award of prejudgment interest as to the future costs of repair. *See id.*

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

2. Attorneys' Fees and Costs

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. Kever*, 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); *Berry Property Management*, 850 S.W.2d at 670 (prejudgment interest not available on DTPA award of attorneys' fees); *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386, 398-99 (Tex. App.—Beaumont 2008, pet. granted) (prejudgment interest not available on award of attorneys' fees based on indemnity statute); *Carbona v. CH Medical, Inc.*, 266 S.W.3d 675, 688 (Tex. App.—Dallas 2008, no pet.).

However, a few courts have been willing to allow equitable prejudgment interest on attorneys' fees. *Williams v. Colthurst*, 253 S.W.3d 353, 362 (Tex. App.—Eastland 2008, no pet.); *Kurtz v. Kurtz*, 2010 WL 1293769 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *A.V.I., Inc. v. Heathington*, 842 S.W.2d 712, 717 (Tex. App.—Amarillo 1992, writ denied). For instance, 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. A.V.I. Inc.*, 842 S.W.2d at 717.

3. Punitive Damages

Prejudgment interest serves to compensate the injured party, not punish the defendant. *Johnson & Higgins*, 962 S.W.2d at 528. Accordingly, prejudgment interest may not be assessed or recovered on an award of punitive damages. TEX. CIV. PRAC. & REM.CODE § 41.007 (Vernon 2008); *Cavnar*, 696 S.W.2d at 555-56; *Keever*, 888 S.W.2d at 798; *Shook v. Walden*, 304 S.W.3d 910, 928 (Tex. App. — Austin 2010, no pet.); *Meridien Hotels, Inc. v. LHO Financing Partnership I, L.P.*, 255 S.W.3d 807, 822 (Tex. App. — Dallas 2008, no pet.). 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 is the logical extension of *Vail* because “including interest in the baseline figure that is trebled would have the same mathematical effect as an award of prejudgment interest on treble damages.” *Shook*, 304 S.W.3d at 928. This resolved an earlier split in the case law on whether prejudgment interest on actual damages could be trebled.¹⁰

5. Prompt Payment of Claims Damages (Texas Insurance Code § 542.060)

The purpose of the Prompt Payment of Claims subchapter of the Texas Insurance Code (formerly article 21.55) is to ensure prompt payment of insurance claims by penalizing the

¹⁰ 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). 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.)

insurer when the insurer fails to follow the steps required by the article. TEX. INS. CODE ANN. § 542.054 (Vernon 2008); *see generally id.* §§ 542.051-.061. Because the award is akin to exemplary damages, several appellate courts have held that a party is not entitled to prejudgment interest on these 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. Settlement Credits

In *Battaglia v. Alexander*, 177 S.W.3d 893, 908-09 (Tex. 2005), the Texas Supreme Court ruled that the “declining principal” formula was the proper way to apply credits in the calculation of prejudgment interest. 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. *Id.* at 907. To award interest without crediting settlements periodically 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.

Id. Thus, the Court concluded that “[a] settlement payment should be credited first to accrued prejudgment interest as of the date the settlement payment was made, then to ‘principal,’ thereby reducing or perhaps eliminating prejudgment interest from that point forward.” *Id.* at 908.

The Court reiterated the “declining principal” approach in *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 816-17 (Tex. 2006) and *State Farm Mutual Auto. Ins. Co. v. Norris*, 216 S.W.3d 819, 822 (Tex. 2006). *See also 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 agreement) (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”).

D. Suspension of Interest

In 2003, the Legislature repealed section 304.108 of the Finance Code which permitted courts to toll prejudgment interest during periods of delay in trial caused by either party.

Prejudgment interest can still be tolled by a standstill agreement to temporarily suspend a lawsuit. *See Johnson & Higgins*, 962 S.W.2d at 561.

In addition, a settlement offer can toll the accrual of prejudgment interest while the plaintiff decides whether to accept the offer. 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 and delivered to the claimant or his attorney to affect the accrual of prejudgment interest. *Id.* § 304.106.

V. Postjudgment Interest

Postjudgment interest accrues on the entire amount of the judgment, including prejudgment interest and court costs. TEX. FIN. CODE § 304.003(a).

Postjudgment interest is not a punishment inflicted on a judgment debtor for exercising the right to appeal. 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. Jenson*, 96 S.W.3d 207, 212 (Tex. 2002).

