

# Mastering Prejudgment Interest



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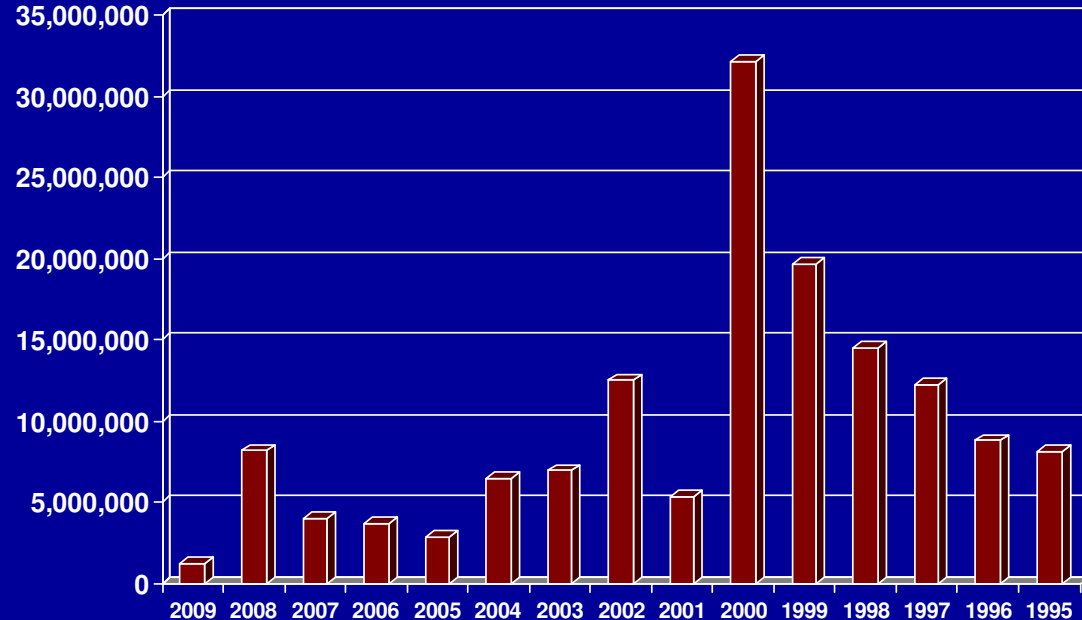
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# Significance of Prejudgment Interest

## Prejudgment Interest in Judgments by Year

2009	1,229,253
2008	8,181,650
2007	4,012,029
2006	3,673,137
2005	2,885,256
2004	6,511,013
2003	6,935,976
2002	12,495,610
2001	5,337,401
2000	32,102,112
1999	19,654,596
1998	14,481,602
1997	12,220,397
1996	8,796,263
1995	8,123,286



Closed Claim Data

# Sources of Prejudgment Interest

There are two legal sources for an award of prejudgment interest: (1) general principles of equity and (2) an enabling statute. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985); *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 629 S.W.2d 480, 483-85 (Tex. 1978).

- See *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (1998).

# Sources of Prejudgment Interest

- Statutes-
- 304.102 Finance Code
- 2260.106 Government Code

# Sources of Prejudgment Interest

- Equity-

- If prejudgment interest is not authorized by statute, the court can award prejudgment interest under the general principles of equity. *Perry Roofing v Olcott*, 744 SW2d 929 (Tex. 1988)

# History of Prejudgment Interest



## 1978: Equity as Basis (Economic Damages)

- *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978)

## ■ 1985: Recoverable in Personal Injury Cases (Rate Tied to Statute)

- *Cavnar v. Quality Control Parking*, 696 S.W.2d 549 (Tex. 1985)
- Tied to Statutory Rate & Compounded
- Accrual 180 days following injury or death

# History of Prejudgment Interest

- 1987: Tort Reform Codified and Modified *Cavnar* Rule Providing for Prejudgment Interest in Wrongful Death, Personal Injury, and Property Damage Cases
  - Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, § 6
- 1997: Recodified Into Finance Code – No Modification of Existing Statutory Law

# History of Prejudgment Interest

- 1998: Common Law Based on Art. 5069-1.05
  - *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 576 (Tex. 1998)
- 2003: House Bill 4
  - Accrual on Past Damages Only
  - Rate adjusted down: 5% to 15%
  - Simple Interest



# Rates of Prejudgment Interest – State Courts:

- § 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.
- Amended by Acts 1999, 76th Leg., ch. 62, § 7.18(a), eff. Sept. 1, 1999.