All money judgments must specify the postjudgment interest rate applicable to that judgment. TEX. FIN. CODE ANN. § 304.001. However, several courts have held that postjudgment interest is so fundamental that the interest is recoverable whether or not it is specifically awarded in the judgment. *RAJ Partners v. Darco Constr. Corp.*, 217 S.W.3d 638, 653 (Tex. App.—Amarillo 2006, no pet.); *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 or a time-price differential, 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.

B. Method of Calculating Postjudgment Interest On All Other Claims

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). For judgments signed or subject to appeal after June 20, 2003, the postjudgment interest rate is: (1) the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation; (2) five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is less than five percent; or (3) 15 percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System described by Subdivision (1) is more than 15 percent. TEX. FIN. CODE §304.003(c). The rate for judgments rendered in August 2010 is 5%. 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.

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

C. Accrual of PostJudgment 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). 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).

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*, 164 S.W.3d 487 (Tex. App. — Dallas 2005, no pet.); *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).

VI. Attorneys' Fees

If properly pled and proved, a judgment may include an award of attorneys' fees, assuming such recovery is allowed by law. Under the "American Rule," each party bears its own costs of suit, so a prevailing party can recover an award of reasonable attorney's fees against its adversary only if such an award is allowed by contract or statute. *Tony Gullo Motors, Inc. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006). In Texas, attorneys fees are most often recovered in breach of contract, declaratory judgment, and DTPA actions, but many more statutes sanction the recovery of fees in a number of different contexts. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 38.001 (recovery of attorney's fees for oral or written contracts); TEX. CIV. PRAC. & REM. CODE § 37.009 (declaratory judgments); TEX. BUS. & COM. CODE § 17.50(d) (Deceptive Trade Practices Act).

A. Stated as a specific amount, not a percentage

Life for judgment calculators became substantially simpler when *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997), was decided. Before *Arthur Andersen*, it was common practice for prevailing parties to put on expert testimony (often from the attorney trying the case) that the reasonable and customary fee was a contingency fee of a given percentage. But in *Arthur Anderson*, 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 prejudgment 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).

B. Appellate Attorney's 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. *Borg-Warner Protective Servs. Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.). As a general rule, an award of attorneys' fees on appeal must be conditioned upon the appeal being unsuccessful. *Id.*; *A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 707 n.1 (Tex. 2007) (noting that the court of appeals properly reformed the trial court's unconditional grant of appellate attorney's fees to condition the award on an unsuccessful appeal brought by the appellant). 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). When

the trial court fails to condition the award of appellate attorney's fees on an unsuccessful appeal, the usual remedy is reformation of the judgment on appeal to clarify that the award of appellate attorney's fees is conditional. *See Truman Arnold Cos. v. Hammond & Consultants Enters.*, No. 12-09-00099-CV2010, Tex. App. LEXIS 6190 (Tex. App.—Tyler, July 30, 2010, n.p.h.).

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).

VII. Costs

The successful party is entitled to recover from its adversary all of the taxable court costs it has incurred in the prosecution or defense of the lawsuit. 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. The failure of a trial court to assess costs does not affect the finality of a judgment. *See Straza v. Friedman, Driegert & Hsueh, L.L.C.*, 124 S.W.3d 404, 406 (Tex. App.—Dallas 2003, pet. denied) (citing *Thompson v. Beyer*, 91 S.W.3d 902 (Tex. App.—Dallas 2002, no pet.)). The advantage to specifying taxable costs in the judgment is that post-judgment interest will clearly run on the costs. Also, any controversies can be immediately resolved.

Generally, a party is entitled to costs if (1) that party is either the successful party or an unsuccessful party but the court finds good cause for awarding costs anyway; and (2) the itemized expense is a taxable court cost.

A. Awarding Costs to the “Successful Party”

A “successful party” is “one who obtains judgment of a competent court vindicating a civil right or claim.” *See Mag Instr., Inc. v. G.T. Sales Inc.*, 294 S.W.3d 800, 808 (Tex. App.—Dallas 2009, pet. denied). Whether a party is successful is based upon success on the merits and not on the award of damages. *Id.* (citing *Moore v. Trevino*, 94 S.W.3d 723, 729 (Tex. App.—San Antonio 2002, pet. denied)). To be successful, a party need not prevail on every claim. *Williamson v. Roberts*, 52 S.W.3d 354, 356 (Tex. App.—Texarkana 2001), *rev'd in part on other grounds*, 111 S.W.3d 113 (Tex. 2003). Moreover, both parties can be considered successful or unsuccessful under Rule 131. *See Mobil Prod'g Tex. & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916, 920 (Tex. App.—Corpus Christi 2002, no pet.) (“A trial court does not abuse its discretion in taxing costs against both sides where neither party was wholly successful in that one expected to receive more while the other expected to pay less.”).

Rule 303 addresses costs for counterclaims. TEX. R. CIV. P. 303. 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.

However, Texas appellate courts have not been entirely consistent in reviewing trial courts' splitting of costs between opposing parties, particularly when counterclaims are involved. Some courts have held that the party receiving the larger recovery is entitled to costs. *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 895 (Tex. App.—San Antonio 1996, writ denied); *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 580 S.W.2d 850, 866 (Tex. Civ. App. — Corpus Christi), *rev'd on other grounds*, 592 S.W.2d 340 (Tex. 1979); *Willingham v. Hagerty*, 553 S.W.2d 137, 139-40 (Tex. Civ. App.—Amarillo 1977, no writ). Other courts have held that when both sides successfully prosecute their claims, a trial court can in its discretion split costs between the parties. *Bayer Corp. v. DX Terminals, Ltd.*, 214 S.W.3d 586, 612 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Niemeyer v. Tana Oil & Gas Corp.*, 39 S.W.3d 380, 389-90 (Tex. App.—Austin 2001, pet. denied); *Building Concepts, Inc. v. Duncan*, 667 S.W.2d 897, 905-06 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *Okon v. Levy*, 612 S.W.2d 938, 943-44 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

B. Good Cause for Assessing Costs Against the Successful Party

The court may tax costs against the successful 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.

C. Taxable and nontaxable costs

A taxable cost is a litigation-related expense that the successful party is entitled to recover as a part of the court's award. Generally, taxable costs are "those items in the clerk's bill of costs." See *Pitts v. Dallas County Bail Bond Bd.*, 23 S.W.3d 407, 417 (Tex. App.—Amarillo 2000, pet. denied). 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. Taxable costs.

The following can be recovered as court costs under Texas Rule of Civil Procedure 131:

- Clerk fees. TEX. CIV. PRAC. & REM. CODE 31.007(b)(1); *Ferry v. Sackett*, 204 S.W.3d 911, 913 (Tex. App.—Dallas 2006, no pet.).

- Service fees, such as filing fees and other fees paid to the clerk. *Id.*; TEX. GOV'T CODE § 51.317.
- Court-reporter fees for original stenographic transcripts of hearings. TEX. CIV. PRAC. & REM. CODE 31.007(b)(2). No fees are allowed for copies. TEX. CIV. PRAC. & REM. CODE 31.007(b)(2); TEX. R. CIV. P. 140. But an appellant's fee for an official transcript covers the cost of an original and one copy. TEX. GOV'T CODE § 52.047(c).
- Deposition costs. This includes the original deposition transcript and any exhibits. Tex. R. Civ. P. 203.2; *Crescendo Investments, Inc. v. Brice*, 61 S.W.3d 465, 480 (Tex. App.—San Antonio 2001, pet. denied). While copies are not generally recoverable, the cost for certified copies of depositions and trial transcripts to be admitted at trial are taxable as costs. *Id.* at 481.
- Master fees for court-appointed special masters. TEX. CIV. PRAC. & REM. CODE § 31.007(b)(3).
- Interpreter fees, which include the interpreter's compensation plus a \$3 fee collected by the clerk. *Id.* §§ 31.007(b)(3), 21.051; TEX. R. CIV. P. 183.
- Reasonable guardian ad litem fees. TEX. CIV. PRAC. & REM. CODE § 31.007(b)(3); TEX. R. CIV. P. 173.6(c); *Roberts v. Williamson*, 111 S.W.3d 113, 116 n.1 (Tex. 2003). An ad litem may only be compensated for fees that are incurred as a result of an actual or potential conflict of interest and are reasonable. TEX. R. CIV. P. 173.4; *Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604, 609 (Tex. 2006) (holding that guardian ad litem's extensive advice to plaintiff's attorney and daily involvement in case exceeded formal role of guardian ad litem); *Youngstown Area Jewish Federation v. Dunleavy* 223 S.W.3d 604, 609 (Tex. App.—Dallas, 2007, no pet.) (reversing award of ad litem fees where ad litem duplicated work performed by the plaintiff's attorney).
- Court-appointed auditor fees. TEX. R. CIV. P. 172.
- Court-appointed receiver fees. *Jones v. Strayhorn*, 321 S.W.2d 290, 292-93 (Tex. 1959) (listing six factors to consider in determining the value of a receiver's services); *Bishop v. Smith*, No. No. 09-08-00185-CV, 2009 WL 5205362, *5 (Tex. App.—Beaumont 2009, no pet.).
- ADR fees for an impartial third party. TEX. CIV. PRAC. & REM. CODE § 154.054(b); *Decker v. Lindsay*, 824 S.W.2d 247, 249 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).
- Witness fees. TEX. CIV. PRAC. & REM. CODE § 22.001. The statutory fee for a witness subpoenaed to attend trial or a deposition is \$10.00 per day. *Id.* This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage.