# Rates of Prejudgment Interest – State Courts:

- § 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 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.

# Rates of Prejudgment Interest – State Courts:

- § 304.004. PUBLICATION OF JUDGMENT INTEREST RATE. The consumer credit commissioner shall send to the secretary of state the postjudgment interest rate for publication, and the secretary shall publish the rate in the Texas Register.
- Amended by Acts 1999, 76th Leg., ch. 62, § 7.18(a), eff. Sept. 1, 1999.

# Rate of Prejudgment Interest

[http://www.occc.state.tx.us/pages/int\\_rates/index.html](http://www.occc.state.tx.us/pages/int_rates/index.html)

# Rates of Prejudgment Interest – Federal Courts

- For state law claims, Texas law would control. *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, Civ. No. H-08-1707, 2010 WL 4791493 (Tex. App.—S.D. Houston, Nov. 16, 2010).

# Accrual of Prejudgment Interest

- Texas Finance Code 304.104
  - Accrues on amount of judgment during period beginning on the earlier of the 180<sup>th</sup> day after the date D receives written notice of claim or the date suit is filed, and ending on the day preceding the date the judgment is rendered.
  - Computed as simple interest

# Accrual of Prejudgment Interest

- “Claim” Under 304.104
  - For purposes of calculating prejudgment interest, “claim” is a demand for compensation or an assertion of a right to be paid. *MCN Energy Enters., Inc. v. Omagro de Colombia, L.D.C.*, 98 S.W.3d 766 (Tex. App.—Fort Worth 2003, pet. denied).
  - 180 days after UIM carrier receives written notice of accident. *State Farm Mut. Auto Ins. Co. v. Norris*, 216 S.W.3d 819 (Tex. 2006).
  - But if tort liability disputed, from date tort liability established by judgment. *Henson v. Southern Farm Bureau*, 17 S.W.3d 652 (Tex. 2000).



# Accrual of Prejudgment Interest

- Negligence suit: Date original petition filed against company, not date of amended petition naming individual doing business under name of company.
  - *Hughes v. Thrash*, 832 S.W.2d 770 (Houston [1<sup>st</sup> Dist.] 1992, no writ).
  - *Brownsville Pediatric Ass'n v. Reyes*, 68 S.W.3d 184 (Tex. App.—Corpus Christi 2002, no writ).

# Accrual of Prejudgment Interest

- Prejudgment interest may not be assessed or recovered on an award of future damages or punitive damages.
  - Tex. Fin. Code 304.1045
  - Tex. Civ. Prac & Rem. Code 41.007
- Exceptions: Tolling
  - Tex. Fin. Code 304.105(a) & (b)

# Accrual of Prejudgment Interest

- Not Recoverable when prohibited by statute or case law. *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 462 (Tex. 1998).
  - Statutory (punitive damages, future damages, DTPA treble damages)
  - Case Law (Attorney's fees, interpleaded funds, prejudgment interest, or under both statutory and common law)

# Tolling Provisions

- Sec. 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.
- Amended by Acts 1999, 76th Leg., ch. 62, Sec. 7.18(a), eff. Sept. 1, 1999.

# Tolling Provisions

- Sec. 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.
- Amended by Acts 1999, 76th Leg., ch. 62, Sec. 7.18(a), eff. Sept. 1, 1999.

# Tolling Provisions

- Sec. 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.
- Amended by Acts 1999, 76th Leg., ch. 62, Sec. 7.18(a), eff. Sept. 1, 1999.

# PASSWORD:



SCHOOL

# Tolling of Prejudgment Interest

- 1) Offer must be in writing
- 2) Offer must be delivered to claimant or attorney
- 3) Offer should be outside mediation
- 4) Offer should be left open as long as possible
- 5) Rejection may terminate offer – include language that it remains open after it has been rejected



# Tolling of Prejudgment Interest

- **JUDGMENT NOT MORE THAN OFFER**-If the judgment for the claimant is less than or equal to the amount offered as settlement, prejudgment interest does not accrue at all during the period the offer could be accepted.