- Costs of the transcript on appeal. *Bayoud v. Nassour*, 408 S.W.2d 344, 345 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).
- Fees for required copies. Costs of photocopies required by statute or rule are taxable court costs. TEX. R. CIV. P. 140.
- Costs of statutory procedures. Costs of tests or statutory procedures mandated by statute are taxable court costs. See *Whitley v. King*, 581 S.W.2d 541, 544 (Tex. Civ. App.—Fort Worth 1979, no writ).
- Fees for court-appointed surveyor in trespass-to-try-title suits are taxable as court costs. *Whitley*, 581 S.W.2d at 544.
- Interest on court costs. Prejudgment interest on court costs, compounded annually, is a taxable court cost. Tex. Fin. Code § 304.003(a), 304.006.
- Other costs and fees permitted by law. The court may assess “other costs and fees” in addition to those listed in Remedies Code section 31.007. TEX. CIV. PRAC. & REM. CODE § 31.007(b)(4).

2. Nontaxable costs

The following describes expenses that are expressly not taxable under the rules and statutes.

- Fees for certified copies that are not required by statute or rule. *Phillips v. Wertz*, 579 S.W.2d 279, 279 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (no statutory authorization for the clerk to charge expenses for obtaining certified copies of deeds as “costs,” and thus taxing of such costs by clerk was erroneous and expungement was required); see also *Allen v. Crabtree*, 936 S.W.2d 6 (Tex. Civ. App.-Texarkana 1996, no writ).
- With some exceptions, expert fees necessary to establish an evidentiary matter. “[R]ecoverable costs do not generally include expert-witness fees.” *Headington Oil Co. v. White*, 287 S.W.3d 204, 212 (Tex. App.—Houston [14th Dist.] 2009, no pet.). In *Headington Oil*, 287 S.W.3d at 212, the trial court awarded expert witness fees as costs, relying on Texas Rule of Civil Procedure 191.2, which mandates cooperation in pre-trial discovery. TEX. R. CIV. P. 191.2. In finding no good cause for awarding such costs, the court held that that the neither the trial court’s findings nor the appellate record demonstrated that Headington failed to cooperate in discovery or unnecessarily prolonged the proceedings. *Id.* (citing *Roberts*, 111 S.W.3d at 124) Therefore, the trial court abused its discretion in awarding the cost of expert-witness fees to White. *Id.* See also *Whitley v. King*, 581 S.W.2d 541, 544 (Tex. Civ. App.—Fort Worth 1979, no writ) (regardless of good cause shown, costs of experts are merely incidental expenses in preparation for trial and are not recoverable; thus, court was without authority to assess as costs the expenses of a surveyor who was not court-appointed but performed his duties

solely on plaintiffs' behalf in trespass to try title suit); *Richards v. Mena*, 907 S.W.2d 566, 567 (Tex. App.-Corpus Christi 1995, no writ) (regardless of any good cause shown, costs of experts are incidental expenses in preparation for trial and not taxable court costs); *King v. Acker*, 725 S.W.2d 750 (Tex. App.-Houston [1st Dist.] 1987, no writ) (plaintiffs in action for tortious interference with inheritance rights could not recover costs of handwriting experts, as those were litigation expenses).

- Incidental expenses such as attorneys' fees, costs of experts and other expenses in preparation for trial. *City of Houston v. Biggers*, 380 S.W.2d 700 (Tex. Civ. App.-Houston 1964, no writ), cert. denied, 85 S.Ct. 1105, 380 U.S. 962 (1965). The court in *Biggers* noted that paralegal fees are recoverable only to the extent the paralegal did work traditionally done by an attorney; otherwise, "paralegal expenses are unrecoverable overhead expenses." 380 S.W.2d at 705.
- "Miscellaneous" expenses incurred in the representation of a client, such as delivery services, travel, long distance calls, bond premiums, postage, reproduction expense, binding of brief, transcripts of testimony elicited during trial, office air-conditioning and secretarial overtime. *Shenandoah*, 741 S.W.2d at 487 n. 15.
- Estimated expenses of collection. *Id.* at 488 n. 19.
- Cost of supersedeas bond. *Hammonds*, 313 S.W.2d at 605.
- Fee for an auditor who was not appointed by the Court under T.R.C.P. 172. *Taormina v. Culicchia*, 355 S.W.2d 569, 575 (Tex. Civ. App. — El Paso 1962, writ ref'd n.r.e.).
- Certified copies of deeds. *Whitley v. King*, 581 S.W.2d 541 (Tex. Civ. App.-Fort Worth 1979, no writ).
- Loss of earnings due to time devoted to suit, such as time required for depositions and attendance at trial. *Phillips v. Lathan*, 523 S.W.2d 19, 27 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); *Berts v. Businesspeople Personnel Services, Inc.*, 620 S.W.2d 861, 863 (Tex. Civ. App.-Dallas 1991, no writ).
- Computerized legal research expenses. Although there does not appear to be a Texas case directly on point, at least one federal court has held that computerized legal research expenses "fall within the rubric of attorney's fees and are not taxable as costs." *Ferguson v. FDK, Liquidator of Union Bank and Trust, Northern District of Texas*, No. 3.91-CV-2494-D, 1997 WL 279885 (N.D. Tex. May 13, 1997).
- Cost of county surveyor for services rendered. *City of Hurst v. City of Colleyville*, 501 S.W.2d 140 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).
- If the trial court taxes costs other than those customarily taxed, it may do so only for good cause stated on the record. *See* TEX.R. CIV. P. 141.

D. Costs for Rejected Settlement Offer

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).

E. 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.

VIII. Issues Relating to Finality

The judgment should also include a brief statement of whether it is intended to be a final judgment that disposes of all parties and all claims in the lawsuit. *Childers v. Advanced Foundation Repair, L.P.*, 193 S.W.3d 897, 899 (Tex. 2006). Certainty about whether the judgment is final is important because a final judgment marks the beginning of the appellate timetable. See *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 n. 12 (Tex. 2001). Unfortunately, experience has proven the final judgment rule to be “deceiving in its apparent simplicity and vexing in its application.” *Allen v. Allen*, 717 S.W.2d 311, 312 (Tex. 1986). But it doesn’t have to be that way. A brief statement of finality in the judgment can help circumvent such appellate uncertainty.

A. Judgments Following Conventional Trials

When the judgment is entered after a full trial on the merits, there is actually no need for any supplemental statement of finality, but in practice, it is common to include such language nonetheless. For more than 50 years, the law has *presumed* that a judgment is final if it is signed following a “conventional trial on the merits” and is “not intrinsically interlocutory in character.” *N.E. Indep. School Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966). An intrinsically interlocutory order is “one that does not inherently resolve the merits of the case.” *Infonova Solutions, Inc. v. Griggs*, 82 S.W.3d 613, 616 (Tex. App.—San Antonio 2002, no pet.). For the majority of judgments that follow a conventional trial, there will be no real need to include a statement of finality because the judgment is presumed to dispose of all parties and issues before the court. *Moritz v. Preiss*, 121 S.W.3d 715, 719 (Tex. 2003). Nevertheless, a cautious practitioner seeking to ensure finality should add a belt-and-suspenders finality statement, instead of simply relying on the presumption. Conversely, if the drafter does not intend the judgment to be final, then explicit language should be included to rebut the presumption of finality.