# Tolling of Prejudgment Interest

- **JUDGMENT MORE THAN OFFER**-If the judgment for the claimant is greater than the amount offered as settlement, prejudgment interest accrues only on the portion of the judgment in excess of the settlement offer during the period the offer could be accepted.

# Tolling of Prejudgment Interest

- Tex. Fin. Code 304.108 allowed the courts to toll the accrual of prejudgment interest during periods of delay in trial caused by either party. This section was repealed in 2003; Acts 2003, 78<sup>th</sup> Leg., R.S., ch 204, Sec 6.03, eff. Sept. 1, 2003.
- This discretion is no longer provided to the trial courts.

# Calculation of Prejudgment Interest in Judgments

- Computed as Simple Interest, calculated on principal amount:
  - Amount of damages found by TOF minus any amounts on which prejudgment interest is prohibited by state or case law (exemplary damages, future damages)
- Rate is the same as post-judgment interest (Tex. Fin. Code 304.103)

# Calculation of Prejudgment Interest in Judgments

- Time of Accrual is Earlier of:
  - (1) 180<sup>th</sup> day after D's receipt of written notice of claim or
  - (2) Date suit is filed
- Settlement
  - Credit for settlement must be deducted from the judgment using the declining principal formula. *Brainard v. Trinity Univ'l Ins. Co.*, 215 S.W.3d 809 (Tex. 2006).
  - Amount deducted according to when settlement made.

# Calculation of Prejudgment Interest in Judgments

## ■ Settlement

- Before PJI Accrues (Advance Payments)
  - Reduce Past Damages by Settlement Amount and then Add PJI
- After PJI Accrues
  - Apply first to reduce any PJI interest that has accrued to date of settlement, and then to reduce past damages, and then accrues on past damages remaining from date of settlement to day before date of judgment

# Calculation of Prejudgment Interest in Judgments

## ■ Tolling

- Standstill Agreements: Could toll accrual of PJI while agreement in effect, unless otherwise contractually provided. *Johnson & Higgins*, 962 S.W.2d at 531
- Settlement Offer: Can Toll while P decides whether to accept D's offer
  - $\text{Judg} \leq \text{offer}$ : No accrual during period could accept
  - $\text{Judg} > \text{offer}$ : PJI only on portion in excess of settlement offer during period P could accept.

# Effect of Reformation of Judgment

- Court of Appeals Affirms and Orders Reformation of the Judgment
  - PJI Accrual ends on day before date of original judgment.
    - *See Cessna Aircraft Co. v. Aircraft Network, LLC*, \_\_\_ S.W.3d \_\_\_ (Tex. App.—Dallas May 27, 2011)
    - *D.C. Hall Transport, Inc. v. Hard*, 355 S.W.2d 257 (Tex. Civ. App.—Fort Worth), writ ref'd n.r.e., 163 Tex. 504, 358 S.W.2d 117 (Tex. 1962)
    - *Lewis v. Hill*, 429 S.W.2d 572 (Tex. Civ. App.—Tyler 1968, no writ)



# Impact of Caps

- Because PJI Accrues on Amount of Judgment, Damages Must be Capped Before PJI Can Be Computed
- PJI Included within CPRC 74.301 and 74.303 Damages Limitations?

# Coverage for Prejudgment Interest - CGL

## ■ **Supplementary Payments – Coverages A and B**

1. We will pay with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

\* \* \*

- f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

Form CG 00 01 12 04

# Coverage for Prejudgment Interest

## Personal - Auto

- **Supplementary Payments –**
- In addition to our limit of liability, we will pay on behalf of an "Insured":
- \* \* \*
- 3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.

Form PP 00 01 06 98

# Coverage for Prejudgment Interest – Business Auto

## 2. Coverage Extensions

### ■ a. **Supplementary Payments –**

We will pay for the “insured”:

- (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any “suit” against the “insured” we defend, but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

Form CA 00 01 03 10

# Coverage for Prejudgment Interest - Homeowners

- **Incidental Liability Coverages**

\* \* \*

- **2.Claims and Defense Cost – “We pay for:**

\* \* \*

- e. prejudgment interest awarded against an “insured” on that part of the judgment “we” pay. If “we” offer to pay the “limit” that applies, “we” will not apy any prejudgment interest based on that period of time after the offer.

Form HO 0003 01 06



**THE END**