B. Judgments That Do Not Follow Conventional Trials

There is no such presumption of finality for judgments that follow other dispositions like summary and default judgments. *In re Burlington Coat Factory Warehouse*, 167 S.W.3d 827, 829 (Tex. 2005); *Lehmann*, 39 S.W.3d at 199-200. While the standard of finality for these

judgments has been historically uncertain, the Texas Supreme Court laid down a clear rule in 2001, holding that:

. . . [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.

Lehmann, 39 S.W.3d at 192-93.

After *Lehmann*, the practitioner has two distinct tools to ensure finality, which can be used separately or concurrently. First, if the judgment actually disposes of all parties and all claims, it is final, regardless of the language. *Burlington Coat Factory*, 167 S.W.3d at 830. Such a judgment will be final even if it fails to mention all of the parties and even if it is labeled as interlocutory. *Moritz*, 121 S.W.3d at 719; *Jobe v. Lapidus*, 874 S.W.2d 764, 766 (Tex. App.—Dallas 1994, writ denied) (holding that summary judgment was final despite the fact that “it refer[red] to itself as interlocutory”). As a result, the finality of a summary judgment order will often depend on the language of the motion. If one party moves for summary judgment on the whole case and the court grants it with some damages, the judgment is final even if the court’s order fails to address specific damage questions. *See Ford v. Exxon Mobil Chemical Co.*, 235 S.W.3d 615, 617 (Tex. 2007).

But for the practitioner who wants to be certain that the judgment is final, the better option would be to draft a judgment that includes the following language (or something similar):

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

Lehmann, 39 S.W.3d at 206; *see also Ritzell v. Espeche*, 87 S.W.3d 536, 538 (Tex. 2002) (finding that the words “the plaintiff takes nothing” serve the same purpose in a case with only one plaintiff). If that language of “unmistakable clarity” is included, the judgment will be final even if the record gives no adequate basis for the rendition of judgment as to certain claims or parties. *Lehmann*, 39 S.W.3d at 200 (finding that such an order would be “erroneous, but final”). While that specific language is not mandated, the drafter should not stray too far because other attempts to indicate finality have come up short. *See Lehmann*, 39 S.W.3d at 203-04 (holding that a Mother Hubbard clause does not impress finality on a judgment rendered without a conventional trial); *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001) (simply calling the judgment “final” does not make it so); *Burlington Coat Factory*, 167 S.W.3d at 830 (awarding costs and providing for execution of the judgment does not alone make a judgment final). The bottom line is when the Texas Supreme Court “suggests” how to do something, it’s probably wise to listen.

C. Other Ways to Achieve Finality

There are, however, certain situations where a judgment can be final without a single order that disposes of all parties and all claims—through merger, severance, and nonsuit. The practitioner should keep these possibilities in mind to avoid unwittingly falling into a final judgment.

An interlocutory judgment—one that is not final when signed—can later become final when the last of the remaining claims and parties is disposed of. *Parking Co. of America v. Wilson*, 58 S.W.3d 742, 742 (Tex. 2001) (judgment signed after trial of last claim rendered earlier interlocutory partial summary judgment order final). Unlike federal court, there is no need for a single judgment form finalizing all of the orders. So under this merger doctrine, all of the interlocutory orders merge into the final judgment—that is, the one that resolved the last of the claims and parties—even when they are not recorded in the judgment. *In re Miller*, 299 S.W.3d 179, 184 (Tex. App.—Dallas 2009, no pet.); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 391 (Tex. App.—Corpus Christi 2000, no pet.). As a result, a partial summary judgment, for instance, can become final simply by having the “unadjudicated claims or parties...removed by severance, dismissal, or nonsuit.” *See Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995).

Similarly, the severance of an interlocutory judgment into a separate cause makes it final because the unadjudicated claims are placed into a separate and independent cause. *Doe v. Pilgrim Rest Baptist Church*, 218 S.W.3d 81, 82 (Tex. 2007). But remember that a severance order is different than an order for separate trials, which leaves the lawsuit intact but enables the court to hear and determine one or more issues separately. *Columbus Mkt. v. Zoning Bd. of Galveston*, 302 S.W.3d 408, 414 (Tex. App.—Houston [14th] 2009, no pet.); *In re Allstate County Mut. Ins. Co.*, 209 S.W.3d 742, 744 (Tex. App.—Tyler 2006, orig. proceeding). The order entered at the conclusion of a separate trial is almost always interlocutory, because “no final judgment can be entered until all of the controlling issues [are] tried and decided.” *Id.* The practitioner must be aware of these doctrines because a seemingly insignificant last-minute order of nonsuit or severance against a minor party can often be the final judgment that starts the appellate timetable.

Finally, there are certain situations where a judgment that disposes of less than all parties can actually be a final judgment on its own. This arises in situations where some, but not all, named defendants are served with process and move for summary judgment. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004). If the trial court grants summary judgment in favor of all the appearing defendants, that judgment can be final on its own as long as: (1) the only remaining parties are unserved defendants; and (2) nothing in the record indicates that the plaintiff ever expected to obtain service on those defendants. *Id.* at 674-75; *Youngstown Sheet and Tube Co. v. Penn.*, 363 S.W.2d 230, 232 (Tex. 1962); *In re Minter Elec. Co.*, 277 S.W.3d 540, 543-44 (Tex. App.—Dallas 2009, orig. proceeding). In this situation, “the case stands as if there had been a discontinuance as to [the unserved party], and the judgment is to be regarded as final for the purposes of appeal.” *M.O. Dental Lab*, 139 S.W.3d at 674.

IX. Signatures

A. 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 _____, 2010.” 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 v. Humble Sand &*

Gravel, Inc., 875 S.W.2d 311, 313 (Tex.1994). 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).

B. 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. In other words, "[P]rovid[ing] a draft judgment to conform to what the court had announced would be its judgment" does not result in waiver of the appeal. *John Masek Corp. v. Davis*, 848 S.W.2d 170, 174-75 (Tex. App.- Houston [1st Dist.] 1992, writ denied); *In re Bahn*, 13 S.W.3d 865, 875 (Tex. App.—Fort Worth 2000, orig. proceeding) ("A party should not be estopped from challenging a court's order when the party provides to the court a proposed order following what it believes was the court's ruling at the hearing, and the court signs it.").

However, absent such a disclaimer, other courts have held that appellate rights are waived. *Fischer v. Wells*, No. 04-07-00328-CV, 2008 WL 2602122, *3 (Tex. App.—San Antonio July 2, 2008) (finding waiver where attorney approved judgment as to form and content and requested that the title company be ordered to "disburse the funds as requested"); see also *Casu v. Marathon Refining Co.*, 896 S.W.2d 388 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that a party who asks the trial court to accept a settlement agreement and to enter judgment accordingly may not later attack that judgment); *D/FW Commercial Roofing Co. v. Mehra*, 854 S.W.2d 182 (Tex. App.—Dallas 1993, no writ).

Still other cases have held that the notation "approved" and the like, with nothing more, does not indicate a consent judgment and a voluntary relinquishment of the right to appeal. When there is nothing in the body of the judgment suggests that the case had been settled or that judgment was rendered by consent, and there are no other indications of agreement in the record, some courts have been unwilling to find waiver on appeal. See *Oryx Energy Co. v. Union Nat'l Bank of Tex.*, 895 S.W.2d 409, 417 (Tex. App.—San Antonio 1995, writ denied) (holding notation "Approved and Agreed," standing alone insufficient to establish a consent judgment); *First Am. Title Ins. Co. v. Adams*, 829 S.W.2d 356, 364 (Tex. App.—Corpus Christi 1992, writ denied) (holding notation "Approved as to Form and Substance," standing alone, insufficient to

establish a consent judgment); *Bexar County Criminal Dist. Attorney's Office v. Mayo*, 773 S.W.2d 642, 644 (Tex. App.—San Antonio 1989, no writ) (holding notation “Approved,” standing alone, too indefinite to establish a consent judgment); *Hill v. Bellville Gen. Hosp.*, 735 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1987, no writ) (holding notation “Approved,” standing alone, insufficient to establish a consent judgment).

X. Conclusion

This paper has addressed Texas law and customary practice on many of the items that will go into your judgment: the opening recitals, the decretal portion of the judgment, pre- and post-judgment interest, attorney’s fees, costs, finality language, and signature lines. Next time the court asks you to prepare a judgment, we hope that you can use this information as a tool to aid in drafting a clear, concise judgment that leaves no room for doubt.